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

**CASE NO.: 1832/2019
Date heard: 06-02-2023
Date delivered: 06-09-2024**

In the matter between:

KOBISANG MICHAEL MOLAOA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: WILLIAMS J

JUDGMENT

WILLIAMS J:

1. The plaintiff, Mr Kobisang Michael Molaoa, who was a pedestrian at the time, was injured in a road traffic accident on 23 September 2015. He has instituted a claim for damages against the defendant, the Road Accident Fund (RAF). The merits have previously been conceded at 70% in favour of the plaintiff. The general damages have also been settled between the parties in an amount of R550 000,00 as well as an undertaking by the RAF

in terms of s 17(4)(a) of Act 56 of 1996. The remaining issue to be considered is the plaintiff's loss of earnings.

2. It is not in dispute that the plaintiff sustained an injury to his right ankle as a result of the accident. Dr PA Olivier, the plaintiff's orthopaedic expert describes the injury in his report as a Dupuytren fracture to the right ankle. During his testimony he explained that it involved the fracture of two bones, one on the inside of the ankle and one on the outside. Despite an open reduction and internal fixation, the plaintiff has developed osteoarthritis. The injury has affected the mobility of the plaintiff.
3. The plaintiff, who was 30 years old when the accident occurred (37 years at the time of the trial), has a grade 10 qualification. He upskilled himself in the building trade from a general worker to a skimmer and plasterer at the time of the accident.
4. During 2015 he worked as a skimmer at Esmoené Ceiling where he had been employed since 2012. His work as a skimmer involved carrying a toolbox and ladder, climbing and balancing on the ladder and stretching to neaten and even out ceilings before it gets painted. He earned between R3000,00 and R5000,00 per week depending on the amount of work done.
5. Some 8 to 9 weeks after the accident, and after the plaster cast had been removed from his ankle, the plaintiff attempted to return to work but found that he could not wear his safety boots because his right foot started bleeding. As a result he had to leave the

site. About 3 months afterwards he went back to Esmoené but found that his position had been filled by someone else.

6. During 2016 the plaintiff did not do any formal work but was supported by his wife and by doing piece work.
7. From 2017 to 2019 the plaintiff was employed by a shopfitting business named Petite, where he did carpentry, skimming and the installation of ceilings. The plaintiff testified that he was not employed at Petite full-time, but only when shopfitting contracts were to be carried out. He earned R1500, 00 per week on those occasions. Petite's contract came to an end sometime after the middle of June 2019 which was when he stopped working there.
8. At the beginning of 2020, the plaintiff started working for Theron Ceilings and Partitions, also as a skimmer, carpenter and installer of ceilings. He earned R4000,00 per month. Unfortunately the Covid 19 pandemic struck and the plaintiff lost his job there at the end of March 2020. Thereafter he received about R3900, 00 per month for 3 months from the Unemployment Insurance Fund.
Since then he has been unemployed and reliant on the R350,00 per month Government grant which has been implemented for the unemployed since the pandemic.
9. The plaintiff testified that post-accident he has been suffering from pain in his right foot but had to force himself to work despite the pain and swelling of the right foot caused by putting weight on it when standing on a ladder, since he was desperate to put

food on the table for his family and had no other means of earning a decent income.

10. The piece work he did when it became available and when he could manage it physically, consisted of the installation of doors from which he earned about R250, 00 per door. His evidence was that he could at times manage to install up to three doors per day but that at times up to 3 months would pass without him having any work. He stated that he would not be able to work as a skimmer anymore unless he was forced to do so due to his circumstances.
11. The plaintiff's evidence with regard to his ability to perform work as a skimmer/plasterer is confirmed by the evidence of both Dr Olivier and the plaintiff's occupational therapist, Ms B Crouse.
12. Dr Olivier testified that the plaintiff's osteoarthritis would have a negative effect on his ability to perform weight-bearing activities. The osteoarthritis is progressive and is responsible for the plaintiff's inability to negotiate uneven or slippery surfaces or to balance on ladders or scaffolding. The plaintiff is expected to experience progressively more pain in the right ankle. According to Dr Olivier there are only two options available to provide the plaintiff with a stable and painless ankle, i.e. an ankle arthrodesis or a total ankle replacement.
13. An ankle replacement is however only recommended for elderly people since it loosens very quickly – after about 5 years. An ankle arthrodesis involves the fusion of bones within the ankle

which results in stiffness and will probably leave the plaintiff with a permanent limp. He will not be able to work in confined spaces, squat or balance properly. Either way he will not be able to perform duties such as installing ceilings, negotiate building sites, carry toolboxes or stand on ladders.

14. Ms Crouse, who during her examination of the plaintiff, performed all the standardised tests on him, was of the opinion that as far as mobility is concerned, standing and repeated negotiation of stairs aggravated the plaintiff's ankle pain. Long distance and fast walking also increase his pain and swelling of the ankle. He relies heavily on the injured leg when going down on his haunches and has poor balance when standing on the injured leg alone. The plaintiff experiences pain in cold and rainy weather, when he has to wear formal shoes or safety boots and his ankle swells when he is required to carry a heavy weight.
15. Ms Crouse, who has been informed by the plaintiff of his work history and functions, considered the plaintiff to be a semi-skilled worker merely because he has no formal qualifications. She was further of the opinion that although the plaintiff had worked for some time post-accident, it was done with pain and at risk to himself since he has poor balance as well as creating a safety concern for his employers.
16. Both Dr Olivier and Ms Crouse assessed the plaintiff and compiled their reports during 2018, some 5 years before the matter came to trial. Despite some criticism from Mr Mogano for the RAF, that updated reports had not been compiled and

provided, both these witnesses stood by their reports on the basis that it was a known fact that osteoarthritis is a degenerative disease and that the plaintiff's condition would not have improved over the course of the intervening years, but would have worsened.

17. Dr E J Jacobs, an industrial psychologist, also testified on behalf of the plaintiff. He had interviewed the plaintiff and had insight into the reports of Dr Olivier and Ms Crouse. He also made use of two invoices which the plaintiff had supplied relating to work he had done for Esmoené just before the accident during September 2015 as well as Koch's Quantum Yearbook of 2020 to give an opinion on the plaintiff's loss of earnings claim.
18. Dr Jacobs compiled his report in July 2020 and has had regard to the plaintiff's history up until that stage. He informed that he had prepared an addendum to the report during September 2022. This addendum has not been filed, but is according to Dr Jacobs of no consequence as the plaintiff has remained unemployed after the initial report.
19. Be that as it may, based on his assessment of the plaintiff and the supporting documentation, Dr Jacobs opined that the plaintiff was a semi-skilled worker who was relatively stabilized in his career before the accident. He had worked as a subcontractor for Esmoené for 4 years before the accident and based on the invoices dated 3 September 2015 and 22 September 2015, Dr Jacobs determined an income of R3315, 00 per week, which translates to R152 490, 00 per year in 2015. This amount falls

within the parameters of Koch's Annual Income Tables 2020 (as adjusted) for semi-skilled workers. Dr Jacobs testified that the plaintiff had informed him that he sometimes earned up to R5000, 00 per week, but that he did not take that into account as it could not be proved. No provision had been made by Dr Jacobs for career improvements because the plaintiff was self-employed. Based on the information supplied to Dr Jacobs by the plaintiff, he determined the plaintiff's injured income at R54 000, 00 per year. The plaintiff, who is not suitable for sedentary work, as he has no skills in this regard, would only be able to secure light jobs (as per the report of Ms Crouse) and will not earn more than R54 000,00 per year in his injured state.

20. Dr Jacob's report, which stipulated the retirement age for the plaintiff, both in the injured and uninjured state as 65 years (since Ms Crouse, although suggesting an early retirement, did not stipulate an age was used as a guideline for the actuarial calculation of the plaintiff's loss of earnings.
21. Mr Willem Boshoff of Monroe Forensic Actuaries, compiled an actuarial report based on the data supplied by Dr Jacobs without taking into account any apportionment of negligence or contingencies. Mr Boshoff calculated the plaintiff's past loss of earnings at R729,00.00, his future loss of earnings at R2 342,500.00, bringing the total loss of earnings to an amount of R3 071,500.00.

22. During cross-examination, Mr Boshoff was confronted with the fact that Dr Jacobs, in his report which was relied of for the actuarial calculations, did not take into account all the income made by the plaintiff post-accident, which would have the effect of increasing his earning capacity post-accident
23. The only income, as far as I could discern from Dr Jacobs' report, which he failed to mention, relates to the piece work done by the plaintiff and a possible one month's salary received from Theron Ceilings before the Covid-19 lockdown. According to Mr Boshoff, should there be uncertainty about income in the region of R50 000,00 it would have no real impact on the claim. Should unaccounted for income be in the region of R100 000.00 it would affect the claim for future loss of earnings but could be addressed with contingencies.
24. It is clear from the plaintiff's evidence however that the piece work (installation of doors) had been done only when he was physically able to do it and even then the work was not regularly available. In my view, taking into account the medical evidence and that of the plaintiff that he will not in future be able to perform work as an installer of ceilings or a skimmer, the amount of R54000,00 per year which has been determined by Dr Jacobs as his injured earning capacity is generous and in favour of the RAF.
25. Another issue which arose during Mr Mogano's cross-examination of Mr Boshoff and during his argument, was that the past and future uninjured earnings of the plaintiff have been

calculated without taking into account his tax liability in his uninjured state. The argument is that it would be unjustifiable for the plaintiff to have more money in his pocket as a result of a loss of earnings award than what he would have had had the accident not occurred.

26. There are certain misgivings which I have with this line of argument. Firstly, the plaintiff was never cross-examined on his tax liability prior to the accident; secondly it must be kept in mind that the plaintiff was a sub-contractor for Esmoené prior to the accident. Or, at the very least he was regarded as a sub-contractor for Esmoené. The invoices from Esmoené and on which his past and future uninjured earnings have been based, refer to him as a sub-contractor and no deduction for tax has been made. I would assume that he would have been responsible personally for paying his taxes. Whether he paid tax and/or whether he would have been entitled to the benefit of tax deductions is not known. These are the issues that should have been canvassed with the relevant witnesses. Mr Boshoff has testified that uncertainties with regard to earnings are often a challenge to actuaries but that it could be addressed by the application of appropriate contingencies. I agree with this view.
27. The only issue which remains then is the assessment of the contingencies to be applied. Mr Jankowitz has argued that there is no need to deviate from the normal contingency adjustments of 5% to the plaintiff's pre-accident earnings and 15% to his future earnings, taking into account the usual vicissitudes of life

and the fact that the plaintiff was willing to abide with the actuarial calculations of 2020 and not insist on an updated calculation which would presumably result in an increased award for loss of earnings. Mr Mogano on the other hand has suggested that the contingencies be fixed at 40% pre-accident and 50% post-accident which would make provision for the deduction of tax to the actuarial calculations, in addition to the usual contingencies.

28. I do not agree with either of these submissions. The contingencies suggested by Mr Jankowitz are too low in my view, taking into account the nature of the plaintiff's employment or work skills. As a subcontractor he was essentially self-employed. In addition to the normal contingencies with regard to a shorter life expectancy, unemployment due to ill-health, accident, retrenchment, his employment is also dependant on the state of the country's economy and specifically the building industry. His past employment history, pre-Esmoené, as can be gleaned from the report of Ms Crouse, shows two retrenchments. Another example of the fluctuations within the building industry can be found in the plaintiff's inability to obtain employment post-accident for close to 6 months after the Petit contract had come to an end.
29. The contention by the RAF regarding the contingencies to be applied, is highly speculative and not based on any evidence regarding the plaintiff's pre-accident tax liability. While it is so that the determination of contingencies would of its nature be speculative, because no one has the ability to see what the future

holds, the assumptions made should at least be consistent with the evidence before court.

30. In my view, taking into account all the relevant circumstances, the appropriate contingencies to apply are that of 10% to past loss of earnings and 25% to future loss of earnings.
31. The RAF has not called any witnesses in this matter. It is not in dispute that the plaintiff has suffered a loss of earnings and will in future suffer a loss of earnings. The only issues challenged by the RAF were those I have dealt with herein. The award for loss of earnings will be determined based on the contingencies I have proposed above.
32. The actuarial calculation based on the information received from Dr Jacobs can in my view safely be used as a point of departure. The result is as follows:

Past loss of earnings	R729,000.00
Less 10%	<u>R72,900.00</u>
Subtotal	R656,100.00

Future loss of earnings	R2 342,500.00
Less 25%	<u>R585,625.00</u>
Subtotal	R1756,875.00

Total loss of earnings	
before apportionment	R 2 412,975.00
Less 30%	<u>R723,892.00</u>
	R1689,083.00

33. General damages have been agreed upon between the parties in the amount of R550,000.00. After apportionment the amount to be awarded is R385,000.00.
34. There is one further issue which I need to determine. At the commencement of the trial the plaintiff brought an application in terms of Rule 38(2) for the evidence of one or more or all of their expert witnesses to be adduced by way of affidavits. The reasons given for this application were that Dr Olivier, Ms Crouse and Mr Boshoff were all from Cape Town and that their attendance in court would result in enormous costs for the plaintiff especially in light of the fact that their reports did not appear to be challenged by the RAF, which had not filed any countervailing expert reports. This application was opposed by the RAF on the basis that it had not admitted the plaintiff's expert reports, that it had a right to test the evidence of the plaintiff's witnesses and that the plaintiff should have been aware of the cost implications of appointing experts outside of this province. In its opposing affidavit the RAF suggested that the plaintiff in any event has an alternative option which would not impinge on the RAF's right to test the plaintiff's witnesses and that is that these witnesses testify virtually should I deem it reasonable for them to do so.
35. I did not make a ruling on this application at the time since I did not have all the facts before me. The matter had been set down for hearing initially for two days. The plaintiff and Dr Jacobs, who is from Kimberley, were available and ready to testify, Ms Crouse

was available to testify virtually. Mr Mogano reserved his rights with regard to the actuarial evidence based on what Dr Jacobs would testify and it was not clear whether Dr Olivier would be available to give his testimony virtually on the days reserved for the trial.

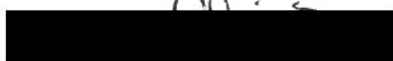
36. The matter resolved itself however in that the initial two days were used in hearing the evidence Dr Jacobs and the plaintiff in court and I allowed the evidence of Ms Crouse to be heard virtually. The evidence of Dr Olivier and Mr Boshoff were heard virtually on the postponed dates. The only issue remaining with regard to the Rule 38(2) application, is that of costs.
37. In this regard it must be mentioned that the Rule 38(2) application was served on the State Attorney one and a half months before the hearing of the matter. The RAF filed its opposing affidavit a day before the hearing. In all fairness to the plaintiff and his attorneys, they could not have known the attitude to be taken by the RAF and to have prepared for the relevant witnesses to testify virtually. On the other hand the plaintiff and his attorneys cannot as a matter of course expect their expert witnesses' evidence to be adduced on affidavit simply because there was no timeous opposition from the RAF. The granting of such an application lies within the discretion of the court. But be that as it may, no court time was wasted except for the time it took to argue the application, which was a matter of minutes. In my view the appropriate costs order in this application would be that each party has to pay its own costs.

38. The only remaining issue is that of the costs of the action. There is no reason why the plaintiff should not be entitled to his costs, inclusive of the qualifying costs of his experts.

The following order is made:

- 1) The defendant is ordered to pay the plaintiff the amount of R1 689,083.00 (one million six hundred and six hundred and eighty nine thousand and eighty three Rand) in respect of loss of earnings.**
- 2) By agreement, the defendant is ordered to pay the plaintiff R385,000.00 (three hundred and eighty five thousand Rand) in respect of general damages.**
- 3) The defendant will pay interest on the amounts in paragraph 1 and 2 above at the applicable statutory rate calculated fourteen (14) days from the date of judgment to date of full and final payment.**
- 4) By agreement the defendant will provide the plaintiff with an undertaking in terms of s 17 (4)(a) of Act 56 of 1996.**
- 5) The defendant is to pay the plaintiff's taxed or agreed costs (inclusive of VAT), which costs will include the qualifying, attendance and travelling expenses (where applicable) of the following expert witnesses: Dr Everd Jacobs, Dr Pieter Olivier, Ms Benita Crouse.**
- 6) The plaintiff shall, in the event that costs are not agreed, serve the Notice of Taxation, alternatively the notice contemplated in Rule 70(3B) of the Rules, whoever is applicable, on the defendant's attorney of record.**

- 7) The plaintiff shall allow the defendant 14 (fourteen) days within which to pay the agreed or taxed costs after which the defendant will pay interest thereon at the prescribed rate of interest to date of full and final payment.
- 8) Each party is to pay its own costs in the Rule 38(2) application.



CC WILLIAMS
JUDGE

For Plaintiff: Adv D Jankowitz
 P Joubert Inc

For Defendants: Mr Mogano
 State Attorney