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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 5788/2017

In the matter between:

BABA MAX MBHELE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: LOUBSER, J

HEARD ON: 14 & 16 FEBRUARY 2024

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 16 MAY 2024

[1] The Plaintiff in this matter initially claimed a total amount of R3 111 147.00 damages from the Department, arising from a motor vehicle accident which occurred on the road between Kestell and Bethlehem on 10 September 2015. The Plaintiff was a passenger in one of the vehicles, and he sustained serious injuries in the accident. He suffered a fracture of the left hip, deep abrasions on the left side of the forehead and the left cheek, as well as a

deep laceration on the left forearm. The summons against the Defendant was issued as far back as 8 November 2017.

[2] In its Plea the Defendant denied any liability on the basis that it had no knowledge of the averments made in the summons, but it pleaded in the alternative that the amount claimed be reduced in terms of the provisions of the Apportionment of Damages Act.¹

[3] On 4 December 2018 this Court made an order by agreement between the parties that the issues of merits and quantum are separated, and that the Defendant is liable to pay 100 percent of the Plaintiff's proven or agreed damages. The Court further ordered that the Defendant shall furnish the Plaintiff with an undertaking pertaining, inter alia, to future treatment of the Plaintiff in terms of Section 17(4)(a) of Act 56 of 1996.

[4] The result hereof was that this Court was only called upon to determine the issues of general damages and the Plaintiff's claim for loss of earning capacity when the matter went on trial. The Plaintiff himself testified in the hearing, and thereafter an occupational therapist, an industrial psychologist and an orthopaedic surgeon testified in support of his claim. In addition, the reports and confirming affidavits of a plastic and reconstructive surgeon, a clinical psychologist and an actuary were handed in by counsel appearing for the Plaintiff in terms of the provisions of Rule 38, without any objection on behalf of the Defendant.

[5] The Defendant did not present any evidence at all, including any expert evidence. To make matters worse for the Defendant, none of the witnesses were cross-examined by its legal representative, and no submissions in respect thereof were made on its behalf towards the end of the hearing. The evidence presented on behalf of the Plaintiff, and indeed his whole claim, therefore became virtually unopposed during the course of the

¹ Act 34 of 1956

trial.

[6] Responding to questions by the Court in this regard, the legal representative of the Defendant explain that she could not participate in the proceedings in a meaningful way because she was unable to obtain any instructions from the Defendant despite her many efforts to obtain same. This failure of the Defendant to provide clear instructions is lamentable and deserves to be frowned upon, because if the Defendant was not interested in contesting the expert evidence and the claim as a whole, it should have settled the claim without further ado. Instead, the Defendant chose to sit back and to cause the Court the inconvenience of an unnecessary hearing for one full day.

[7] Be it as it may, nothing presented by the Plaintiff in the form of evidence now remains in dispute, and it is not necessary to deal with that evidence in any detail. Suffice it to only provide a summary of the expert evidence pertaining to the present situation of the Plaintiff, as confirmed by the Plaintiff himself.

[8] The Plaintiff testified that he was 25 years old at the time of the accident. He passed grade 12, and he has no further qualifications. The hip-injury he sustained in the accident, was the serious one. He was hospitalized for two weeks, whereafter he was discharged with pain medication and crutches, which he used for three weeks. At the time of the accident, he was employed as a forklift-driver. After the accident, he suffered acute pain for some 2 - 3 weeks after his discharge from the hospital. He eventually went back to work, but he soon found that he could not properly resume his duties as a forklift-driver, because of the pain he experienced. In April 2022 he realized that he could not continue with his work, because of the pain he suffered when he had to load the forklift with the heavy loads that had to be placed on the trucks. Because of the constant pain he suffered at work, he decided to resign. Even when testifying, he stood up from time to time because of the pain he felt sitting in the witness stand. Before the accident he

used to play soccer and to train in the gym, but he cannot do so anymore. When he puts weight on the injured hip, the pain increases. He has visible scars on the hip, he testified.

[9] The expert evidence presented for the Plaintiff, mainly corroborates his own evidence pertaining to his condition. As already intimated, this evidence stands uncontested before the Court. A cumulative analysis of all the expert evidence shows that the Plaintiff was diagnosed with a left acetabulum fracture followed by painful instrumentation, visible scarring and a chronic painful hip joint. He has a 90% probability of his left hip degenerating to end stage osteoarthritis. This hip injury will be permanent, and the Plaintiff can only be placed in a permanent light duty working environment. The scarring on the hip is also permanent and will always be visible.

[10] In addition, the Plaintiff is suffering from psycho-social difficulties which are likely to have a negative impact on his efficiency, motivation and occupational relationships. It can be said that the Plaintiff would never again be suited to even do occasional medium work. He is therefore disadvantaged in the competitive workplace with regard to efficiency and effectiveness in comparison with injured peers. In addition to the sequelae of his injuries and the enduring pain, he has suffered a loss of emotional stability, loss of employability, and a loss of independence and enjoyment of life. The Plaintiff only has a less than 10% chance of being employed in the future, and he will most probably remain unemployed in the open labour market due to his limited skills.

[11] Relying on these findings by the experts, the actuary provided the Court with two different calculations in determining the Plaintiff's loss of earning capacity. The first calculation is based on the assumption that the Plaintiff is unemployable in the future. In this calculation the actuary applied a 5% contingency deduction for the past loss of earnings and a 10% contingency deduction for the future loss of earnings, which amounts to nil income. In the

second calculation, it is assumed that the Plaintiff would earn an unskilled worker income in the future. Having regard to the evidence that it is more probable that the Plaintiff would not be able to find employment again, the first calculation must prevail. In that calculation, the contingency deduction of 5% applied with regards to the past loss of income, cannot be questioned in view thereof that such a deduction is normally applied in most cases where the past loss of earnings becomes relevant.

[12] In the first calculation, the Plaintiff's total loss of earnings is indicated in the amount of R3 136 154.00. This is then the amount that shall be awarded to the Plaintiff for loss of earning capacity.

[13] As for general damages, it is trite that the Court has a broad discretion to award what it considers to be fair and adequate compensation. The Court will generally be guided by awards previously made in comparable cases and will be alive to the tendency for awards to be higher in recent years than was previously the case. The basic rule is that the award should be fair to both sides, it must give just compensation to the plaintiff, but not "pour largesse from the horn of plenty" at the defendant's expense.²

[14] Mr. Sander, who appeared for the Plaintiff, suggested that an amount of R800 000.00 be awarded for general damages. He referred the Court to a number of comparable cases where general damages were awarded in amounts ranging from R628 000.00 to R864 000.00. I am of the view that, having regard to the facts of the present matter, an amount of R700 000.00 would be fair and just compensation for the Plaintiffs general damages.

[15] Mr. Sander has presented the Court with a draft order, which I intend making an order of Court accordingly, with the necessary amendments thereto.

[16] The following order is made:

² De Jongh v Du Pisane N.O. 2005 (5) SA 457 (SCA) at par. 60

1. The Defendant shall pay the Plaintiff the sum of **R 3 836 154,00 (THREE MILLION EIGHT HUNDRED AND THIRTY-SIX THOUSAND ONE HUNDRED AND FIFTY-FOUR RAND)** in respect of loss of earning capacity and general damages, set out as follows:

General Damages:	R 700 000,00
Loss of Earnings:	R 3 136 154,00
Total:	R 3 836 154,00

2. The Defendant shall pay the abovementioned amount into the Plaintiff's Attorneys trust account.

The Plaintiffs Attorney's trust account details are as follows:

ACCOUNT HOLDER:	VZLR INC
BRANCH:	ABSA BUSINESS BANK HILLCREST
BRANCH CODE:	632005
TYPE OF ACCOUNT:	TRUST ACCOUNT
ACCOUNT NUMBER:	301[...]
REFERENCE:	MAT104059

3. In the event of default on the costs payment, interest shall accrue on such outstanding amount at the statutory mora rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

4. In the event that the Defendant does not, within 180 (one hundred and eighty) days from the date on which this order is handed down, make payment of the capital amount, the Defendant will be liable for payment of interest on such amount at 11,75% (the statutory rate per

annum) compounded and calculated fourteen days from date of this order.

5. The Defendant to pay the Plaintiff's taxed or agreed party and party cost, up to and including the date of 16 February 2024.

6. The Defendant to pay the reasonable qualification fees of all the Plaintiff's experts whose reports had been furnished to the Defendant and/ or its experts:

6.1	Dr MB Deacon	Orthopaedic Surgeon
6.2	Dr D Hoffmann	Plastic & Reconstructive Surgeon
6.3	Ms Claire Hearne	Clinical Psychologist
6.4	Ms Lucindy van Zyl	Rita van Biljon Occupational Therapist
6.5	Dr AC Strydom	Industrial Psychologist
6.6	Mr J Sauer	Actuary

7. The reasonable taxable reservation, qualification and attendance fees at Court for the following experts:

Dr MB Deacon –	Orthopaedic Surgeon - 14 February 2024
Lucindy van Zyl –	Occupational Therapist - 14 February 2024
Dr AC Strydom -	Industrial Psychologist - 14 February 2024

8. Cost of Counsel, including the costs of drafting and settling settlement submissions to the Defendant as well as heads of argument that were submitted to the Court on 16 February 2024.

In the event that cost is not agreed, the parties agree as follows:

9. The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

10. The Plaintiff shall allow the Defendant fourteen court days to make payment of the taxed cost.

P. J. LOUBSER, J

For the Plaintiff: Adv. A. Sander
Instructed by: VZLR Inc. Pretoria
c/o VZLR Inc. Bloemfontein

For the Defendant: Me. M. Booysen
Instructed by: Office of the State Attorney
Bloemfontein

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