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

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

Case Number: 2409/2015

In the matter between:

E[...] L[...] L[...] H[...]

1st Plaintiff

A[...] E[...] L[...] H[...]

2nd Plaintiff

and

METSIMAHOLO LOCAL MUNICIPALITY

Defendant

HEARD ON:

01 December 2023

CORAM:

JORDAAN,AJ

DELIVERED ON:

31 May 2024

[1] On the 20th of July 2014 the 2nd Plaintiff, then a 16yr old male person, hit a pothole on the road surface of Gamsberg Street, Vaalpark in Sasolburg, whilst driving his motorcycle with registration number and letters, LX [...].

[2] The Plaintiffs, on the 18th of July 2016, issued summons with two

substantive claims against the Defendant. The 1st Plaintiff- the father of the 2nd Plaintiff, claimed payment for past medical and hospital expenses in the amount of R24 567.69, while the 2nd Plaintiff- who by then had reached the age of majority, claimed payment for general damages in the amount of R400 000.00, payment of R900 000.00 for future medical expenses and loss of earnings in the amount of R2 600 363.00.

[3] The issue of merits was previously settled. This trial served before me pursuant an order by Nicholson AJ dated the 16th of August 2017¹ in the following terms:

"IT IS ORDERED THAT:

- 1. The defendant is liable to compensate the first plaintiff for any medical expenses he may prove he incurred as a consequence of the incident that is the subject of these proceedings.*
- 2. The defendant is liable to compensate the second plaintiff for all damages he may prove he suffered as a consequence of the incident which is the subject of these proceedings.*
- 3. The defendant is liable to compensate the 2nd plaintiff for all future medical expenses he may prove he will incur as a consequence of the incident which is the subject of these proceedings.*
- 4. The defendant pay the costs.*
- 5. The case is referred back to the trial court to proceed with the determination of quantum."*

[4] The claim for past medical and hospital expenses, which was instituted by the 1st Plaintiff, was settled and made an Order by Daffue AJP, as he then was, dated the 8th of November 2022.²

¹ Paginated Bundle: Court Order pages 120 to 121

² Paginated Bundle: Court Order page 183 order number one

[5] The only heads of damages for determination by this court is the issue of the 2nd Plaintiff's general damages, future medical and hospital expenses and loss of earning capacity.

[6] The Defendant disputed the 2nd Plaintiff's claim, contending that the 2nd Plaintiff sustained minor/non-serious injuries on the 20th of July 2014 from which he had recovered and that there is no causal link between the pain the 2nd Plaintiff now experiences and the accident.

[7] In establishing that as a consequence of the accident the 2nd Plaintiff sustained injuries and the sequelae of same, Counsel for the 2nd Plaintiff led the evidence of the 2nd Plaintiff, Dr Ziervogel (orthopaedic surgeon), Ms Enid Kruger (occupational therapist), Ms Lariska van Rooyen (industrial psychologist) and the actuarial report of Mr. Wim Loots (actuary) was handed in by way of affidavit.

[8] The 2nd Plaintiff's evidence in summary was that he was 16 years old and in grade 11 in July 2014 when driving his motorcycle, he hit a pothole in the road surface, causing his motorcycle to fall as a result of which he sustained lacerations to his right knee, an injury on his left ankle, abrasions on his arms, hands, legs and toes of his right foot.

[9] He testified that he was hospitalised for five days and the laceration on his right knee was deep cleaned in the operating theatre. It was his evidence further that he received a moonboot for his left ankle in hospital, received physiotherapy afterwards and that he was in the moonboot and crutches for approximately three weeks.

[10] It was the evidence of the 2nd Plaintiff that he is currently a solar technician and installs inverters, batteries and solar panels, which involves working on roofs and inside ceiling spaces. He experiences that when he spends long hours on his feet or walk long distances, then his left ankle will pain. It was his testimony that when he crouches in the roof inserting wiring his

right knee pains, it is not as painful as his left ankle, but it is uncomfortable. The right knee pain is more in winter, but his left ankle pain is all year round. He testified that climbing a ladder is not a problem, but having to execute tasks while standing on the ladder, causes pain in his feet.

[11] The 2nd Plaintiff testified that he participated in sport. He participated in Taikwondo and received a bronze medal in Taiwan in 2011, he did Krav-Magura- an Israeli fight style and rugby but did not seriously play rugby.

[12] He testified that he is running on approximately 75% of his capacity. If a job should take him about 3 hours, it will take him about an hour longer.

[13] One of the 2nd plaintiffs solar installations was on a two-storey building. It took an extra day to complete the job. They had to hire a cherry picker for an extra day which costs around R15 000-00 per day. Concentration is important, when in too much pain, he makes mistakes, he drilled into a water pipe by accident.

[14] He studied Economics and Risk Management for two years, but lost interest. He then went to Vietnam where he taught English for six months. Hereafter he returned to South Africa and worked as a bartender for approximately eighteen months. Thereafter he worked on a guest farm in the Clarens region and was employed as a general worker whose duties included the booking of the guests, feeding of livestock, patrolling at night and cleaning of the facility. This he did for a period of nine months.

[15] The 2nd Plaintiff and his father started a solar company in the year 2022. He is currently earning a salary of R9 000-00 to R10 000-00 per month. He completed a course at Green Solar Academy where he obtained a qualification for the installation of solar systems. He is the installer and also provides technical advice. His father's duties include finances and general management.

[16] Before the accident he had an interest in attending the Royal Marines Commando in the British Navy. He also had an interest in hydroponics, aquaponics and renewable energy.

[17] During cross-examination the 2nd plaintiff testified that he suffered no other serious injuries after the accident. He denied that the injuries on the J88 is what he sustained in the accident, as he later went for further medical examinations.

[18] The 2nd Plaintiff was confronted that his payslip indicates an income of R7 500- 00 per month to which he replied that he earned that salary in the year 2022. It was his testimony further that during winter their business increases which then increases his salary to between R9 000.00 to R10 000.00 per month, but that it is just a rough estimate depending on the quantity of work procured.

[19] Being confronted with the Mediclinic discharge information, the 2nd plaintiff conceded that the information on the discharge form was correct, that he was indeed not issued with a moonboot and crutches on discharge from the hospital. It was his evidence that his grandfather had a wheelchair and crutches. The 2nd Plaintiff stated that he could have borrowed it. The 2nd Plaintiff could not recall where he got the moonboot.

[20] The 2nd Plaintiff's response to the question whether the accident caused a sprain to his ankle was that he had flat feet at a young age that his parents treated. After the accident, when his left foot came out of the moonboot, his left foot was flat again. Both his feet are flat again. The pain in the left foot is exponential after the accident. He later testified that he wore the moonboot after the accident because his left ankle was injured in the accident.

[21] Further during cross-examination he testified that he wanted university acceptance for engineering studies not economic studies. He testified that he lost interest in education and sport after the accident.

[22] Dr Ziervogel, the Orthopaedic Surgeon testified among others the following: He obtained his MBCHB in 1968 and MMed in Orthopaedics in 1978. He started in private practice in 1980. He examined the plaintiff on 8 March 2023. A copy of his report with colour photos as well as some articles were submitted.

[23] On examination of the right knee he found that there was tenderness when pressing on both medial and lateral borders of the patella. There was a degeneration at the back of the knee. There is tenderness when pressing on the joint space on both sides of the knee. The fat pad test is positive on the lateral side. The Thessaly test for menisci was positive. The medial side is more of a problem.

[24] X-rays of the right knee reveal signs of minor narrowing of the medial joint space. He explained that the cartilage is wearing away, there is degeneration.

[25] It was Dr Ziervogel's evidence that there is torn cartilage in the knee. The cartilage makes the different bones fit. The bones does not fit properly anymore and that is the start of degeneration.

[26] He explained that there is a tenderness on the inner side of the knee ligament which connects the top and the bottom part of the knee. There is torn menisci. There is furthermore tenderness on the ligaments on the medial and lateral side. It is a grade 1 injury for the ligaments are stable and there is degeneration at the back of the knee cap.

[27] He explained that for a torn cartilage there are three tests: the grinding test, the McMurray test and the Thessaly test. The McMurray test is positive 70% of the time and the knee snap if there is a torn cartilage. The Thessaly test is 92% accurate in showing a torn cartilage.

[28] The x-rays of the left ankle shows that there are signs of sharpening of the articular surface edges of the distal tibia. This is an indication of osteo-arthrosis. There is also vague ossification in the joint capsule. An injury in the capsule of the joint will lead to ossification (bone forming).

[29] The right knee of the plaintiff already has signs of osteo-arthrosis (clinically the Thessaly test for meniscal tear is positive and x-rays reveal slight narrowing of the medial joint space). He explained that the knee must be investigated, by doing an arthroscopic investigation. Once confirmed the torn part of the meniscus can be excised. It is known that about 55% of patients will develop osteo-arthrosis within eight years after the meniscectomy. If the torn part is left, they will develop osteo-arthrosis sooner. Osteo-arthrosis is always progressive. In the end the plaintiff will need a knee replacement. This will happen in twenty to twenty-five years' time.

[30] Regarding the plaintiff's left ankle, Dr Ziervogel states that the plaintiff already has early clinical and radiological signs of osteo-arthrosis. When the process becomes advanced, an ankle-arthrodesis may become necessary. This involves the tailbone and is a fusion in the ankle. Dr Ziervogel estimate a period of twenty to thirty years, before the plaintiff will need an arthrodesis. Otherwise, the plaintiff will be limping and will be severely symptomatic.

[31] Dr Ziervogel confirmed the plaintiff's possible future medical costs. This is set out in paragraph 17 to 21 of his report.

[32] The future treatment of the plaintiff's left ankle involves the following: conservative treatment of osteo-arthrosis (R9 410-80), ankle-arthrodesis (R114 439-20) and removal of instrumentation (R37 124-80).

[33] He explained that the plaintiff will have severe challenges in performing his current work after he had a knee replacement and/or an ankle-arthrodesis. With a knee replacement the plaintiff will not have full flexion anymore and he won't be able to squat and therefore work in small places. With a stiff ankle he

won't be able to negotiate uneven terrain or work on sloped roofs.

[34] Dr Ziervogel in support of his findings and opinion relied on three articles which was accepted as Exhibit A. He explained that the first article he refers to confirms that a menisectomy is associated with radiological post-traumatic osteoarthritis. The incident with modern techniques is approximately 55% at eight years. The second article deals with the fact that physiotherapy may have the same effect as arthroscopic debridement (cleaning out of loose bodies). The third article deals with the fact that with an ankle injury there is a high incidence of osteo-arthritis. In the plaintiff's case there is already signs of osteo- arthritis.

[35] During cross-examination Dr Ziervogel confirmed that he had sight of the J88 which recorded only soft tissue injuries.

[36] He disagreed that soft tissue injuries are not serious injuries as ligaments are serious injuries. It was his evidence during cross-examination that the doctors did not look for ligament injuries.

[37] In response to his evidence that the doctors did not look for ligament injuries, he was confronted with the stress view x-rays that were done according to Dr Heyns and no torn ligament was found, to which Dr Ziervogel responded that he also found no instability, but he found this to be a grade 1 ligament injury which will not be seen on an x-ray therefore it does not exclude a grade 1 injury to the ligament.

[38] He was confronted that he saw the 2nd plaintiff 9 years after the accident and Dr Heyns saw him 7 months after the accident, Dr Ziervogel stated a grade 1 ligament injury will not be picked up on an x-ray. When confronted that a grade 1 injury would heal in 3 months, he replied that he has seen patients who suffer long term.

[39] The Dr was confronted that two of the 2nd plaintiff's doctors, Dr Heyns

and Dr Preddy, as well as the Defendant's Dr Agbazue, do not agree with him, to which Dr Ziervogel replied that would it be valid if the examination was done on the same day.

[40] Dr Ziervogel was then confronted with his own report wherein he stated that the ligaments are intact what would the need for an operation be, to which Ziervogel replied that the ligaments are intact, it is a grade 1 injury there is no instability it remains stable for a long time. He did not indicate an operation. He was confronted that the x-ray of the left ankle done by him shows a normal joint space, to which he replied on the x-rays.

[41] He was confronted that he is unable to provide facts, his opinion is based on assumption, to which Dr Ziervogel answered that is how doctors in the world operate.

[42] Dr Ziervogel was asked why he is advocating arthroscopy of the knee when there is a joint narrowing, to which Dr Ziervogel replied because there is a narrowing of meniscus based on the positive Thessaly test he performed.

[43] It was Dr Ziervogel's evidence during cross-examination that the 2nd Plaintiff's injury was rated by him at 1% whole person impairment and that although the injury is not serious, it may have serious consequences.

[44] Enid Kruger, the Occupational Therapist, testified amongst others the following: She obtained her degree in Occupational Therapy in 1986 at the University of the Free State. She confirmed the contents of her report.

[45] Regarding loss of earning capacity she states that Mr L[...] H[...]s work as an installer of solar systems requires him to handle heavy objects - some batteries can weigh up to 60 kilograms. Although there is usually help available, it does happen that he lifts and carries such a battery on his own. By performing these duties, he could adversely affect his function and speed up the likelihood of deterioration of the knee function. By persisting in such a strenuous job, the

likelihood of deterioration of his abilities increases and the need for surgery could increase.

[46] During cross-examination she testified that she only saw the report of Dr Ziervogel the previous day. She stands by her recommendations as set out in her report. Her recommendations are based on the injuries to the ankle and the knee.

[47] Enid Kruger also confirmed her opinion as set out in the joint minutes about the assistive devices that the plaintiff will need and the prices thereof.

[48] Lariska van Rooyen, the Industrial Psychologist, testified that she obtained her Master's Degree in Industrial Psychology in 2010.

[49] She explained in her report that Mr L[...] H[...] is not currently receiving a market related remuneration. In self-employed capacity, Mr L[...] H[...] can continue to work until the retirement age of 75 years.

[50] She is of the view that the accident and its sequelae has rendered Mr L[...] H[...] a vulnerable employee and a severely disadvantaged competitor against healthy counterparts in the open labour market, even in a self-employed capacity.

[51] She stated that it seems probable from the expert opinion and record, that Mr L[...] H[...] would have to retire early at the age of 58 to 60 years, (as per Dr Preddy's report) and will then sustain a full loss of income until retirement age of 75 years. She states that the accident-related sequelae will probably have a negative impact on his work ability and productivity, which would lead to a decrease in actual earnings. Mr L[...] H[...] should therefore be fairly compensated for these vulnerabilities by way of a considerably higher post- accident contingency award.

[52] The actuarial report of Mr. Wim Loots was handed in by affidavit.

[53] In contesting the 2nd Plaintiff's claim, the Defendant led the evidence of Dr Agbazue (orthopaedic surgeon) and Ms Clara Shivhabu (occupational

therapist).

[54] Dr Agbazue testified that he obtained a Bachelor of Medicine, Bachelor of Surgery Degree from the University of Nigeria in 1991, he received his Fellowship of Royal College of Surgeons at Glasgow in the United Kingdom in 1998, he received Fellowship at the College of Orthopaedic Surgeons in 2004 from the University of Witwatersrand and he received a Fellowship of Interventional Pain Practice at Miami, USA

[55] Dr Agbazue consulted the 2nd Plaintiff on the 03rd of November 2022 and established that he sustained minor soft tissue injuries, skin lacerations and sprains during the accident. The Dr testified that these injuries are non-serious injuries, hence the 2nd Plaintiff was discharged from the hospital within five days. Dr Agbazue testified, there was consensus between himself, Dr Heyns and Dr Preddy, who are the 2nd Plaintiff's Orthopaedic Surgeons, that the injuries sustained were non-serious.

[56] On examination, the 2nd Plaintiff weighed 110.2kg and his height was 1.81m and had a BMI of 32. Dr Agbazue testified that a BMI above 25 is obese, which makes the 2nd Plaintiff prone to arthritis. Dr Agbazue testified that the 2nd Plaintiff was actively participating in the sports of Taikwondo and Krav-Magra and he did lifting of weights. The 2nd Plaintiff had bilateral flat feet as a toddler. As the 2nd Plaintiff grows, the added body weight causes pain on the deformed feet. This combination of factors will lead to early onset of knee arthritis. The ankle had a sprain which was a grade 1 injury which heals within 6 to 8 weeks. The accident did not cause the symptoms that the 2nd Plaintiff experiences currently.

[57] Dr Agbazue testified that the J88 which recorded injuries at the time of the accident accords with his, Dr Heyns and Dr Preddy's reports that it was all soft tissue injuries. It is agreed between Dr Agbazue, Dr Heyns and Dr Preddy that current condition of the 2nd Plaintiff is a progression disease of flat feet that

is natural and has nothing to do with the accident. The stress x-rays of the ankle which were done showed no instability.

[58] Dr Agbazue strongly disputed the opinion of Dr Ziervogel, which he testified was not supported by the articles that Dr Ziervogel himself relied upon, rather the second article contradict Dr Ziervogel's opinion of arthroscopic debridement of the meniscus. He also testified that the articles that Dr Ziervogel relied on are not scientific. Dr Agbazue testified there is no science or scientific basis for Dr Ziervogel to say that a Grade 1 injury can later develop serious sequelae, credible scientific studies which were internationally researched with thousands of patients across all nations were done, which shows that a grade 1 injury has complete recovery. Dr Agbazue testified that in hospital normal x-rays were done which showed no boney injury and stress x-rays were done twisting the ankle inside and outside, if there is instability found then it means there is a ligament injury- there was no instability found.

[59] Dr Agbazue further testified that the 2nd Plaintiff was seen by Dr Heyns seven months later, who reported that the injuries have healed and that the pain the 2nd Plaintiff felt in his left foot was due to flat feet. This he testified, was in line with Dr Preddy and himself, who saw the 2nd Plaintiff thereafter. He further testified that Dr Heyns had x-rays of the right ankle and the left ankle done and found no difference between the two ankles.

[60] Dr Agbazue testified that the meniscus is most difficult to assess clinically through physical stress, only an MRI can. He testified that Dr Ziervogel's x-rays shows that both right and left knees of the 2nd Plaintiff shows a narrowing on the inside knee, which is in accord with Dr Agbazue's evidence that the biomithology of the 2nd Plaintiff, that the load is on the inside compartment of his knees. Dr Agbazue refered to an article which supports his opinion that patients with flat feet and being overweight have a natural progression to knee arthritis.

[61] Dr Agbazue further testified that the sport the 2nd Plaintiff participated in is high impact sport, which on its own can lead to osteo arthritis. Persons who are obese have a 2½ chance of developing osteoarthritis. Bearing the 2nd Plaintiff's BMI in mind, he thus have a accumulative 35% chance of contracting osteo arthritis. It was his evidence that an article the Association of Bilateral Flat Feet with Knee Pain & Disability in Patients with Knee Osteoarthritis indicates that patients with bilateral flat feet have chances of worsening knee pain and back pain. The 2nd Plaintiff has both bilateral flat feet and bilateral knee narrowing, thus he has the medical risk of osteo arthritis.

[62] During x-examination Dr Agbazue was confronted that Dr Heyns indicated 18 to 24 months for healing, which Dr Agbazue replied that the pain reported by a patient is subjective and examination is subjective, while the tests and x-rays done, are objective and it showed no instability.

[63] Dr Agbazue was confronted by Dr Preddy's 2nd report that indicates pain in the 2nd Plaintiff's left foot and that he is suffering from injury sequelae, to which Dr Agbazue replied that he did a joint minute with Dr Preddy, wherein he stated that he cannot prove a link between pain and the accident, with which Dr Agbazue agree. When confronted that Dr Preddy later said due to injury sequelae, Dr Agbazue replied its due to the 2nd Plaintiff's biometrics. It was his evidence that the 2nd Plaintiff had pain for two weeks then moderate pain for 5 weeks and that the achilles tendon is not related to the accident.

[64] The doctor testified that the left flat foot and problems with left foot was not caused by the accident as x-rays and stress x-rays were done at the time of the accident and it showed no instability, 7months later stress x-rays were done and no instability was found, thus accident did not cause it it is a natural left flat footed problems, one foot is always worse that the other in flat footedness. X-rays done 9years later show osteo arthritis in knee this is due to overweight, flat footedness and activity.

[65] Ms Shivhabo, the occupational therapist, testified that the 2nd plaintiff walked normally and functioned independently. She testified that if it was found that the 2nd plaintiff has early onset osteo arthritis then she would recommend that he does sedentary work. She cannot state an opinion of whether the accident caused the current problems of the 2nd Plaintiff as it does not fall in her field of expertise. She agreed with some of the 2nd Plaintiff's occupational therapist' recommendations on assistive devices that the second plaintiff might need.

[66] From the evidence led, it is clear that there is no dispute that the 2nd Plaintiff sustained injuries in the accident on the 20th July 2014. The issue for determination is the extent of the injuries sustained and whether there is a causal connection between the 2nd Plaintiff's current condition and the injuries sustained in the accident of 20th of July 2014, and if so, the quantum to be awarded. The 2nd Plaintiff bears the onus to proof his case on a balance of probabilities.

[67] Causation is an element of liability which gives rise to two distinct inquiries. The first is a factual inquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second inquiry arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote.³

[68] The case of Minister of Safety and Security v van Duivenboden⁴ is instructive on the assessment of causation, it held:

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a course of the loss, which calls for sensible retrospective analysis of what would probably have occurred, based on the evidence and what can be expected to occur in the

³ Minister of Police v Skosana 1977 (1) SA 31 (A)

⁴ 2002 (6) SA 431 SCA

ordinary course of human affairs rather than metaphysics."

[69] Once the two tiers of the causation inquiry have been established by the plaintiff, then the evaluation of the amount to be awarded for the plaintiff's loss can ensue. If causation is not established the enquiry ends and the plaintiff's claim must fail.

[70] The approach in evaluating expert evidence was laid down in *Micheal and Another v Linksfield Park Clinic (Pty) Ltd and Another*⁵ where the court was held:

" What is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision in the medical negligence of Bolitho v City and Hackney Health Authority {1997} UKHL46 {1998} AC 232 (HLE) which states: The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'. "

[71] Expert evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion. Isolated statements made by experts should not too readily be accepted,' especially when dealing with a field where medical certainty is virtually impossible'.

[72] The determination of the quantum to be awarded is a matter of estimation and does not involve proof on a balance of probabilities. In *Road*

⁵ [2001] ZASCA 12; 2002 (1) All SA 384 (A)

Accident Fund v Guedes⁶ it was stated:

"The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO) Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages."

[73] From the evidence it is common cause that the 2nd Plaintiff sustained injuries as a result of the accident on the 20th of July 2014. Based on the J88, the evidence of the 2nd Plaintiff on the injuries he sustained when asked in evidence in chief, this court finds of the injuries sustained were:

abrasions to the right forearm, abrasions to the right hand, lacerations to the right knee, abrasions to both lower legs, injury to the left ankle, abrasions to both feet and based on the J88 and the evidence of Dr Agabazue, the court find that theses injuries are soft-tissue injuries.

[74] The 2nd Plaintiff's evidence showed internal contradictions. He testified that on discharge he was in a wheelchair, with crutches and his left foot was fitted with a moonboot. When confronted with the discharge documents that no devices were issued, he testified that he could have borrowed it from his grandfather who had a wheelchair and crutches at that time, but he could not recall where he got the moonboot as it was too long ago.

[75] 2nd Plaintiff during cross examination stated that his salary of R9 000-00 to R10 000-00 per month which was proffered as his salary, was only when they have a lot of business during winter, but could not say from which month he

⁶ [2006] ZASCA 19; 2006 (5) SA 583 (SCA)

earns this salary and that this salary was just a rough estimate, this after he asserted that the R7 500-00 payslip is what he earned in 2022. When asked if the court can do an estimate when determining his loss of earning capacity he replied no.

[76] 2nd Plaintiff testified his flat footness returned in his left foot after the accident, when he removed his foot from the moonboot, yet he later testified both feet are flat but he did not testify of any injury to the right foot except abrasions to the right foot.

[77] Dr Ziervogel examined the 2nd Plaintiff and testified that the 2nd Plaintiff suffered a ligament tear in the left ankle, yet on page 8 of his report contrary to his evidence he opines that the ankle ligaments seem to be intact, when confronted on this he replied it means the ligaments are intact. He then stated that It is a grade 1 injury which can remain stable for a long time.

[78] He opined that there were signs of onset osteo arthritis which he opined is caused by the injury sustained in the accident, he confirmed that it was soft tissue injuries sustained in accident but denied it was non-serious as ligament injury is serious, when confronted that stress x-rays of ankle was done in hospital when admitted and no instability was found, no torn ligament was found, how nine years later did he find it, he replied a grade 1 injury will not show on x-rays.

[79] When confronted that Dr Preddy and Dr Heyns both found no instability after stress x-rays were done ?months later when they saw him, Dr Agbazue also consulted him thereafter and found no instability and all agree that is minor grade 1 injury, 9years later he finds a ligament tear caused by the accident he replied that it would be valid if the tests were done on the same day.

[80] Dr Ziervogel during cross-examination was confronted that the x-rays that he himself commissioned showed a normal joint space of the ankle, his response was on the x-rays.

[81] Dr Ziervogel when confronted that he cannot give fact based answers, replied that is how doctors operate in the world.

[82] Dr Agbazue disputed Dr Ziervogel's evidence and explained that the biometrics of the 2nd Plaintiff caused the knee narrowing that can be seen on the x-rays. Instability is indicative of ligament tears the left ankle was swollen due to a sprain there is no instability on any of the x-rays and stress x-rays were done. The best indication of ligament tear and menisci tear is an MRI.

[83] The 2nd Plaintiff's evidence impressed the court as contrived in regard to his injuries sustained, its sequelae and his income. When during cross-examination this was exposed, he deflected and stated that his father drafted the payslips, his grandfather had the supporting medical devices and he can not remember it was long ago, when moments ago he testified the opposite as facts. Dr Agbazue testified that the 2nd Plaintiff's left flat footedness is a deformity not caused by the accident, the 2nd Plaintiff's own evidence was that both his feet were flat, without evidence from him on how the right foot was injured. Dr Ziervogel did not testify on this aspect either.

[84] Dr Ziervogel's evidence was initially detailed in regard to where the menisci is located, where the sensitivity was located and what arthroscopic debridement is and the treatment needed. However, during cross examination, his answers were stoic that the injuries caused the sequelae that the 2nd Plaintiff is currently experiencing. The articles that he used in support of his opinion of treating the knee injury, is contra-indicated in his own article. All three his articles were proven to be non scientific, through the evidence of Dr Agbazue.

[85] His concocclusions and opinion did not factor in the pre-disposition of the 2nd Plaintiff in regard to his BMI, his flat footedness or sport activity in circumstances where he himself agreed that there is no instability. Dr Ziervogel was confronted that the flat footedness caused/contributed to the osteo- arthritis, which he dismissed. He responded that is how doctors in the world operate, to the

statement that he did not give fact based answers. When confronted that there are normal joint spacing of the left ankle, he responded on the x-rays.

[86] Dr Agbazue's evidence was logical, chronological, based on facts and he made allowances for the 2nd Plaintiff in his testimony, he was not stoic in his responses, every response had a logical basis, there were scientific articles which supported his opinion based on examination and experience, objective tests and even 2nd Plaintiff's expert Dr Preddy and Dr Heyns in their reports corroborate certain opinions. Dr Agbazue pointed out and explained when articles are indeed scientific articles, why those of Dr Ziervogel are not and how Dr Ziervogel's articles do not support his evidence.

[87] In the circumstances, the court accepts the evidence of the 2nd Plaintiff in as far as it does not conflict with the evidence of the Defence. The court finds Dr Agbazue to be an expert, who is a reliable witness, and whose opinions are based on sound logical reasoning, objective scientific tests, experience and in addition scientific articles, while the same cannot be said of Dr Ziervogel's evidence, who went as far as saying that doctors in the world operate that way when confronted that he is not fact based, the court therefore rejects the evidence of Dr Ziervogel for the reasons already enumerated herein and accepts the evidence of Dr Agbazue.

[88] Fortified by the authorities and the law cited herein, the 2nd Plaintiff failed to proof on a balance of probabilities, that the soft tissue injuries he sustained on the 20th of July 2014 caused the sequelae contended for.

[89] The 2nd Plaintiff however sustained soft tissue injuries in the accident of the 20th of July 2014, which caused the 2nd Plaintiff pain. In this regard the court was referred to the cases of *Alla v RAF Quantum of Damages* Volume 6 on page E8-1 and *Kameni v RAF Quantum of Damages* Volume 5 on pages E5-9 as guides to the quantum of damages awarded in similar cases. The facts of these cases are not similar to the facts in the instant cases, few

cases are directly comparable.

[90] Having regard to the facts of this case and the age of the 2nd Plaintiff, the amount of R350 000.00 is in my view a fair, just and reasonable award for general damages.

[91] There is, in my view, no reason to depart from the gernal rule that costs should follow cause and that the successful party is awarded costs as between party and party.

[92] In the circumstances the following order is made:

ORDER

- [93] 1. The 2nd Plaintiff's claim in respect of future medical expenses and payment for loss of earnings is dismissed;
2. The Defendant is ordered to pay the 2nd Plaintiff's general damages in the amount of R350 000.00;
3. The Defendant is orderd to pay interest a *tempore morae* on the amount awarded;
4. The 2nd Plaintiff is awarded costs as between party and party

M.T. JORDAAN, J

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