

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

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Case Number: 15/2020

In the matter between:

OCKERT SMIT

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

HEARD ON: 5, 6 and 13 MARCH 2024

CORAM: JORDAAN,AJ

DELIVERED ON: 13 JUNE 2024

- [1] The plaintiff, Ockert Smit, was enroute from his place of employment to his home driving his motor bike with registration number [...] in the early hours of the 14th of January 2017 on Albrecht Street, Dan Pienaar, Bloemfontein when an unknown vehicle driven by a n unknown driver collided with him.

- [2] As a consequence of the collision, the plaintiff sustained the following Injuries:¹
- 2.1 a right femur fracture;
 - 2.2 a right hip dislocation;
 - 2.3 concussion and bleeding on the brain;
 - 2.4 injury to C1 and C2 vertebrae;
 - 2.5 various cuts, abrasions and lacerations.
- [3] On the 2nd of February 2017, the plaintiff was a passenger in a motor vehicle with registration number [...], driven by G.Maarten when it collided with a motor vehicle with registration number [...] driven by D.B. Solomons or F.Smith at the intersection of the R64 Boshof Road and Du Plessis Road, Langenhoven Park, Bloemfontein.
1. Paginated Bundle: Particulars of claim page 5-6 paragraph 5.
- [4] As a result of the collision as aforementioned, the plaintiff sustained the following injuries:²
- 4.1 injury to the left hand and right thigh;
 - 4.2 bilateral femur fractures;
 - 4.3 Various cuts, abrasions and lacerations.
- [5] The Plaintiff consequently instituted action in terms of the provisions of the Road Accident Fund Act 56 of 1996, as amended, to recover damages comprising of:
- | | | |
|-----|-------------------------|----------------------|
| 5.1 | Past medical expenses | R500 000.00 |
| 5.2 | Future medical expenses | R1 700 000.00 |
| 5.3 | Past loss of income | R403 200.00 |
| 5.4 | Future loss of income | R5 044 86 667.00 |
| 5.5 | General damages | <u>R1 500 000.00</u> |
| | TOTAL | <u>R 9 148 066.6</u> |
- [6] The Defendant settled the merits 100% in favour of the plaintiff in terms of a written merits settlement offer which was accepted by the plaintiff.³
- [7] In terms of the order by Loubser J dated 30/10/2023, general damages and future medical expenses were settled and separated in terms of R 33(4) from adjudication of past and future loss of earnings and past medical expenses.⁴The

¹ Paginated Bundle: Particulars of Claim page 5 - 6 paragraph 5.

² Paginated Bundle: Particulars of claim page 9 paragraph 13.

³ Paginated Bundle: Notices page 275-278.

⁴ Paginated Bundle: Notices page 390.

only heads of damages for determination by this court is the loss of past and future income, the aspect of past medical expenses is separated in terms of R 33(4) for later adjudication.

- [8] The plaintiff bore the onus of proof and thus the duty to begin. The Plaintiff himself an the occupational therapist, Letitia Delport, testified in the Plaintiff's case.
- [9] It was agreed between the parties that the evidence of the remaining experts will be presented and handed in by way of affidavit in terms of Rule 38(2). The court accordingly accepted the following reports as exhibits:
- 9.1 The Occupational Therapist's report by Letitia Delport, as Exhibit "A";
 - 9.2 The Orthopaedic Surgeon's report by Dr A Szabo, as Exhibit "B";
 - 9.3 The Industrial Psychologist's report and addendum report by Bernard Swart Merwe, as Exhibit "C1 & C2";
 - 9.4 The Actuarial report and addendum report by Human & Morris, were accepted as Exhibits "D1 & D2".
- [10] It was the plaintiffs evidence that he matriculated in the year 2016, had an interest in the engineering sciences as he was interested in working with his hands and confirmed his National Senior Certificate.⁵
- [11] The Plaintiff testified that at the time of the collisions, he was working as a waiter and barman at no 16 Stoep and Beer Garden. It was his evidence further that he could only return to work in November 2017, due to a lengthy rehabilitation, and continued to work at The Office and Saffies until November 2019, when he left for Cape Town.
- [12] It was his testimony further that he worked as a barman/waiter which entails him working for long hours on his feet, which was strenuous on his legs. He testified that being on his legs for long caused pain in his legs and joints. His main source of pain would be his right hip which causes pain in his nerves and does not allow for him to place his full weight on his leg.
- [13] His evidence further rang that he started to work as a junior technician at Black Ops in Cape Town from 2020 and confirmed his salary slips.⁶ During March 2021 he was appointed as the project manager which involved a lot of traveling, earning a

⁵ Paginate Bundle: Notices Page 339.

⁶ Paginated Bundle: Notices pages 343 to 347.

higher salary as his payslips reflect.⁷

- [14] The plaintiff testified that the nature of his work involved a lot of walking, picking up and carrying of equipment and it requires a lot of physical exertion. He explained that he installs security camera's & alarm systems while standing on ladders and cherry pickers. It was plaintiff's evidence further that the installations often occur in confined spaces and takes a physical toll on his right hip, but not to the extent of his right knee & hip.
- [15] The plaintiff testified that his work also entails extensive driving which causes leg pains and the sitting for long periods causing a feeling of pins & needles. His evidence further rang that from 5pm daily his limbs pain and the cold weather only serve to exacerbate it. He has difficulty sleeping because of his hips and thus sleeps on his stomach, but his right hip and right knee is the first to pain.
- [16] During September of 2022 he moved to a company called TAG, The Alarm Guy, in the same industry as Black OPS, but with a high end clientele and different types of equipment, in order to enrich his experience. He left the company in December 2023 and confirmed his salary slips.⁸
- [17] Letitia Delport, the Occupational Therapist, testified in essence that the plaintiff would not be able to continue with the work that he is currently doing beyond 55 years of age.
- [18] It was her evidence that the plaintiff would be able to work until the age of 60 years, but in a sedentary capacity.
- [19] During cross-examination she conceded that she cannot opine on early retirement, but that it is within her expertise to opine on the functional level estimations. She also conceded that the plaintiff is currently in a managerial position. She confirmed her report.
- [20] That concluded the *viva voce* evidence.
- [21] Dr A Szabo, the Orthopaedic Surgeon, opined that the Plaintiff sustained Orthopaedic injuries and will likely develop post-traumatic osteoarthritis the

⁷ Paginated Bundle: Notices pages 3348 to 355.

⁸ Paginated Bundle: Notices pages 356 to 365.

right hip and of the knee replacement at the approximate age of boys old. He might need same far left hip and knee as well.

- [22] He opined that the Plaintiffs employability and working capability has been affected. The Plaintiffs cannot stand for a long time and his walking distance is limited due to his right leg pain. He cannot sit for longer than an hour due to knee pain. This will probably have a bearing on his job opportunities, productivity and potential earnings.
- [23] Dr Szabo qualified the Plaintiffs on the narrative Test for serious long- term impairment or loss of bodily function.
- [24] Industrial Psychologist, Bernard Swart Merwe opined the Plaintiff's physical impairments will definitely affect his promotional prospects in the security industry adversely. The Plaintiff's potential for future promotions will invariably be affected adversely due to his physical limitations.
- [25] The industrial psychologist opined that the most appropriate manner to calculate the Plaintiff's claim pertaining to loss of Earnings would be by way of differential contingencies.
- [26] The actuarial calculation make provision for retirement at the age of 55 years and retirement at 60 years, both assumed truncated retirement ages not opined or determined by the orthopaedic surgeon.
- [27] If one applies a 15% contingency on the on the uninjured scenario and Scenario and a 35% contingency on the injured scenario, the Plaintiff's loss of income is an amount of R 3 166 610.00 in scenario 1 where the assumed retirement age is 55 years. If one applies 15% contingency on the uninjured scenario and a 35% contingency on the injured scenario in scenario 2 where the assumed retirement age is 60 years the Plaintiff's loss of future income is an amount of R2 904 041.00.
- [28] The Defendant rebutted the evidence of the Occupational Therapist in That she does not have the necessary competency to establish a truncated age of retirement for the Plaintiff in the absence of the Orthopaedic surgeon opining same.
- [29] The Defendant proposed that while there might be a diminished capacity to earn

an income, it does not translate in a definite future loss of earnings and *in casu* the exact situation has been manifested.

- [30] The Defence the submitted a 20% contingency be applied in respect of the Plaintiff's uninjured future loss of earnings and contingency reduction of 35% be applied in respect of his injured future loss of earnings.
- [31] In order for the Plaintiff to succeed with his claim for loss of earnings. He must prove that his earning capacity has been compromised as a Result of the damage causing event. The .Plaintiff's own evidence and the evidence as extracted from the expert witnesses' reports established this. I am thus satisfied that the Plaintiff was able to proved that his earnings capacity has been compromised as as a result of the injuries he sustained in the accident in question.
- [32] The avaluation of the amount to be awarded for the for the loss however, does not involve proof on a balance of probabilities. The Plaintiff herein relied on the expertise of an Actuary in coming to an assessment of the amount payable.
- [33] The *locus classicus* as to the value of actuarial expect opnion in assessing damages is Southern Insurance Association Ltd v Baily NO⁹ where Nicholas JA said the following:
"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has a large discretion to award what he considers right. One of the elements in excercing that discretion is the making of a discount for contingencies or differently put the 'vicissitudes of life'."
- [34] In Road Accident Fund v Guedes¹⁰ Zulman JA stated:
"The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a malter of exact mathematical calculation. By its nature, such an enquiry is sepeculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate. Courts have adopted the approach that, in order to assist in such calculation an actuarial computation is a useful basis for establishing the quantum of damages."

⁹ 1984 (1) SA 98 (A).

¹⁰ 2006 ZASCA 19.

- [35] The occupational Therapist analysis that the Plaintiff will have a truncated retirement at 55 years of age, could not logically be motivated by the Occupational Therapist and is not supported by the Orthopaedic Surgeon.
- [36] The Plaintiff, notwithstanding his injuries which was known to his prospective employer, was promoted in less than the projected time of 7 years, but 4 years to a Managerial Position. Therefore the Industrial Psychologist postulation of the Plaintiff's post-accident career path is flawed and not in line of the career progression of this Plaintiff.
- [37] The Industrial Psychologist opinion that provision should be made for retirement between the ages of 40 years and 50 years for actuarial calculations are unfounded.
- [38] The Actuarial calculations are based on truncated ages of 55 years and 60 years of age. These truncated ages were not opined by the Orthopaedic Surgeon of the Plaintiff and thus based on unfounded postulations.
- [39] The occupational Therapist oral evidence of a truncated age of 55 years was not supported neither by her evidence in cross-examination nor her written report. She testified that the most suitable expert to determine whether early retirement is indicated based on the injuries, would be the Orthopaedic Surgeon. In her written report, she did not mention the truncated retirement age. Thus the Actuarial Report is based on collateral information or evidence pertaining to retirement age, which is not credible.
- [40] In the circumstances this court is not bound to accept the actuarial calculations as per the actuarial report as it was based on unfounded expert postulations, deprived of logic.
- [41] This court had regard to the age of the Plaintiff, his admirable drive and stellar advancement in his career, notwithstanding his injuries and its sequelae. The plaintiff submissions were for an award of R 3 385 007.00, while the Defendant submitted R1 058 044.65 to be a just & fair award.
- [42] Having regard to the facts of this case, the submissions made, I find that an appropriate contingency to be applied to future loss of earnings is 45%.

[43] Thus the Pre morbid earnings R 887 327,- with a 5% contingency and a future loss of earnings at R7 053 631.- with 15% contingency representing total pre- morbid earnings, while Post- Morbid earnings have past loss of R 887 327.- with a 5% contingency and a future loss of earnings at R7 053 631 with a 45% contingency representing the post morbid earnings. Thus a total loss of earnings of R 2 116 089.30.

[44] In the circumstance I make the following order:
The Defendant shall pay the plaintiff the amount of R 2 116 089.30 (TWO MILLION ONE HUNDRED AND SIXTEEN THOUSAND AND EIGHTY NINE RAND AND THIRTY CENTS) for loss of earnings.

1. The aforesaid amount is to be paid into the following bank account:

Symington & De Kok Attorneys

[...] [...] [...]]

Account number: [...]

Branch code: [...]

Reference: [...]

2. The Defendant shall be afforded a period of 180 calendar days from the date of this order to effect payment herein, during which period the Plaintiff will not be entitled to issue a writ against the Defendant.

3. The adjudication of the remaining aspect of past medical expenses is separated in terms of Rule 33(4) and postponed to the pre-trial roll for hearing on **30 September 2024**.

4. The defendant shall pay the plaintiff's taxed party and party costs on a High Court scale to date of this order, which shall include the travelling costs for the plaintiff and the reasonable qualifying, preparation fees and reservation fees of Counsel and the following experts:

4.1 Dr. Aszabo (orthopaedic surgeon)

4.2 Bernard Swart (Industrial psychologist)

4.3 Letitia Delport (Occupational therapist)

4.4 Human & Morris (Actuary)

5. Interest shall accrue at the prescribed statutory rate in respect of:

5.1 The capital amount of the claim, calculated 14 (fourteen) days from date of this order to date of final payment, in the event that payment is not affected within the 180 days from date of this order as per prayer 3.

5.2 The taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs to date of final

payment.

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