



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **29th January 2021** Signature: _____

CASE NO: 17949/2018

DATE: 29th JANUARY 2021

In the matter between:

STORM, PETRUS JACOBUS NICOLAS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Coram: Adams J

Heard: 11 and 12 August 2020 – The ‘virtual hearing’ of this matter – the trial – was conducted as a series of videoconferences on the aforementioned trial dates on the *Zoom* digital platform.

Delivered: 29 January 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 29 January 2021.

Summary: Damages – application for default judgment – bodily injuries – determination of quantum in an application for default judgment based on

undisputed facts – court still has a duty to ensure that just and fair compensation awarded – court must use available evidence to determine quantum –

ORDER

Judgment by default is granted in favour of the plaintiff against the defendant for: -

- (a) Payment of the sum of R2 455 345.31.
 - (b) Payment of interest on the said sum of R2 455 345.31 at the prescribed legal rate from fourteen days from date of this judgment to date of final payment.
 - (c) The defendant shall furnish the plaintiff with a 100% undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, Act 56 of 1996 ('the Act'), to pay the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision on the 8 June 2017, after such costs have been incurred and upon proof thereof.
 - (d) Payment of the plaintiff's costs of suit, including the reasonable costs of all medico-legal reports and joint minutes obtained by the plaintiff, and the qualifying fees and court attendance fees of his expert witnesses.
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JUDGMENT

Adams J:

[1]. On the 8th of June 2017 the plaintiff sustained serious bodily injuries in a motor vehicle collision along the R516 Road between Vaalwater and Lephalale, near Bulge River. He was a passenger in a light delivery vehicle, which collided with a TLB, which had inopportunely cut across their line of travel from their right hand side. When the TLB cut across their lane of travel as it did, they were so

close to it that a collision was inevitable. In this action the plaintiff claims damages from the Road Accident Fund ('the Fund') for the serious bodily injuries he sustained in the collision.

[2]. The matter was set down for trial on the 6th of August 2020. On this date there was no appearance on behalf of the Fund, which, in the months preceding the trial date, had terminated en masse the mandates of all of the firms of attorneys which had up to that point served as the Fund's panel of suppliers of legal services. The idea was that the Fund would deal with the claims and litigation arising therefrom internally without the assistance of outside lawyers. That was easier said than done. Despite his every endeavor to amicably settle this action directly with the Fund during the days leading up to the trial date and on the few days thereafter, Mr Kok, the plaintiff's attorney, was not able to resolve the disputes. In fact, the communiqués he addressed to the Fund went unanswered.

[3]. On the 11th of August 2020 the matter came before me, it having been standing down for allocation since the 6th of August 2020. By then, there was still no appearance on behalf of the Fund. The plaintiff therefore proceeded with an application for judgment by default, and in support of that application *viva voce* evidence was led. The plaintiff himself gave evidence, as did his brother, his life partner and his Industrial Psychologist, Ms Talia Talmud. From the evidence led, the facts in this matter are as set out in the paragraphs which follow.

[4]. The Fund is clearly liable for the plaintiff's damages. On the evidence before me, the driver of the TLB was negligent and his negligence caused the injuries sustained by the plaintiff in the accident.

[5]. The plaintiff's date of birth is 01 April 1965. That makes him 55 years old at present and 52 years old at the time of the accident on the 8th of June 2017. At present he lives on a plot in a rural area with his fiancé and her son. The plaintiff is a skilled artisan and possesses numerous technical skills and qualifications. At the time of the accident, he was employed as a Workshop Foreman at L & N Auto, having been in that position since the 1st of November 2013. When he met the accident, the plaintiff had therefore been employed in

that capacity for approximately 3 years and 7 months. His duties entailed *inter alia* the running of the workshop, preparing quotations, invoicing, budget planning and planning of manpower hours, as well presenting the budget to management, managing approximately twelve other workers and himself attending to the maintenance and repairs on all earthmoving vehicles.

[6]. His aforesaid employment before the accident was of a heavy physical nature. His work was challenging also from a cognitive point of view. He earned about R15 000 per month, which, by all accounts, was well below the market related salary for persons employed as Workshop Foremen or Supervisors in the heavy machinery and equipment industry. As indicate later on in the judgment, the plaintiff ended up in this position due to circumstances beyond his control, however at the time he was looking out for better opportunities and higher-paying prospects.

[7]. In fact, at the beginning of June 2017 – literally days before the accident – the plaintiff had received an official job offer from T-Rex Field Services, a company owned by his brother, for the role of Maintenance Mechanic. This offer the plaintiff had already accepted and, but for the accident, he would have commenced employment with this company on the 1st of August 2017 at a monthly salary calculated on the basis of an hourly rate of R160 per hour, which translates into a salary of approximately R31 200 per month – R374 400 per annum.

[8]. Due to the accident and the injuries sustained by him, the plaintiff was unable to take up the position at T-Rex. He therefore remained in his position as a Workshop Foreman at L & N Auto, where he still earns approximately R15 000 per month.

[9]. In the accident, the plaintiff sustained the following injuries: a fracture of his right ankle with serious complications, notably wounds that became septic and just would not heal; a soft tissue injury of the right knee; and a laceration of the forehead. His present complaints are: he has a stiff right ankle, which is always painful; two wounds on his right ankle just won't heal; he has difficulty sleeping due to the pain and the wounds; his right ankle is swollen most of the

time and he has very limited movement in his right foot; his right knee is weak and he will probably need a knee replacement within about two years; his right knee often gives in when walking; he has difficulty getting up from a seated position due to pain; he cannot climb stairs or any machinery at his job; he can no longer climb a ladder; he cannot lift or carry heavy objects as he cannot put weight on his right knee and right ankle; he cannot run or crouch; he has difficulty getting in and out of the bath, specifically due to the wounds; and he has difficulty walking or standing for extended periods.

[10]. Emotionally, he is a mess. He gets angry quite easily – he is short-tempered and irritable. He feels frustrated with his situation. He is more prone to conflict since the accident due to his moods. His relationships with his fiancé and step-son have been affected.

[11]. Immediately after the accident, the plaintiff was transported by ambulance to the Bela-Bela Hospital. The same evening, after he had been stabilized, he was transferred to the Sunshine Hospital where he was admitted for approximately six days. There he underwent an operation to insert plates in his right ankle. His face and knee were sutured. After being discharged from hospital, the plaintiff wore a moon boot for three months and mobilised with crutches until December 2018. There can be no doubt that the injuries sustained by the plaintiff as a result of the accident were of a very serious nature.

[12]. The orthopedic surgeon assessed the plaintiff's Whole Person Impairment ('WPI') at 44%. He was accordingly of the opinion that the plaintiff's injuries were of a serious nature and that it qualifies him for general damages.

[13]. As indicated by the plaintiff's expert witnesses, his job working as a diesel mechanic would have required of him to stand, walk and work in small confined spaces most of the day in most weather conditions especially if in the field. Without the use of power tools and hydraulic lifts, the plaintiff would have had to rely mostly on manual power to get the job done. For this type of work, he required the full use of both his upper and importantly too his lower limbs. There is a high frequency of crouching, kneeling, squatting and crawling all of which the plaintiff

can no longer do. He is no longer able to use his lower limb for capacities that requires pushing or pulling of any kind.

[14]. By all accounts, the plaintiff is currently being accommodated in his role as Workshop Foreman in the sense that he is no longer required to perform any of the tasks that require physical ability. He is suited to his current accommodated role, which is sedentary to light in nature. His current employer is quite happy to accommodate him in this role given the valuable and scarce skills and knowledge he possesses. The company probably cannot afford to lose his valuable knowledge and experience as it is important to the company and for the requirements of his role.

[15]. According to the Orthopaedic Surgeon, plaintiff, due to his injuries and the progressive deterioration of his joints, would have to retire five years early. There does not appear to be much dispute about this.

[16]. With that background, I now proceed to deal with the quantification of the plaintiff's claim under the different heads of damages.

Past Hospital and Medical Expenses

[17]. Under this head of damages, the plaintiff claims an amount of R29 145.60. Included in this total, is the following three sizeable amounts, totaling R20 273.67, all paid on or about the 26th of August 2018, when the plaintiff had removed from his ankle the screws and other internal fixative: R15 000 paid by the plaintiff to Mediclinic Limpopo, which is the private hospital where the surgery was performed; R2 409.67 paid to the Orthopaedic Surgeon, Dr G F Van Zyl, the surgeon who in fact did the operation during which the fixatives were removed; and R2 864 paid to the Anaesthetist, Dr Hugo Van Rensburg, who assisted Dr Van Zyl with the surgery.

[18]. The balance of the amount claimed was in respect of small sums paid from time to time by the plaintiff for over the counter medication, mainly painkillers, which he purchased from Pharmacies and in respect of which he was able to produce documentary proof in the form of invoices and cash or credit card slips. A reconciliation of these slips indicates that these small amounts, which range

from anything between R26.45 and R660.40, add up to R7 550.98, which results in a grand total of R27 824.65 for past hospital and medical expenses. This total amount is evidenced by the plaintiff's testimony and supported by the documentary evidence.

[19]. Therefore, the amount to be awarded to the plaintiff as representing his past hospital and medical expenses is the total amount of R27 824.65.

Future Hospital, Medical and Related Expenses

[20]. There was more than adequate evidence before me that, as a result of the injuries sustained by the plaintiff in the accident, he would require future hospital and medical treatment. The details and particulars of such hospitalization and treatment are contained in the medico-legal expert reports by the plaintiff's expert witnesses.

[21]. This head of damages should be dealt with on the basis of a statutory undertaking to be provided by the Fund to the plaintiff in terms of section 17(4) (a) of the Road Accident Fund Act, Act 56 of 1996 ('the Act'), and I therefore intend granting and order to that effect.

Past and future Loss of Earnings / Loss of Income Earning Capacity

[22]. The plaintiff's past and future loss of income has been actuarially calculated and the bases of such calculations, which are elaborated upon in the paragraphs which follow, appear to accord generally with the facts and the probabilities in the matter.

[23]. It is assumed that, at the time of the accident, the plaintiff was employed as a Workshop Foreman by L & N Auto, earning R15 000 per month with no other benefits. It is also assumed that at the time the plaintiff earned, in addition to his income from his formal employment, from an informal Chicken Farming operation about R14 625 per month. Following the accident, the plaintiff was off work for two weeks. He did however receive his remuneration in full during his period of recovery, and he has remained and still remains employed at L & N Auto, still earning R15 000 per month (assumed as at April 2019).

[24]. It is also assumed that the plaintiff suffered a total loss of profit in respect of his farming business from February 2018 to date.

[25]. But for the accident, the plaintiff would have secured employment as a Diesel Maintenance Mechanic at T-Rex Services on 1 August 2017, earning R31 200 per month. The postulation is that the plaintiff would have worked in this capacity, receiving annual inflationary increases until retirement at age 65, and he would have continued working as a Chicken Farmer, earning annual inflationary increases until retirement between ages 65 and 70.

[26]. Now that the accident has occurred, it is assumed that the plaintiff will continue working in his current accommodated capacity until early retirement at age 60.

[27]. Disregarding the accident, his earnings are taken as R180 000 per annum from the date of the accident until 31 July 2017 and as R374 400 per annum from the 1st of August 2017, to increase in line with the Consumer Price Index to R420 277 per annum as at the 1 August 2020. Additionally, his earnings from the Chicken Farming business are taken as R175 500 per annum from the date of the accident and would have increased in line with the Consumer Price Index to R197 867 per annum as at 1 August 2020, representing about 47% of the plaintiff's projected future income as from the 1 August 2020. The importance of this ratio I shall revert to later on in my judgment when I deal with the probabilities relating to whether or not the plaintiff would have continued with his Chicken Farming business after returning to a position in which he would then have been paid a market related salary.

[28]. On the basis of these assumptions, the results of the actuarial calculations relating to the plaintiff's past loss of income are as follows: Pre-morbid projected income, before the application of contingencies = R1 259 622, and post-morbid income = R577 228. Included in the amount of the pre-morbid earnings is the income that would have been generated by the plaintiff from his Chicken Farming business. The difficulty with this approach is that the plaintiff started that business out of necessity and in order to supplement his otherwise meagre salary after he took a drop in salary after losing his previous job. In other words, he only started

this business in order to make up for the fact that he was earning less than what he would have earned as being market related. Effective the 1 August 2017, he would have returned to earning a salary at market rates. The need to engage in extra work would have fallen away. It stands to reason that this is a factor, which should be taken into account when calculating the plaintiff's loss.

[29]. I am of the view that this should be done by applying a higher contingency to the income disregarding the accident. That contingency should be close to the 47%, which represents the portion of the plaintiff's income constituted by the earnings generated from the Chicken Farm enterprise. I believe that, in the calculations relating to the projected pre-morbid past earnings, that contingency should be 30%. As for the post-morbid past earnings, I am of the view that applying normal contingencies of 5% is appropriate. This would then result in the plaintiff's past loss of earnings being calculated thus: R881 735.40 – R548 366.60 = R333 368.80.

[30]. As for the future loss of income, the above assumptions and its application result in future projected pre-morbid earnings, before the application of general and other contingencies, of R3 908 222 and post-morbid earnings of R778 646. For the reasons mentioned above relating to the income earned from the Chicken Farm enterprise and the fact that the plaintiff would probably not have continued with that business after resuming employment at the level and for the remuneration fitting of his experience and qualifications. Contingencies of 40% should therefore be applied to the future pre-morbid projected income. As regards the post morbid income, I think that normal contingencies should be applied. The fact of the matter is that the plaintiff brings with him a wealth of experience and skills independent of his physical abilities. These qualities will stand him in good stead and is one of the reasons why he is at present still employed and he probably would remain employed to retirement age notwithstanding his physical challenges. He retains the ability and the skills to supervise and manage and to train. And he can earn a good living in that way. 10% contingencies, and not 30%, as suggested by the plaintiff, should be applied to the projected future post-morbid earnings.

[31]. The calculations would therefore be as follows as regards future loss of income: R2 344 933.20 – R700 781.40 = R1 644 151.80.

[32]. That means that the plaintiff's total loss of income (past and future) is R333 368.80 + R1 644 151.80 = R1 977 520.60. This is the total amount, which I intend awarding to the plaintiff as loss of income.

General Damages

[33]. I now turn to deal with the quantum of the general damages suffered by the plaintiff. In that regard, I am satisfied that the plaintiff's injuries are serious and that he qualifies for general damages. There can be little doubt about this. And although the Fund has never formally accepted liability for the plaintiff's general damages, it similarly has never disputed liability for such damages. Moreover, in compliance with the Act and the regulations promulgated thereunder, the plaintiff had lodged with the Fund a Form RAF 4 by Professor Chris Frey, who assessed the plaintiff's WPI at 44%, which more than qualifies the plaintiff for general damages.

[34]. Mr Kok suggested that a sum of R500 000 should be awarded to the plaintiff for his general damages. For comparative purposes, he referred me to a number of cases. Importantly, I was referred to *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA), in which the SCA in 2003 awarded general damages of an amount of R175 000 to a plaintiff who suffered a fracture femur, which resulted in manifold complications. The amount of R175 000 updated to 2020 monetary terms equates to R513 000. In that matter, like in the present one, the plaintiff was incapacitated by the comminuted fracture of his femur and the resultant complications for four of the eight years from the date of the accident to the date of the hearing of the matter in the trial court. Mr Marunga also had to undergo numerous operations and other surgical interventions.

[35]. *In casu* the plaintiff, not unlike Mr Marunga, suffered serious orthopaedic injuries, with complications, which have had a devastating effect on his activities of daily living and on his occupation. I have dealt with those issues *supra*. Importantly, the complications which resulted from the ankle injury are such that

the plaintiff faces the possibility of a below the knee amputation of his right leg. He suffers from constant and chronic pain in the right leg.

[36]. I therefore consider an amount of R450 000 to be fair and adequate compensation to the injured party in respect of his general damages.

Conclusion

[37]. The amounts to be awarded to the plaintiff as damages are therefore the following: R27 824.65 – for past hospital, medical and related expenses; R1 977 520.66 – future loss of income; and R450 000 – general damages = Total amount to be awarded: R2 455 345.31.

[38]. In respect of the future hospital, medical and related expenses, I intend directing the Fund to furnish the plaintiff with a statutory undertaking in respect of such costs.

Costs

[39]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[40]. I can think of no reason why I should deviate from this general rule.

[41]. Accordingly, I intend awarding costs in favour of the plaintiff against the defendant.

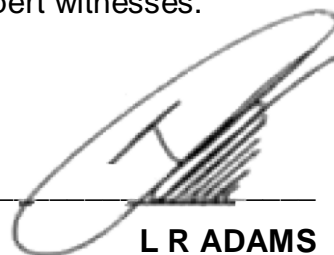
Order

Accordingly, judgment by default is granted in favour of the plaintiff against the defendant for: -

- (a) Payment of the sum of R2 455 345.31.
- (b) Payment of interest on the said sum of R2 455 345.31 at the prescribed legal rate from fourteen days from date of this judgment to date of final payment.
- (c) The defendant shall furnish the plaintiff with a 100% undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, Act 56 of 1996 ('the

Act'), to pay the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision on the 8 June 2017, after such costs have been incurred and upon proof thereof.

- (d) Payment of the plaintiff's costs of suit, including the reasonable costs of all medico-legal reports and joint minutes obtained by the plaintiff, and the qualifying fees and court attendance fees of his expert witnesses.

A handwritten signature in black ink, appearing to be 'L R ADAMS', written over a horizontal line.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	11 th and 12 th August 2020 – the trial of this matter proceeded on the 2 aforementioned days as a ‘virtual hearing’ in a series of videoconferences on the <i>Zoom</i> digital platform
JUDGMENT DATE:	29 th January 2021 – judgment handed down electronically
FOR THE PLAINTIFF:	Mr Rudie Kok
INSTRUCTED BY:	Leon J J Van Rensburg Attorneys, Rosebank, Johannesburg
FOR THE DEFENDANT:	No appearance
INSTRUCTED BY:	No appearance