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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number: 1034/2013

Heard: 02 to 04 May 2023

Delivered: 02 February 2024

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

Circulate to Magistrates: YES / **NO**

In the matter between:

ADRIAN ERASMUS VAN NIEKERK

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: Tyuthuza AJ

JUDGMENT

Tyuthuza AJ

INTRODUCTION

1. The plaintiff, Mr van Niekerk, instituted an action against the defendant, the Road Accident Fund, claiming damages arising from the injuries he sustained as a result of a motor vehicle collision that took place on 2 June 2009.
2. The defendant conceded liability for the plaintiff's proven damages in the action. On 4 October 2022 Sieberhagen AJ ordered *inter alia*, that the defendant pay to the plaintiff 100% of the still to be proven damages resulting from the collision. The order further recorded that the issues relating to the quantification of the Plaintiff's damages be remanded for trial.
3. These proceedings, therefore, relate to the determination of the plaintiff's claim for past and future medical expenses, loss of earnings and earning capacity, general damages and costs.
4. The plaintiff filed expert reports in respect of an orthopaedic surgeon, an occupational therapist, an industrial psychologist and an actuary. The defendant did not file any expert reports.
5. The plaintiff seeks an order in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the Act"), that the defendant be directed to furnish an undertaking to compensate the Plaintiff with 100% of the costs arising from the collision for the plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods, after such costs have been incurred and upon proof thereof.
6. The plaintiff's orthopedic surgeon, Dr Olivier, noted in his report that the comminuted proximal femoral fracture is stabilized by an antegrade intramedullary nail and that provision should be made for the removal of the intramedullary construct. The plaintiff would be a candidate for a total right knee replacement and a revision procedure about 15 to 20 years later. Ms Howell, the plaintiff's occupational therapist, is of the view that the plaintiff will benefit from supplementary health services by an occupational therapist,

a physiotherapist, a biokineticist and the provision of assistive devices and equipment.

7. I am satisfied in the circumstances that a directive in terms of section 17(4) of the Act should be ordered in respect of the anticipated future medical costs of the plaintiff.

FACTUAL BACKGROUND

8. On 2 June 2009 at approximately 12:00, along the Postmasburg and Kimberley road, a collision occurred between two vehicles, one driven by a C Prinsloo, bearing registration number B[...] 5[...] N[...], ("the insured driver") and the other then driven by the plaintiff. At the time of the collision the plaintiff was 19 years of age, and he is presently 34.
9. As a result of the collision the plaintiff suffered various abrasions and lacerations of the scalp, a fracture to the right femur and a disruption of the infra-patellar tendon of the right knee joint.
10. The defendant has filed its plea and denies each and every allegation and avers that the collusion was due to the sole negligence of the driver of the identified vehicle and prays that the plaintiff's claim be dismissed with costs.

EXPERTS:

11. On 21 April 2023, the plaintiff made an application in terms of rule 38(2), that the evidence of Dr Olivier be given on affidavit at the hearing. The application was served on the defendant's attorneys on 21 April 2023 but was not opposed. From the bar, Mr Mogano for the defendant, asked that the evidence of Dr Olivier not be admitted but it was the plaintiff's case that the application remained unopposed and that the evidence of Dr Olivier was undisputed as the defendant had not provided a report from an orthopaedic

surgeon. I am of the view that the plaintiff made out a case for the relief sought and granted the order in favour of the plaintiff.

ORTHOPAEDIC SURGEON

12. Dr Olivier, the plaintiff's orthopaedic surgeon evaluated the plaintiff during March 2023. His report detailed the plaintiff's injuries as, *"comminuted proximal right-sided femoral fracture, extensive laceration over the anterior aspect of the right knee, multiple deep lacerations of the facial area, soft tissue injury of the left knee, soft tissue injury of the right elbow"*. He also reports, *"It is therefore my view, that the degenerative changes which are present in the right knee is the direct result of the significant injury that the client sustained to the patellofemoral joint as well as the patellar tendon. Since the accident occurred that client is unable to walk at a fast pace or to perform activities such as squatting and kneeling. The client is unable to balance himself on ladders or scaffolding or to carry heavy objects. Based on the evaluation the client is limited to a job that entails administrative duties or light duties only. I am of the opinion that his injuries were severe and he will continue to suffer intermittent permanent and serious long term impairment in respect of his work and personal life"*. He further states *"in the long term he will probably need to do less physical demanding activities and do more supervisory work, especially after the age of 55-60 years."* Dr Olivier further noted that the functional restrictions, which he would describe as permanent, would have a negative impact on the plaintiff's future vocational opportunities in that the plaintiff is unable to compete against uninjured individuals in the open labour market. According to Dr Olivier the plaintiff's ability to perform normal duties which would be expected of a diesel mechanic is compromised.
13. Dr Hunter, the plaintiff's industrial psychologist who evaluated the plaintiff during May 2015 and again in December 2020 was tasked to report on the plaintiff's work potential both prior and after the collision. He reported, *"considering Mr Van Niekerk's age, education and training, employment history, collateral obtained and his current employment, it seems reasonable*

to conclude that, had he not been injured he would probably have progressed to the level of foreman sometime during 2020/2021. He would then have worked at Paterson Job Grade C3 as opposed to his current job rate i.e. Paterson Job Grade C2. It is envisaged that he would have worked as a foreman, earning inflationary increases until the age of approximately 65 when he would have retired". Under re-examination Mr Hunter testified that it would be highly unlikely for the plaintiff in his injured state to progress to Paterson Job Grade C5. He further stated that the plaintiff was fortunate in being able to obtain jobs from people who knew him.

14. Dr Hunter further reports that, *"the Plaintiff's employment prospects in the open labour market had been significantly adversely affected and that it is highly unlikely that the Plaintiff will be able to continue to work until the normal retirement age"*. He states, *"he may still be able to progress to the level of foreman as, what would have been the case, pre-morbidly. However, the role of a foreman will still include performing physical work, which he will continue to struggle with."*

OCCUPATIONAL THERAPIST

15. Ms Howell, the plaintiff's occupational therapist, who evaluated the plaintiff on 16 March 2023 in relation to the plaintiff's work duties, was of the view that, *"the plaintiff primarily works with earth-moving equipment and currently works on excavators"*. *"The plaintiff's work can be categorised as medium work parameters with occasional requirements for very heavy lifting"*. *"Considering the frequency and reparative nature of his work, the existing pathology and the recommended surgery, the Plaintiff is not suited for medium, heavy and very heavy physical demands which may accelerate degenerative changes of the right knee. He is best suited to a position where he is able to alternate between standing/walking and sitting regularly (therefore sedentary to light work parameters). As degeneration of his right knee progresses, pain and discomfort with prolonged walking and standing will likely increase. His work productivity is then expected to be negatively impacted on by the worsening of his right knee symptoms in the long run,*

restricting him to sedentary to occasional high work demands. Even though the Plaintiff continues to work in an environment that requires him to participate in medium to occasionally very heavy work; note should be taken that he has continued to do so with daily pain, requiring pain medication, tasks adaption (sitting instead of kneeling) and task avoidance (asking colleagues to assist); making him an unfair competitor in the open labour market, compared to his uninjured peers. He also finds himself working for a sympathetic employer who overlooks his ability to work in kneeling and crouching. His ability to retain his current occupation may be jeopardised in the long run.”

16. She testified that the work currently done by the plaintiff requires him to carry heavy objects and as a result of expected degeneration the plaintiff would need a knee replacement much sooner. She further testified that the plaintiff should only do light work. Under cross examination she testified that it is recommended that the plaintiff does not continue to lift heavy objects, that his work required a lot of kneeling and crouching and constantly using his knee and as a result it is worsening at an accelerated pace.

ACTUARY

17. Mr Boshoff, the plaintiff's actuary, completed an initial actuarial report based on the report of Mr Hunter and instructions received from plaintiff's legal representatives, as at 1 October 2022. This report makes provision for retirement at 60 and for the deduction of contingencies injured at 25%. According to this report the actuary calculated the loss of earnings in the total amount of R5,293,000.00 (past loss at R223,600.00 and future loss at R5,069,400.00)
18. At trial, I was presented with two additional reports based on the same information issued by Mr Boshoff, as at 1 June 2023. The first report makes provision for retirement at 50 and the contingencies is applied at 40% on future earnings. According to this report the actuary calculated the loss of earnings to be an amount of R5,045,700.00 (past loss: R145,700.00 and

future loss: R4,900,000.00). The second report presented at trial makes provision for retirement at 55 and the contingencies is applied at 40% on injured future earnings and 15% on uninjured. According to this report the actuary calculated the loss of earnings to be an amount of R5,035,300.00 (past loss: R145,700.00 and future loss: R4,889,600.00).

19. Under cross-examination, when asked what the difference between the reports of October 2022 and 3 May 2023 are, Mr Boshoff replied that the differences were the dates of calculation, that a conservative approach was adopted in the May 2023 reports and that the conservative approach was in favour of the defendant as the amounts were reduced.
20. The expert reports of the plaintiff stand uncontested as the defendant did not file its expert reports to dispute those of the plaintiff.
21. I accept the respective expert opinions as proven by the plaintiff.
22. The plaintiff also filed reports of Dr Sagor (orthopaedic surgeon) and Ms Bester (occupational therapist). These reports were not considered as no affidavits were filed by the experts to confirm the contents of the report, nor were the witnesses in Court to testify.

PLAINTIFF

23. The Plaintiff confirms his employment history after the accident as reported by Dr Hunter and further confirms that despite the change of employers that the work has remained the same. He further testified that he was always accommodated by his employer and had another person working with him. He further stated that his employers are aware of his challenges. He testified that the vehicle which he uses at work has been specially adapted to suit him. He testified that he is assisted with both heavy lifting and when he is required to make use of his knees. He testified that the injury has affected his knees in that he is in constant pain and can feel the pain when walking or standing for long periods of time. He testified that the pain is less

once he is resting, but because he loves to work that he cannot remain stationary and is used to working with his hands. He has to provide for his family and thus he has to work.

24. He testified that he has considered better work prospects at other places but stated that he is not sure whether he can work without assistance. He confirmed in cross-examination that when the accident occurred he was unemployed and studying.
25. The plaintiff closed his case. The defendant also closed its case without leading any evidence.

LOSS OF EARNINGS:

26. In *Rudman v Road Accident Fund 2003 (2) SA 234 (SCA)*, the court emphasised that: *"...where a person's capacity was compromised that incapacity constitutes a loss, if such loss diminishes his estate and that he was entitled to be compensated to the extent that his patrimony was diminished."*
27. The legal principle in respect of a claim for diminished earning capacity is trite in that the plaintiff must be placed in the position he would have been in had the injuries not occurred. To succeed in the claim for loss of income or earning capacity, the plaintiff has to establish on a balance of probability that as a result of the accident, he has lost future earning capacity.
28. *"Any enquiry into damages for loss of earning capacity is to its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of a loss".¹*

¹ Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98 AD

29. When making an order for future losses, it is expected from the court to make use of contingency deductions to provide for any future circumstances which may occur but which cannot be predicted with any amount of certainty.
30. Our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies have to be accounted for. The longer the period over which unforeseen contingencies can have an influence over the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies have to be applied.
31. Adv. Botha, for the plaintiff, submitted in his closing arguments that the plaintiff would have to retire early and that based on the conservative approach will retire at the age of 55 years. According to the actuarial report which makes provision for retirement at 55 years, the past loss of earnings amount R145,700.00 and future loss of earnings amount to R4,889,600.00, thus a total of R5,035,300.00 (this is the capital value including the RAF cap, after contingencies.) Mr Botha held that the actuarial evidence stands uncontested.
32. Mr Mogano, in his closing argument, stated that there was no basis for the plaintiff to be compensated in the amount of R5,035,300.00. He further submitted that there was no evidence presented to show that the plaintiff's estate had diminished. According to the defendant, the plaintiff did not suffer any actual loss of earnings.
33. Dr Hunter's reports indicate the pre-morbid career path for the plaintiff to have been as a mechanic, a chargehand during 2020/2021, a foreman (Paterson Job Grade C4) approximately one to three years later and an engineering supervisor (Paterson Job Grade C5) after three to five years. For the post-morbid career path, the report indicates that the Plaintiff will indeed progress to chargehand (Paterson Job Grade C3) and then foreman (Paterson Job Grade C4) at which level he will retire and thus not become an engineer supervisor. It is thus clear that his abilities have been negatively

affected by the accident. Furthermore the actuary report also indicates that the Plaintiff's career and earnings would have progressed to engineering supervisor (Paterson C5) and that he would have retired at 65 but for the accident. Dr Hunter testified that it would be highly unlikely for the plaintiff to meet all the inherent requirements for the job of engineering supervisor. He also testified that based on his experience in the corporate sector, he has seen many people with orthopaedic injuries retire earlier.

34. The Plaintiff has a grade 12 education, is a diesel mechanic and has been and still is employed as a diesel mechanic since 2011. At the time of the accident the plaintiff was a student and as a result of the accident could not complete his studies in 2009 as he was recuperating at home for 6 months. The plaintiff resumed his studies in 2010. According to Dr Hunter's report, *"it is possible, had he not been injured he would have probably have qualified as a diesel mechanic approximately 6 months earlier. According to the reports the plaintiff's condition will progress to end stage osteoarthritis. The plaintiff has been fortunate enough to work as a diesel mechanic despite the daily pain, as his employer is sympathetic to him and has allowed him to work with assistance"*.
35. The plaintiff is qualified and young and I accept that the probabilities are that he would have been able to generate an income until the so-called "normal" retirement age of 65, had it not been for his injuries.
36. Whilst the defendant disputes that the plaintiff would have to retire early, based on the reports before me and the condition which the plaintiff is in, he will in all probability be forced to retire earlier. To this end I am of the view that the plaintiff will retire at 55, 10 years earlier than the normal retirement age of 65 years.
37. Having considered the actuarial calculation in relation to retirement at 55 years, the amount is in my view, reasonable, fair and just. The plaintiff in respect of past loss of income is awarded R145,700.00 and for future loss of earnings is awarded R4,889,600.00, totalling an amount of R5,035,300.00.

38. I am satisfied that the plaintiff has shown that the injuries he sustained in the collision have caused a loss of earning capacity or will cause a loss of earnings in the future, to the extent that he claims.
39. Mr Boshoff calculated the plaintiff's past and future loss of earnings on the assumptions and opinions contained in Dr Hunter's report and the plaintiff's payslips. He applied a contingency deduction of 15% in the plaintiff's future earnings in an uninjured scenario and 40% in respect of the plaintiff's future earnings in the injured scenario. The RAF Amendment Cap was applied after the apportionment. The amount for past and future loss of earnings amounts to R5,035,300.00.
40. I find no reason to reject the version of the plaintiff as supported by the various experts. I am satisfied that the plaintiff has suffered injuries that have negatively affected his future earning capacity. In my view it would be justified in the circumstances of this case to award an amount for past and future earnings as calculated by Mr Boshoff.

GENERAL DAMAGES:

41. In the matter *Legodi v Road Accident Fund*² the court stated the following:

"[50] General damages include a person's physical integrity, pain and suffering, emotional shock, disfigurement, a reduced life expectancy, and loss of life amenities."

42. The plaintiff got injured at the age of 19, which means he has experienced most of his adult life in an injured state. As a result of the collision, the plaintiff's right knee is in constant pain which is worsened by lifting heavy objects and spending prolonged periods on his feet. According to the experts the plaintiff's condition is going to worsen over time. The plaintiff will

² (50948/17) [2021] ZAGPPHC 566 (2 September 2021)

develop osteoarthritis of the right knee in his mid-forties. The functionality of his right knee will be compromised on a permanent basis. He is unable to walk long distances and having played club rugby prior to the accident, it is reported that the plaintiff will not be able to return to playing rugby. He will ultimately need to retire earlier and as a result of the accident his competitiveness in the open labour market has been comprised.

43. An award for general damages *“must be fair to both sides - it must give compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendants expense”*.³
44. Counsel for the plaintiff and defendant referred me to several cases which I found useful in determining what would be a fair to both parties.
45. The first case which I was referred to is Ndlovu v Road Accident Fund⁴. This case concerned a 38-year-old female storekeeper whose injuries comprised compound fractures of both lower legs and a fractured ankle. She had sustained compound fractures of the left tibia and fibula with a large lateral degloving soft tissue injury. She also sustained compound fractures of the right tibia and fibula, as well as a fracture of the medial malleolus of the left ankle. She was hospitalised for three weeks, used a wheelchair for six weeks and operated on crutches for many weeks. She has been left with painful and unsightly scars, has nightmares and faced the prospect of further surgery and skin-grafts. She endured pain in her legs which led to further pain, tiredness and loss of concentration. All of these led to anxiety and depression. Proposed surgery was only expected to improve her situation, but she could never be restored to the position in which she was prior to the accident. In March 2015, the Court awarded this plaintiff an amount of R470,000.00 as compensation for her general damages.

³ Pitt v Economic Insurance Company Ltd 1957 (3) SA 284 (D) 287 E-F

⁴ 2015 (7E4) 18 (GSJ) (11 March 2015)

46. The second case I was referred to was *Nel v The Road Accident*⁵. In that matter a 64 year old manager, who sustained closed fractures of the right tibia and fibula, an amputated fifth metacarpal and little finger, a degloving injury to the right foot, leading to the amputation of the right big toe. He used a crutch in order to ambulate.
47. Counsel for the Plaintiff suggested that I award an amount of R950,000.00 for general damages.
48. Counsel for the Defendant referred me to *Ndaba v Road Accident Fund*⁶, where the Plaintiff, who was 42 years old at the time, was travelling with her youngest child, a mere baby, when a collision occurred. The plaintiff's legs were trapped inside the vehicle and she had to pass her baby through the window to onlookers while waiting to be freed from the mangled vehicle. This caused her much distress. Thereafter she was admitted to the Frere Hospital with very little recollection of the accident. Upon admission the following injuries were noted: A straddled pelvic fracture, a right femoral "midshaft" fracture and a bladder injury (rupture) as a result of blunt abdominal trauma. She also sustained an injury to her right shoulder and a dashboard left knee injury. The latter injury she sustained as a result of being trapped between the seats of the taxi she travelled in. The court awarded here an amount of R300,000.00 in respect of general damages.
49. Mr Mogano suggested that an amount of R400,000.00 be awarded for general damages.
50. The injuries sustained by the plaintiff in the accident has rendered him permanently not able to perform any other work other than that of a sedentary nature. This renders him permanently incapable of fully performing work as a diesel mechanic. The plaintiff is young and the knee replacement may only be considered in about 10 to 15 years. The mobility

⁵ 2017 (7E4) QOD 36 (GP)

⁶ (EL 321/08) [2011] ZAECELLC 6 (30 June 2011)

of the plaintiff with all its consequences is permanently compromised. It is clear that he is accommodated by his employer.

51. Considering the injuries sustained by the plaintiff and the relevant case law an amount of R600,000.00 is a fair and reasonable.

COSTS

52. Lastly, it was submitted on behalf of the defendant that the employment of two counsel was not warranted in this case.

53. It is trite that the award of costs is a matter within the discretion of the trial court. Such discretion must, of course, be exercised judicially.

54. The costs of two or more counsel will be allowed only if a court specially orders this to be the case failing which the costs of only one advocate is awarded. Our courts have in several decisions considered factors which are relevant in deciding whether it was reasonable to employ two counsel. These factors include: the importance of the case, whether the case involves complex legal or factual issues, the quantum of the claim and the volume of the evidence to be represented.

55. I am of the view that the matter was of considerable importance to the plaintiff, that the quantum is not a small amount and that a considerable amount of preparation was undertaken in regard to the volume of the expert report. As a result I am of the view that the employment of two counsel was warranted.

56. In the premise, the following order is made:

1. The Defendant shall make payment to the Plaintiff in the sum of R5,635,300 which amount is computed as follows:

1.1 Past and future loss of income: R5,035,300.00

1.2	General damages:	R 600,000.00
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2. Payment into the following bank account:

DSC Attorneys

First National Bank

Branch code : 2[...]

Account No : 6[...]

Interest on the aforesaid amount at the prescribed rate within 14 days of this order.

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 1996, for payment of 100% of the costs for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service services or supply of goods to him, arising from the injuries he sustained in the motor vehicle collision which occurred on 02 June 2009 and the sequelae thereof, after such costs have been incurred and upon proof thereof.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on a High Court scale to date of this order, which shall include the reasonable qualifying, preparation, reservation and appearance fees (where applicable) of the following expert witnesses:

4.1	Dr JS Sagor	Orthopaedic Surgeon
4.2	Michelle Bester	Occupational Therapist
4.3	Dr Richard Hunter	Industrial Psychologist
4.5	Mr W Boshoff	Actuary
4.6	Ms L Howell	Occupational Therapist
4.7.	Morton and Partners	Radiologists
4.8.	Kingsbury Radiology	Radiologists
4.9.	Dr P Olivier	Orthopaedic Surgeon

5. In the event that costs are not agreed:
 - 5.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record; and
 - 5.2 The plaintiff shall allow the defendant (14) days to make payment of the taxed costs.
6. The costs of the necessary witnesses of attending the trial, which are:
 - 6.1 Mr Van Niekerk (Plaintiff);
 - 6.2 Dr Hunter
 - 6.3. Ms Howell
 - 6.4. Mr Boshoff
7. The taxed or agreed costs of Plaintiff's counsel.

T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Plaintiff:	Adv JJ Botha SC
	Adv S Botha
On the instruction of:	DSC Attorneys
On behalf of the Defendant:	Mr M Magano
On the instruction of:	Office of the State Attorney