REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/12871

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

MAKUAPANE, BOY Plaintiff

And

ROAD ACCIDENT FUND Defendant

SUMMARY

Motor vehicle accident – damages – loss of earnings and earning capacity – 32 year old mine forklift driver sustaining severe fracture of right femur and moderate concussive brain injury – collateral benefits from pre-accident employer and *maxim* of *res inter alios acta alterti* – sympathetic employer – contingencies deductions.

J U D G M E N T

MOSHIDI, J:

[1] The plaintiff has instituted action for damages against the defendant arising out of a motor collision on Saturday 21 May 2011, during which he sustained certain injuries.

THE JOINT MINUTES

[2] The plaintiff, a 32 year old mine fork operator, was a passenger in the insured motor vehicle at the time of the accident. The injuries he sustained in the collision included a severe fracture of the right femur, and a moderate concussive brain injury.

[3] The joint minute between the plaintiff's orthopaedic surgeon, Dr G O Read, and that of the defendant, Dr R A Morule, confirmed the fractured right femur with an associated knee injury. The doctors also noted that the plaintiff, a matriculant, was unable to return to work at Sebanye Gold Mine for a period of four months following the accident. In the joint minute, the doctors also expressed the view that the plaintiff would be able to continue in his present occupation without significant disability in future.

[4] The neurosurgeons on both sides, Dr S Marius and Dr F D Snyckers agreed that, there were no signs of a pre-accident neurological problem; that the plaintiff had a warning at work because of his forgetfulness; that the plaintiff required evaluation by the various psychologists in order to establish the effects that the injuries will have on his future career structure, and his earning capacity; and that the plaintiff sustained severe long-term mental or severe long-term behavioural disturbances. The plastic surgeons, Prof L A Chait and Dr L Berkowitz, in their joint minute, agreed that even with surgery, the plaintiff will be left with serious permanent disfigurement as a result of the injuries sustained in the accident.

[5] The occupational therapists, Ms D Brummer and Ms I C Kleynhans, agreed that the plaintiff will require occupational therapy, physiotherapy, biokinetics, specialised and adapted equipment, assistive device, as well as a handyman and orthotics since his one leg is now shorter than the other. In addition, the occupational therapists agreed that in spite of the fact that the plaintiff is capable of performing light natured work, he can only perform certain aspects of medium work. Further, that the repetitive movement required in the plaintiff's occupation to operate the pedals of the forklift, and would place stress and strain on the affected joints.

[6] The clinical psychologists, Mr L Roper and Mr O Modipa, agreed that the plaintiff's neuropsychological profile is consistent with a mild-to-moderate

head injury. A head injury of such severity has the potential to result in subtle neuro-cognitive and neuro-behavioural changes. Further that, in addition to the impact of the head injury, likely under the influence of additional factors, such as some pre-morbid cognitive vulnerability including a possible previous head injury, physical pain and the psychological impact of the accident. The plaintiff was rendered psychologically more vulnerable post-accident and its aftermath. The clinical psychologists also agreed in the joint minute that the plaintiff's quality and enjoyment of life, his interpersonal, and his occupational functioning, have been negatively affected by the injuries sustained in the accident. His psychological prognosis may be hampered by his physical difficulties, and the head injury, but his neuropsychological profile is expected to remain vastly stable since three years have passed since the head injury was sustained. In their final recommendations, the clinical psychologists deferred to the occupational therapists for comment on the impact of the physical injuries on the plaintiff's occupational functioning, and to the industrial psychologists in regard to career progression and earning capacity of the plaintiff.

[7] The clinical neuropsychologists, Mr Ormond-Brown and Dr J C Rossi, also compiled a joint minute on 11 November 2014. Dr Rossi believed that, pre-accident, the plaintiff had above average intelligence. This, based on a previous head injury which may have rendered his brain more vulnerable to subsequent head injury. However, both found similar neuropsychological shortcomings. A number of pre-existing conditions also contributed. The plaintiff was involved in a second accident in September 2014 (the accident

under discussion occurred on 21 May 2011), which is likely to have aggregated the effects of the first accident physically and mentally. The plaintiff returned to his pre-accident employment, but he suffers fluctuating attention which affects efficiency, it was noted respect of loss of earnings. Mr Ormond-Brown found that the plaintiff had suffered a brain injury of significant magnitude to create long-term problems. This evidence was not in dispute.

COMMON CAUSE FACTS

[8] At the commencement of the trial, the issue of liability was settled on the basis of 100% in favour of the plaintiff. The defendant has also provided the plaintiff with an undertaking in terms of sec 17(4)(a) of the Road Accident Fund Act 65 of 1996, to make provision for payment of all future medical expenses connected to the accident in question. In addition, the plaintiff's general damages for pain and suffering was settled in the amount of R500 000,00 (Five Hundred Thousand Rand). In the amended particulars of claim, the plaintiff had claimed R850 000,00 (Eight Hundred and Fifty Thousand Rand).

THE ISSUES FOR DETERMINATION

[9] I turn to the only remaining issues for determination in this trial. They are the issues of the past and future loss of earnings of the plaintiff. In the process of such determination, it must be established as accurately as possible, what the basic salary earned by the plaintiff to use as a starting-

point for the calculation of such loss; the future opportunities the plaintiff was likely to be presented with, but for the accident; the applicable contingencies deductions; and if plaintiff is currently employed sympathetically, the implications thereof. Care should also be taken that if the plaintiff is in effect found to be sympathetically employed, the defendant ought not to be granted the advantage thereof by necessarily diminishing the plaintiff's deserved damages. In such a case, the court should make a finding based on the legal *maxim* of *res inter alios acta alteri nocere non debet* ("*res alios actu*"). See for example, *Richards v Richardson* 1929 E.D.L. 146, where the Court held that plaintiff's damages could not be mitigated by the *maxim res alios actu*.

THE EVIDENCE OF PLAINTIFF

[10] The plaintiff testified. He had plans to further his career and studies. He still held these ambitions. He priority was to obtain the position of a Mine Onsetter, however, this position, requires three months of full-time studies. Thereafter, that is qualifying as a Mine Onsetter, the plaintiff had planned to study towards the position of Engine Winding Driver which requires one year of full-time studies. His employers created these opportunities. At the time of his evidence, the plaintiff was still employed by his pre-accident employer, namely Sebanye Gold Mine, as a forklift driver. He had been in this employment for some five years. The plaintiff expressed the view that his ambitions mentioned above were shuttered by the accident.

[11] The plaintiff was cross-examined briefly only. He confirmed that before the accident before 31 May 2011, he had the plans to further his career and to study. In this regard, he had applied to his employers to study, but his name went onto the waiting list. He did not know when his application would be approved since his employers had budgetary constraints. He made regular enquiries and follow-ups. His basic salary was about R4 900,00 per month upon joining his company. His current salary was about R5 600,00 per month, depending on the extent of overtime worked.

EVIDENCE OF MS HOUGH – PLAINTIFF'S INDUSTRIAL PSYCHOLOGIST

[12] Ms Hough, an industrial psychologist, testified on behalf of the plaintiff. She was of the opinion that the plaintiff has certain difficulties in performing his current position as a forklift driver that this would affect the sustainability of his current employment. This opinion was based on collateral information obtained from the employer. The plaintiff is presently being accommodated in his position, and that he is sympathetically employed. The largest contributor to this situation are the orthopaedic injuries, as well as the fact that he would require frequent rest breaks, and ergonomic adjustments with pain and strain of his joints as indicated by the occupational therapist.

[13] Ms Hough also held the view that in view of the cognitive difficulties established by the four psychologists, and two neurosurgeons, she does not foresee the plaintiff fulfilling his ambition of furthering his career and studies which will entitle him to obtain the promotion that he so cherished. The result

is that this would factually render the plaintiff prone to negligent error within the working environment. The plaintiff's continued employment is at risk. For these reasons, Ms Hough, in her evidence recommends a much higher than normal post-morbid contingency based on the finding that the plaintiff is an unequal competitor in the open labour-market post-accident. Additionally, the plaintiff's response inhibition and irritation, might impact negatively on interpersonal relationships which will potentially make the plaintiff prone to conflict in the working place with colleagues and superiors.

[14] Ms Hough was cross-examined. She motivated the difference of opinions between the defendant's industrial psychologist, Mr L Marais, and her opinion. This, in regard to the post-accident scenario. She was influenced by several factors, including that the plaintiff is 32 years old, with a matric. She was adamant that the plaintiff would have progressed as a forklift driver in the mining sphere, but all that has been halted by the accident. The plaintiff would have advanced to Paterson A3 level at approximately age 45. In the joint minute, Mr L Marais accepted that the plaintiff could have progressed to the median of the Annual Guaranteed Package Income on Paterson level A3, reaching his career ceiling at age 45.

[15] On being further cross-examined on the question of the plaintiff's future employability, Ms Hough deferred to the opinions of the orthopaedic surgeons in their joint minute referred to above. She could not explain the reason for the opinion expressed by Mr L Marais, where he differed with her. She had regard to all the relevant reports compiled in this matter.

[16] During questioning by the Court, Ms Hough testified that although the plaintiff was back to his previous job, his future employability is unpredictable. He has the physical defects and *sequelae* of the accident. The plaintiff remains a vulnerable employee. His employer is sympathetic, and the plaintiff can lose his job any time.

THE EVIDENCE OF MR L MARAIS – DEFENDANT'S INDUSTRIAL PSYCHOLOGIST

[17] Mr L Marais, the defendant's industrial psychologist testified as the only witness for the defendant. He relied largely on his report dated 6 November 2014. His views differed in sharp contrasts on crucial issues, to the opinions of Ms Hough. In essence, Mr Marais disputed, the plaintiff's actual salary pre-accident; that the plaintiff ever applied to his employers to study and advance his career; that on return to work post-accident, the plaintiff is not functioning well; that pre-accident, the plaintiff would not had advanced to the Paterson level as claimed; and, most importantly in this matter, that the plaintiff is not in sympathetic employment as alleged on behalf of the plaintiff.

[18] Considered collectively, both in chief and in cross-examination, the evidence of Mr Marais was not well-founded and convincing, on several levels. He was driven to make certain vital concessions in cross-examination.

In his report, he set out the basis on which the plaintiff may have been promoted in future, and postulated that the plaintiff, but for the accident, could have been promoted to various other positions in the mine. However, he crucially omitted to obtain any collateral information in this regard. It was not entirely clear that he questioned the plaintiff on his future plans as well. Ms Hough, on the contrary, took the extra trouble to obtain vital collateral information, as she testified. Significantly, Mr Marais foresaw the possibilities of a promotion but for the accident. The evidence of Mr Marais sounded inherently speculative.

[19] There was more worrisome about the evidence of Mr Marais. For example, he deferred to other experts on the question of the plaintiff's future employability. As a consequence, Mr Marais did not appear to fully and properly take into account the documented *sequelae* of, in particular, the brain injury on the plaintiff. He was undecided, or contradictory in this regard as mirrored in his report as well as in the joint minute with Ms Hough in regard to the probable impact the said head injury may have on the plaintiff's earning capacity.

[20] Furthermore, Mr Marais used, as the basis for his recommendations on the plaintiff's loss of earnings a certificate which was prepared by the HR Manager of the mine indicating a basic salary of R3 596,00. However, no provision is made in his report for the total cost to company which is probably the correct basis upon which any loss of earnings calculations should be made. In the circumstances, it appeared strongly that the defendant's

attorneys may not have provided Mr Marais with the salary advices which indicate the correct remuneration for the plaintiff, provided to them on 11 April 2011. These salary advices show that, for example, for the period 19 May 2011 to 17 June 2011, the plaintiff earned a basic salary of R5 013,98 and a net salary of R4 617,62 per month. For the period of 18 June 2011 to 15 July 2011, it was a basic salary of R5 013,98 and a net of R4 558,85. So the pattern continued showing the significant difference between what Mr Marais had, and what the factual earnings were. The final salary advice for the period 15 February 2014 to 17 March 2014 the plaintiff's salary was a basic of R9 313,74 (including allowances), and a net salary of R7 724,48. Mr Marais, regrettably, did not refer to these salary advices anywhere in his report. He did, however, in fairness, acknowledge that actual earnings must be utilised in the final calculations. The calculations prepared for the plaintiff and given to the Court, commenced on a rather conservative basis, and ought equally be the basis for calculating the plaintiff's loss. This would not prejudice the defendant. It should therefore be accepted that the basic salary earned by the plaintiff to use as a starting point for any calculation on loss, as argued on behalf of the plaintiff, should be his cost to company, taking into consideration all benefits received in a 12 month cycle. It followed that Ms Hough, and not Mr Marais, was factually correct in her recommendations on earnings, but for the accident.

WHETHER PLAINTIFF IS IN SYMPATHETIC EMPLOYMENT

[21] I must make a finding on the question whether or not the plaintiff is currently in sympathetic employment. Ms Hough came to the conclusion that the plaintiff is in fact currently in sympathetic employment. He can lose his employment any time. The conclusion was well motivated and grounded. There was no compelling reason to doubt or reject the conclusion. The credible evidence was overwhelming in favour of the plaintiff. The difficulty inherent in the precise calculation of loss of earnings is a trite matter, which was made clear in cases such as, *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A), and numerous others. In *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at para [15], the Court said:

> "*The essence of the computation of a claim for loss of earnings is to compensate the claimant for his loss of earning capacity (see Byleveldt 1973 (2) SA 146 (A) at 150; Dippenaar v Shield Insurance Co Ltd SA 94 (A) at 111). … When a Court measures the loss of earning capacity, it invariably does so by assessing what the plaintiff would probably have earned had he not been injured and deducting from that figure the probable earnings in this injured state (both figures having been properly adjusted to their 'present day values'. But in using this formulation as a basis for determining the loss of earning capacity, the Court must pay care to make its comparison of pre- and post-injury capacities against the same background.*"

This is the approach preferred in the instant matter as shown later below.

[22] Based on the credible expert opinions presented, the finding that the plaintiff is currently in sympathetic employment, was irresistible. The evidence was overwhelming. Any other opposing views, as those of, for example, Mr Marais, were in my view, not well founded. There were numerous decided case law in this high court where the courts held that, even if found to be gainfully employed post-accident, victims of accidents who no

longer functioned in capacities that they were employed for, and as such entitled to damages since they had sustained a complete loss of earning capacities. See for example, *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), where CJ Claassen J found that Ms Fulton, in spite of being gainfully employed as a teacher at her school no longer functioned in the capacity that she was originally employed for, had as such sustained a complete loss of earning capacity. However, each case must still be decided on its own merits and peculiar circumstances. In my view, the *res inter alio actus maxim* finds application in this case in favour of the plaintiff. (*Cf Richards v Richardson, supra*.) At best, the defendant's evidence showed that it may have taken some time for the plaintiff, but for the accident, to have been able to complete his studies, and promotion, in the furtherance of his career. Indeed, the plaintiff's calculations described more fully below, take into account these difficulties by providing for a delayed period of almost seven years to achieve his ambitions of becoming a Mine Onsetter, on the but for the accident scenario, and a further five years for promotion to the level of Engine Winding Driver. On this basis, it is plain that the plaintiff has been overly cautious and conservative in his calculations on loss in this regard.

THE PLAINTIFF'S ACTUARIAL CALCULATIONS

[23] The plaintiff's loss of earnings have been calculated by Munro Forensic Actuaries based on 2014 terms, and on the evidence of Ms M Hough, as well as on the more reliable payslip advices, referred to earlier in the judgment,

and contained in Bundle G of the papers (see para [20] above). The calculation was on the following basis:

Basic salary	-	R4 892,00 per month
Living allowance	-	R1 820,00 per month
Shift allowance	-	average of R6 790,00 per month
Overtime	-	average of R909,70 per month
Capital	-	ER Provident Fund – 8% of basic income (tax-free)
Annual Bonus	-	13th cheque.

The calculations were based on certain probable assumptions. These included that plaintiff would have progressed to Paterson A3 level (median), earning R122 700,00 per year (2014 terms) by age 45, had the accident not occurred. Further, that the plaintiff's income would have increased in line with inflation until his retirement at age 62½. It was also assumed that the plaintiff will not earn further income. It was also assumed, reasonably and factually, that the plaintiff suffered no loss of income due to the accident, apart from the short period during which he could not earn any overtime. The gross figure of loss of earnings came to R2 077 100,00, excluding any application of contingencies. In the last-mentioned calculation the conservative approach of the plaintiff was, once more, underpinned.

THE CONTINGENCIES DEDUCTIONS

[24] Mr Marais, on behalf of the defendant, once more, did not deal with the issue of contingencies in his report, and the application thereof to the plaintiff's calculations. In these circumstances, it was not unreasonable to infer that he deferred to the Court. On the other hand, based on the credible evidence that the plaintiff currently experiences difficulties in his employment environment, it was argued on behalf of the plaintiff that a much higher post-morbid contingency i.e. 25% contingency deduction, should be applied. I do not agree. In addition to the difficulties presently experienced by the plaintiff, he is undoubtedly in sympathetic employment. It is a precarious situation. He may lose his employment any time. The sympathy of the employer may terminate sooner, or upon the plaintiff receiving the award currently under discussion in this matter. The defendant must take its victim as it found him. In my view, a post-morbid contingency deduction of 15% only, will be just and equitable in all the circumstances of this case. 15% percent of R2 077 100,00 is the sum of R311 565,00. That leaves a net amount of R1 765 535,00.

ORDER

[25] In the result the following order is made:

1. The defendant shall pay an amount of R500 000,00 (Five Hundred Thousand Rand) in respect of general damages to the

plaintiff arising out of a motor vehicle collision, which occurred on 21 May 2011.

2. The Defendant shall pay the amount of R1 765 535,00 in respect of loss of earnings to the plaintiff arising out of a motor vehicle collision, which occurred on 21 May 2011.

3. The amounts as mentioned in 1 (one) and 2 (two) above are payable before 28 April 2015 into the trust account for the plaintiff's attorneys of record with the following details:

Wim Krynauw Attorneys
Absa – Trust Account
Account Number: [4…….]
Ref: TM4129/JC/WP

4. The defendant shall furnish the plaintiff with an undertaking as envisaged in sec 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, for 100% of the costs of the future accommodation of the plaintiff's in a hospital or nursing home or treatment of or rendering of a service, or supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the motor vehicle collision which occurred on 21 May 2011, after such costs have been incurred and upon proof thereof.

5. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include the costs of counsel for 3 (three) days as well as the costs attendant upon the obtaining of the medico-legal reports and/or addendum reports and/or preparation fees and/or joint minutes if any and as allowed by the taxing master.

6. In the event that costs are not agreed the plaintiff agrees as follows:

   6.1 the plaintiff shall serve the notice of taxation on the defendant's attorney of record; and

   6.2 the plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs.

7. The contingency fee agreement entered into between the plaintiff's attorney and the plaintiff is invalid.

8. The plaintiff's attorney shall only be entitled to recover from the plaintiff such fees as are taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to exceed 25% of the amount awarded or recovered by the plaintiff.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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INSTRUCTED BY	STATE ATTORNEY
DATE OF HEARING	19 NOVEMBER 2014
DATE OF JUDGMENT	10 APRIL 2015