

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 11493/2017P

In the matter between:

LESLIE CHARLES MAKER

PLAINTIFF

Versus

THE MINISTER OF SAFETY AND SECURITY

FIRST DEFENDANT

THE MINISTER OF PUBLIC WORKS

SECOND DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Plaintiff instituted an action against Defendants resulting from an incident on 30 November 2016 at the South African Police Service Stolen Vehicle Pound in Mkondeni, Pietermaritzburg. When visiting the said pound Plaintiff was instructed to enter via an outside uncovered stairway which he did. While climbing the stairs he became unsteady and fell down the stairs and injured himself. There were no handrails fitted to the stairs. As a result thereof he sustained a severely comminuted fracture and dislocation of the left wrist which has failed to unite properly and to his head. His claim consists of past medical expenses in the sum of R58 521.69, future medical expenses in the sum of R199 473.00, loss of income in the sum of R 2 254 997.00 and general damages in the sum of R800 000.00 thus a total of R3 312 9991.69.

[2] First Defendant conceded that it was liable to compensate Plaintiff for 100 % of the damages which he may prove.

[3] At this stage the only issue to be decided is that of quantum.

[4] At the commencement of the trial it was agreed between the parties that First Defendant would not be calling any expert witnesses and that the report of Dr. Fraser, the orthopaedic surgeon and Ms. Maharaj the occupational therapist is accepted. There is also no challenge to the Human & Morris Consulting Actuaries report. The only evidence which would be presented by Plaintiff would be the Plaintiff himself and that of Mr. David de Vlamingh, the Industrial Phycologist. The legal representative of First Defendant agreed that this was correct.

[5] Plaintiff testified that he is 73 years of age, that the incident occurred approximately nine and half years before when he would have been approximately 63 years of age. The incident took place on 30 November 2016. He has a degree which he obtained in 1976 as a Civil Engineer. He was employed in senior positions *inter alia* the Natal Roads Department for sixteen years, at the Mere Bank Mechanical Workshop for ten years, Consulting Engineers VWP in Pietermaritzburg and at AKHACH for ten years. He retired in February 2016. It also from the documentation which was uncontested untested that he was very involved in the Natal Vintage Tractor and Machinery Club which restores old farming equipment and has been a member thereof since 1996 and was at some stage the Chairman and the secretary at various times and was presently still the secretary of the said club.

[6] As a hobby he repaired old farming equipment and in 2016, after he retired he realised that his pension was not sufficient as it was approximately a third of what he used to earn. His hobby was a potential for income and there was a need for such restored machinery. He restored such equipment, his retail price was fair and this

supplemented his pension and entitled him to live a reasonable life. He did all the work himself. Some of the equipment was restored for museums. Items such as ploughs sold very quickly. He did not keep a full record of what he sold as there would be a knock on the door, a phone call and somebody then bought for cash various implements. He did have certain items for which he had documentation and cell phone numbers of the people who purchased certain equipment. These were for June 2016, August 2016, October 2016, July 2022 and were handed in as proof of the sales. There was no sale from August 2016 to June 2018.

[7] Due to the fracture of the left arm months he could not do any work hoping for eighteen months that it would heal. Prior to the injury he played squash, went to the gym and after the injury he could not do so anymore. He had to do everything with his right hand. He was able to continue with his hobby to create an income and earned approximately R6 000.00 to do as he had to obtain the services of an assistant. The average profit per month was R23 000.00 prior to the accident and after the accident the profit was R6 000.00 per month.

[8] During cross examination he testified that it was first a hobby but when he retired he realised that he could earn an extra income from it and therefore started to make a profit from it. He was questioned as to whether he was registered with the South African Revenue Services which he said he was and stated that he did not declare to SARS the profit he made on the sale of these equipment. He testified that it was more a hobby and not a business from which an income was derived and that he was informed by his tax consultant that he did not have to declare it. The money was put into a safe and it was used to purchase groceries and spares. There were no bank statements. He did not claim any expenses from SARS and was therefore told that he does not have to declare the income. He had a two hectare small holding where he planted certain vegetables which he would at times take to the market but kept no records thereof. The profit that he mentioned that he made prior to the accident came from the sales which he had done and the schedules which were shown and handed into court. He tried to keep it as accurate as he could.

[9] Mr. David de Vlamingh testified that after obtaining his Master's degree he was registered as an Industrial Phycologist in 1998 and for the past twelve years has dealt with medical legal matters. He prepared a report in February 2026. The history of employment and income was received from Plaintiff. He also considered the reports of the other experts. He received notes of the sales of items which were fixed and there were also photographs provided to him. He has no reason to doubt that it is a reasonable income which was provided to him. Plaintiff would have been able to work up to the age of 70 if he did not have the injury and would have been able to continue to the age of 75 but his work productivity would have decreased from age 70 to 75. It is a fact that the majority of healthy people have to supplement their income due to the fact that people are living longer than before. He required an assistant and this also decreased the income received.

[10] During cross examination he testified that during his interview, Plaintiff indicated to him that the hobby generated an income for him. It was something that he could do to earn an extra income. He agreed that there were no precise records kept by Plaintiff and there was no collateral evidence. He agreed that he had photographs of what he had done and the names of clients, their telephone numbers of whom it was sold to. He thought that it was reasonable, it fitted in the general market research he did. It was typical of the records that he received in this type of situation. He establishes what the market rate for similar work would be and he obtains as much as possible and then gives a reasonable estimation after doing so. The reduction in his capacity is not unreasonable and within the general market trend. The loss of earnings, even though there were no complete records, was not unreasonable but was the best that he could do. When he was asked whether he should not have taken into account the expenses he stated that he had understood that the figures given to him were profit and that is how he calculated it. That was the case for Plaintiff. Whereafter First Defendant closed its case.

[11] In the report of Dr. Fraser, which has been admitted it, set out that Plaintiff sustained a grade one compound comminuted fracture of his left discal radius and ulna and this was reduced and internally fixed with a vagal radio plate. There is

some discomfort in the wrist and he has restrictions to movement at the extremes of movement. There is also a residual shortening of the radius with slight ulna deviation and a positive ulna variance. As far as permanent disability is concerned there would be pain especially in cold weather and a stiffness in the wrist. The fracture has united with a degree of shortening and ulna deviation with positive ulna variance. If he was to develop increasing pain in the left wrist due to ulna impingement syndrome he would require a shortening osteotomy of the left ulna.

[12] Ms. Maharaj, in her report, found that after assessing Plaintiff that he retains the capacity to cope with work on the light to medium physical demand level but did not demonstrate the strength capacity to cope with high range medium, heavy and very heavy work. He has developed persistent injury related pain since the accident.

[13] Mr. Shapiro SC, appearing on behalf of Plaintiff, submitted that the evidence of Dr. Fraser and Ms. Maharaj was unchallenged. Although Mr. de Vlamingh was cross examined, his expert evidence was not disputed nor could it have been in the absence of any other expert opinion. De Vlamingh's quantification of Plaintiff's pre and post morbid earnings was not challenged and there are no grounds to reject his quantification thereof. There was also no real challenge to how the past and future loss of earning of Plaintiff had been calculated. It was submitted that a 5 % contingency to his premorbid earning be applied and given his age that it would be appropriate to apply a contingency of 25 % to his future postmorbid loss of earnings. The past and future medical expenses have also not been challenged. It was submitted that the loss of earnings would be in the amount of R2 133 365.55.

[14] In respect of general damages I was referred to the case of Lombard v Road Accident Fund 2020 (ZAGPPHC335) 3 July 2020 where the plaintiff had sustained an interarticular fracture of the right distal radius. He was awarded R400 000.00 in general damages in 2020 and that this now relates to R560 00.00. He was a Chef, had constant pain over the radial ulna aspect of the wrist and cutting and lifting of heavy things aggravated it. It was submitted that Plaintiff's claim was above that of

Lombard. I was also referred to the case of *Saayman v Commercial Union Insurance Company of South Africa* 1972 (2) (ECD) cited in *M v Road Accident Fund* (2011) ZAGPJH (20) where the plaintiff sustained a compound comminuted fracture of the right humerus together with the fractures of both the radius and ulna and a lumbar spine injury. He had a painful shoulder, back ache and anticipated future risk of operations and an award was granted which was the equivalent to R640 000.00.

[15] I was also referred to the case of *Kubayi v Road Accident Fund* 2013 (6E4) QOD 27 (GNP) where the plaintiff sustained an open fracture of the distal tibia and fibula, it became infected and an amount of R526 000.00 was awarded. It was submitted that an amount of R600 000.00 for general damages would be appropriate in the circumstances and that accordingly it would then amount to a total capital sum of R2 981 394.59 together with interest and costs.

[16] It was submitted on behalf of First Defendant that Plaintiff was conducting a hobby for his own enjoyment and if it was a business he should have kept detailed records, intended to make profit and show that he had paid tax. It was submitted that an activity which was pursued to generate profit was a business and not a hobby. He should therefore have been able to produce books and tax returns. There was therefore no collateral evidence to prove any loss of earning as calculations done by the Industrial Psychologist were based on the slips provided by Plaintiff. It was submitted that in the case of *Hearse N.O. v Road Accident Fund* 2013 (ZAWCHC) 157 the claim for loss of earnings was dismissed because there was no factual basis to establish with collateral evidence the loss of income. It was submitted that Plaintiff must have shown a declared income as this would have assisted the Court. Even if honest without collateral evidence it is difficult to believe that the hobby changed into a profit making enterprise. The costs incurred should have been taken into account. It is therefore difficult to establish the loss of earnings without reliable evidence.

[17] It was submitted in the matter of Pasha v Road Accident Fund 2013 (CE4) QOD2 (GNP) the court awarded general damages in the amount of R623 000.00 but the plaintiff had incurred head injuries, loss of consciousness and amnesia and abrasions on both hands. Also compound fracture of the tibia and fibula including scars deformities and disfigurements. In the case of Mgudlwa v Road Accident Fund a 34 year old suffered injury to the femur and tibia and was in traction for three and half months where there was deformity, a leg shortening of 5 cm an amount of R300 000.00 was awarded. I have also referred to the case of Richard v The Minister of Police case number 21884/2017 a Western Cape decision a 72 year old male was awarded R375 000.00 on 28 February 2025. There was no loss of earnings.

[18] It was submitted that costs should only be awarded on scale A or B and that it does not warrant costs on an attorney and client scale on scale C. It was submitted that an amount of R400 000.00 would be appropriate as far as general damages are concerned. It was submitted that as there was no collateral evidence as far as the loss of income was concerned that absolution of the instance should be granted.

[19] The loss of income evidence which was presented by Plaintiff and also referred to by Mr. de Vlamingh, who in my view, were both good, honest witnesses who gave their evidence clearly, explained the basis for their submissions. Mr. de Vlamingh testified that he investigated the loss of income which Plaintiff testified he had sustained to establish if it was market related and that after making a comparison he was satisfied that it was indeed a realistic amount. The evidence of Plaintiff was challenged mainly on the basis that he did not declare his income to SARS. It was never challenged that he did not sell the said equipment, that he did not obtain that profit for it which he had stated and accordingly the evidence in that regard, in my view, remained unchallenged. We also have the evidence of Mr. de Vlamingh who testified that the amounts given were realistic in the circumstances taking into account his experience of many years in that regard. It was the evidence of both Plaintiff and Mr. de Vlamingh that the amount that was stated was for loss of profit and this was also not challenged and accordingly it cannot now be argued that

the costs should have been deducted because it was never disputed that that was the profit which was made.

[20] It would accordingly appear to me that the loss of income which was presented by Mr. de Vlamingh and Plaintiff was proved on a balance of probabilities that it is evidence which is basically unchallenged as far as the actual amounts are concerned.

[21] As set out at the start and which was agreed between the parties the past and future medical expenses were not in dispute. The issue that still remains is that of general damages. As I have stated I have been referred to various cases and the amounts which were awarded in such cases. None of the cases are exactly the same which is normally the case as the injuries in these events are normally quite unique to the specific case. It must however also be borne in mind that Plaintiff at the time was approximately 63 years of age and that the injury, considering the reports are such that he has limited use of the left arm, that the wrist does cause pain, that he was hospitalised for two days and that he would normally feel more pain in cold weather. Considering the cases that I have been referred to, the factors therein and the factors in the present case in my view an amount of R500 000.00 is appropriate in the circumstances as far as general damages are concerned.

[22] It was submitted on behalf of Plaintiff that the costs should be on scale C as the counsel that commenced the matter and drafted the particulars of claim was counsel of many years standing although not senior counsel. Counsel who appeared on behalf of Plaintiff in this matter is Senior Counsel. However it was submitted on behalf of First Respondent that the matter is not of such complexity that it warrants the costs to be awarded on a scale C level. In my view the said matter is not of such complexity that it warranted the costs to be awarded on scale C. In my view an award of costs on scale B would be appropriate in the circumstances.

[23] The loss of income prepared in the report of Human and Morris applied no contingencies. Taking into account the contingencies which were proposed and were not challenged and which appear from the last page attached to Plaintiffs Heads of Argument, the total loss of income would be R2 133 365.55. The future medical expenses as appears from the reports of Dr. Fraser and Ms Maharaj, applying a 5 % contingency would be R189 499.35. The past medical expenses is the sum of R58 521.69. Adding general damages in the sum of R500 000.00 would then amount to total of R2 881 394.59.

The order that is granted is:

1. Defendant is to pay to Plaintiff, in respect of his claim for damages arising out of the incident, the sum of Two million eight hundred and eighty one thousand three hundred and ninety four rand and fifty nine cents (R2 881 394.59) by way of one instalment to be paid directly to Plaintiff's attorney's trust account, the account details are as follows:

Accountholder : A C De S[...] A[...] T[...] A[...]

Bank : F[...] N[...] B[...]

Branch : M[...]

Branch Code : 2[...]

Account No. : 6[...]

Reference No. : A[...]

2. If Defendant fails to make payment in accordance with paragraph 1, interest shall accrue from 30 days from date of this order at the prescribed legal rate per annum.
3. It is specifically ordered that the costs referred to below are to include the trial costs of 20 April 2026 and the fees and expenses, if any, incurred in respect of the following expert witnesses arising out of the preparation of their reports, preparing of their supplementary reports and their fees for the reasonable and

necessary pre-trial consultations, reservations and qualifying fees and also to include the fees of Plaintiffs Counsel (Scale B) and Plaintiff's Attorney, for attending the said consultations and attending trial (with the quantum of the fees, if any, to be determined by the taxing master); namely:

1. Dr Rober Fraser, Orthopaedic Surgeon (qualifying, reservation and attendance fees for 20 April 2026)
 2. Ms. S Maharaj, Occupational Therapist.
 3. Mr. Davi de Vlamingh, Industrial Psychologist (qualifying, reservation and attendance fees for 24 April 2026).
 4. Human & Morris, Actuary (reports only).
4. Defendant is directed to pay Plaintiff's taxed or agreed party and party costs on the High court Scale B subject to the following conditions:
- 4.1 Plaintiff shall, if costs are not agreed, serve the Notice of Taxation on Defendant's attorney of record; and
 - 4.2 Plaintiff shall allow Defendant 30 days to make payment of the taxed costs.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED: 24 APRIL 2026

JUDGMENT HANDED DOWN: 6 MAY 2026

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