

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No: 1135/2011

In the matter between:

LESAOANA TANKISO ELIAZARA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT BY:

MHLAMBI, AJ

HEARD ON:

22 JANUARY 2013

DELIVERED ON:

7 MARCH 2013

INTRODUCTION:

- [1] On 28 November 2007, the plaintiff, Tankiso Eliazara Lesaoana, an unemployed adult male born on 27 March 1983, residing at Zone 2 Winnie Mandela, Thembisa, Gauteng Province, sustained serious personal injuries when a motor vehicle in which he was a passenger, was involved in a collision with another motor vehicle of which the Defendant was a statutory insurer and liable for compensation in terms of Section 17 (1) (a) of the Road Accident Fund Act, No 56 1996 (hereinafter referred to as the “Act”).

- [2] The collision took place along the R59 road near Viljoenskroon, Free State Province. The Plaintiff then instituted action against the Defendant for payment of both special and general damages. The Defendant opposed the action.
- [3] However, on 7 November 2012, the parties, by agreement, secured a Court Order on the following terms:
1. The quantum and merits are separated in terms of High Court Rule 33(4);
 2. The Defendant undertakes to pay 100% of the plaintiff's proven damages;
 3. The defendant to pay the costs in respect of the merits.
- [4] This matter is now before this Court to determine the quantum of the Plaintiff's claim, and more so in respect of the amount to be awarded for general damages and loss of income.

ADMISSIONS:

- [5] The Defendant has conceded and requested the Court to make the following Order in regard to the Plaintiff's claim for future medical, hospital and para-medical expenses in the following terms:

“Defendant will supply the Plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act, 56 of 1996, to pay all

the expenses of the plaintiff pertaining to future treatment and/or accommodation of the plaintiff in a hospital and/or clinic or similar institution and for all expenses pertaining to the medical treatment as well as medical expenses, lodging and services rendered to the plaintiff resulting from the injuries sustained by the plaintiff in the accident on 28 November 2007”.

[6] The Defendant admitted the reports of the following experts of the Plaintiff:

- 6.1 Neurosurgeon, Dr **Jaap Earle** (Record p.47);
- 6.2 Orthopaedic surgeon, Dr **S M Sara** (Record p.63);
- 6.3 Neurosurgeon, Dr **Pieter Repko** (Record p.78);
- 6.4 Neurologist, Prof **S D Saffer** (Record p.96);
- 6.5 Occupational therapist, **Letitia Delpont** (Record p.106);
- 6.6 Industrial Psychologist, Prof **E van Zyl** (Record p.144);
- 6.7 Clinical Psychologist, **Mariska Pienaar**;
- 6.8 Psychiatrist, Dr **M E Smith**.

[7] The plaintiff and the defendant agreed on the calculation of the plaintiff's total loss of income being the amount of **R463 001.63**. This calculation already makes provision for general contingencies at the rate of 5% in relation to past loss of income and 15% in relation to future loss of income.

[8] The Defendant conceded that plaintiff suffered the following injuries:

- 8.1 Fracture of the left femur;

- 8.2 Fracture of the right radius and ulna;
- 8.3 Fracture dislocation of the right knee;
- 8.4 Ruptured spleen;
- 8.5 Injury to liver and right kidney;
- 8.6 Head and chest injury (with no residual symptoms);
- 8.7 Blunt abdominal trauma – with a tender and conspicuous abdominal scar;
- 8.8 Dislocated right elbow – required with no residual symptoms and normal X-rays.

THE PLAINTIFF'S CASE:

- [9] The Plaintiff was the only witness to give oral testimony. He states that his employer was the driver of the motor vehicle of which he was the passenger and who subsequently died as a result of the injuries sustained in the collision.
- [10] He is a Lesotho citizen who came to South Africa during 2003 seeking employment. Since 2003, when he started working to date, he had no work permit. During 2006, it came to his knowledge that he should be the bearer of a valid work permit. This was at the time he started work with his deceased employer. He was unable to secure a work permit entailed a lot of travelling, spending time outside his area of work and residence and at time sleeping in Pretoria. Besides, he did not know all the procedures to

be followed to acquire a work permit, but as at the time of the collision, he had started making enquiries in this regard from members of the public, despite spending most of his time on the road.

[11] Ever since 2003, he was the holder of a valid travel document or passport. He stayed at Thembisa with his grandmother and next-of-kin and earned weekly wages of R250.00 up until the time the collision took place.

[12] He sustained injuries to his right hand which he can no longer use to lift objects. His right knee was stiff and he can, therefore not bend the leg. His right hip was injured and the right foot broken.

[13] He has not worked since the accident because of the broken hand. Even though it has healed, it has no power. When he lifts containers of water, the right hand becomes painful. He liked gardening, but cannot pursue that kind of work anymore as he cannot bend because of the knee injury and the weak hand. That concluded the plaintiff's case.

THE DEFENDANT'S CASE:

The Defendant closed its case without leading evidence.

THE PARTIES SUBMISSIONS:**THE PLAINTIFF:**

- [14] The extent of the Plaintiff's injuries, contends Plaintiff's Counsel, to an award of R800 000.00 as claimed for general damages.
- [15] The injuries have resulted in on-going symptoms, restricted function, and inability to perform daily activities, sport and work as an artisan.
- [16] The Plaintiff is and will always be totally unemployed in the open labour market.

THE DEFENDANT:

- [17] Counsel for Defendant, having referred to various cases, contends that the Plaintiff is entitled to an award of R400 000.00 to R450 000.00 in regard to general damages.
- [18] The Plaintiff, being a Lesotho citizen without a valid work permit earned illegal wages, but for the forcibility that he might acquire a work permit, at least a half to two-thirds of Plaintiff's claim for lost income may be awarded.

GENERAL DAMAGES:

- [19] The documentation and the reports by the neurosurgeons indicate that the Plaintiff had an occipital fracture. He was unconscious with

a post traumatic amnesia of about two months and throughout this period he was heavily, sedated from multiple injuries.

- [20] In addition to the occipital fracture he had a fracture of the left hip and femur and the left ulna where there are two vertical surgical scars on the lower forearm above the wrist, a fracture of the right knee which was treated by open reduction internal fixation and the left ankle. He has unsightly laparotomy scars from three procedures. He still gets pain if he leans forward too much and at times feels as if he wants to vomit. His spleen was removed but he is not aware what was done to the liver and right kidney but according to documentation both were repaired. He had an intercostal drain with the marks still visible in the right upper chest laterally.
- [21] The date of the accident was 28 November 2007. He was first taken to Tshepong Hospital in Klerksdorp and then sent straight through to Chris Hani Baragwanath hospital where he stayed until February 2008. He said he was mainly in bed but at some stage he cannot say when the physiotherapists tried to help him to get out of bed and walk. His knee was very sore and every time, even now, when he walks the knee is painful.
- [22] He is aware of his physical limitations as a result of the injuries. The limitations to perform remunerative work must affect the Plaintiff psychologically, which must be considered a form of

suffering. The report by the orthopaedic surgeon is that severe permanent impairment of function will persist.

- [23] According to the occupational therapist's report, he struggles to walk up and down slopes, on uneven terrain or slippery slopes. He has an abnormal gait pattern. He experienced severe pain and suffering for a long period of time, and still does.
- [24] Counsel for the Defendant conceded in argument that the plaintiff is entitled to an award of R500 000,00.
- [25] In making an award for damages, a court merely needs to draw on its own experience and does not require to be reminded of earlier awards by the citation of an array of decisions: **Marine and Trade Insurance Co. Ltd v Goliath** 1968 (4) SA 329 (A). Comparison with other cases though never decisive, is instructive: **Hulley v Cox** 1923 AD 234 at 236.
- [26] It is my considered opinion that in the given circumstances, an award of R550 000.00 would be fair compensation in this matter.

LOSS OF INCOME:

- [27] In **DLAMINI v MULTILATERALE MOTORVOERTUIG-ONGELUKKEFONDS** 1992 (1) SA 802 (T) it was held that illegal

earnings as in illegal taxi- driving could be taken into account as an indication of earnings capacity and that a deduction of 30% should be made for the change- over from illegal to legal taxi – driving.

- [28] **In Shield Insurance Co. Ltd v Booysen** 1979 (3) SA 953 (A) at 964 D -E it was said that even though some activities may be found to be illegal, they can nevertheless be relied upon as an indication of a person's earning capacity.
- [29] Counsel for Defendant argued that the Plaintiff's income was illegal as he had no work permit. See **Santam Insurance Ltd v Refguson** 1985 (4) SA 843 (AD); **Dlamini en Ander v Protea Assurance Company Ltd** 1974 (4) SA 906 (A). However, he concedes that at least a half to two thirds of plaintiff's claim may be awarded. Even though I agree with counsel in this regard, I am of the view that 70% of the claim should be awarded.
- [30] Consequently, my considered opinion is that an award for loss of income in the amount of R324 000.00 (three hundred and twenty four thousand rand) is appropriate.

ORDER:

- [31] **In the result the following order is made:**

31.1 Defendant is directed to pay the Plaintiff an amount of R874 000.00 (Eight hundred and seventy four thousand rands) in respect of both general damages and loss of income.

31.2 Defendant shall provide the plaintiff with an undertaking in terms of Section 17 (4) (a) of Act 56 of 1996 to pay all expenses of the plaintiff pertaining to future treatment and/or accommodation in a hospital and/or clinic or similar institution and for all expenses pertaining to the medical treatment as well as medical expenses, lodging and services rendered to the plaintiff resulting from the injuries sustained by the plaintiff in the accident on 28 November 2007.

31.3 Defendant is liable for payment of the plaintiff's party and party costs, which shall include the following:

31.4 The reasonable preparation / qualifying and reservation fees and expenses (if any) of :

- 31.4.1 Dr Jaap Earle
- 31.4.2 Dr S M Sara
- 31.4.3 Dr Pieter Repko
- 31.4.4 Dr S D Saffer
- 31.4.5 Ms L Delport
- 31.4.6 Prof. E van Zyl
- 31.4.7 Ms M Pienaar
- 31.4.8 Dr M E Smith

J. J. MHLAMBI, AJ

On behalf of the plaintiff: Adv. S. K. Mojamobu
Instructed by:
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On behalf of the defendant: Adv. M. D. J. Steenkamp
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