

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE

13 September 2021

SIGNATURE

A handwritten signature in black ink, appearing to be "S. M. M.", is written over a circular stamp and a diagonal line.

Case No.: 41425/2017

In the matter between:

**SICINA MLUNGISI NICHOLAS**

**Applicant**

and

**THE MINISTER OF POICE**

**First Defendant**

**KGASHANE REUBEN THOKA**

**Second Defendant**

---

**JUDGMENT**

---

**MAKHOB A J:**

- [1] All that this court was required to decide in this matter in which the Plaintiff claimed payment of money from the Defendant were:
- 1.1 Past and future loss of earnings.
  - 1.2 Future medical expenses.
- [2] The parties have already settled the matter in respect of damages.
- [3] It is common cause that on 16 December 2016 the Plaintiff was shot by the Second Defendant who was on duty and was employed by the First Defendant. He sustained an injury on his metatarsal.
- [4] The matter was set down for trial and both the Plaintiff and the First Defendant were represented by counsel. It was agreed between the parties that the matter will proceed via a video link and both parties addressed the court and filed heads of argument. Oral evidence was led and both parties asked the court to decide the matter on the papers. Counsel for the Defendant asked the Court to dismiss both claims as the Plaintiff was unemployed not because of the injuries but because he was retrenched. On future medical expenses counsel for the Defendant asked the court to dismiss the claim as the Plaintiff was fully recovered.
- [5] The Plaintiff filed the following expert reports:
- 5.1 Dr.P Marumo – Disability and impairment specialist.
  - 5.2 Nyiko Macherke – Occupational therapist
  - 5.3 S-Vos – Industrial psychologist
  - 5.4 G. Jacobson – Actuary
- [6] The Defendant filed the following expert reports:

6.1 Dr. M.R Shandukani – Orthopaedic Surgeon

6.2 Dr. C. Sivhabu – Occupational Therapist

6.3 Dr. H. Malaka – Industrial Psychologist

[7] The Orthopaedic Surgeon reported as follows about the Plaintiff:

“No permanent disability as a result of injuries sustained”<sup>1</sup>

“Good prognosis. No future morbidity is expected.”<sup>2</sup>

[8] Of outmost importance is paragraph 12.6 of Dr. DR Shandukani which reads as follows:

*“Future Employability*

The injury sustained has not rendered him disabled and does not prevent his employability. It is my opinion that without formal training he will find it difficult to get *employment*”.

[9] In conclusion on paragraph 13 the Dr Shandukani says “It is my opinion that the injury sustained by Mr Sicina was not severe.” The doctor also says “At the time of my assessment he has reached maximal recovery with no mobility as a result”.

[10] Dr. C Sivhabu conclude as follows in her report:

“11.5 Conclusion

11.5.1 Mr. Sicina demonstrated physical ability to perform work in a medium physical demand level. He has retained the inherent physical requirement of his pre-

---

<sup>1</sup> Vide Case line 5-11 para 12.4

<sup>2</sup> Vide Case line 5-11 para 12.3

<sup>3</sup> Vide Case line 5-12

<sup>4</sup> Vide Case line 5-36 para 11.5

incident work. It is however unfortunate that was retrenched 7 months post-accident. Mr. Sicina indicated that his retrenchment was not influenced by the injuries he sustained in the incident in question.

11.5.2 Mr. Sicina has Grade 9 and no variety of work experience than his experience as a machine operator. His level of education and work experience put him at a disadvantage in the open labour market. It is therefore expected that he will struggle to enter open labour market at his pre morbid level considering his vocational skills. He is still suited to perform manual work in the medium physical demand level.”

[11] In regard to the Plaintiff's future medical treatment. Dr Shandukani<sup>5</sup> says there is no clinical basis for him to have chronic pain. The doctor further says the following:

“12.5 Medical Expenses (Quantum)

12.5.1 Past Medical Costs

Mr. Sicina was treated in a public hospital, treatment of which is already heavily subsidized

12.5.2 Future Medical Costs

- Conservative Management

Analgesia at maximum amount of R10308 per annum

There is no value for him to get any physiotherapy or any orthotic services.

- Surgical Management

Mr. Sicina has no indication for surgical intervention. X-rays did show an exostosis pointing to the sole of foot, but he does not have any callosity on the sole, which may be attributed.”

---

<sup>5</sup> Vide Case line 5-11



Seeing that the experts report that the injuries sustained by the Plaintiff as a result of the shooting did not result in permanent disability or serious injury it is my view that he is not entitled to be compensated for future medical expenses.

[12] In respect of a claim for loss of earnings and/or earnings capacity the following are trite legal principles:

In the matter of Southern Insurance Association Ltd v Bailey NO.<sup>6</sup> His Lordship Appellate Justice Nicholas stated as follows:

*“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches:*

- One is for the judge to make a random estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.
- The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

*It is manifest that either approach involves guesswork to a greater or a lesser extent. But the court cannot for this reason adopt a non- possumus attitude and make no award.”*

[13] In Walker v Road Accident Fund.<sup>7</sup> The court not only with approval referred to the aforementioned judgment of Nicholas AJ but also continued as follows:

---

<sup>6</sup> 1984 (1) SA 98 AD at 116H

<sup>7</sup> Case no. 17955/04 reported on the 28<sup>th</sup> of October 2009 in the High Court of South Africa Kwazulu Natal, Durban Division.

*“This principle applies with equal force to the manner in which a judge is called upon to deal with any aspect of the assessment of the loss of earnings – if it is relevant to the assessment, he/she must make the best of the material before the court, notwithstanding that the result may well be open to criticism.”*

[14] In view of the inherent difficulties and uncertainties it has generally been accepted that it is preferable to make an assessment based on actuarial calculations rather than to take a blind plunge into the unknown.

[15] In the matter of *De Kock v Road Accident Fund*<sup>8</sup> the court once again confirmed the approach to be taken with the calculation of loss stated in paragraph 22 as follows:

*“[22] In approaching claims of this nature, the courts have always been open to two possible approaches, namely:*

22.1 either that the Judge makes a round estimate of an amount which seems to him to be fair and reasonable. That process is entirely a matter of guesswork – a blind plunge into the unknown;

Or

22.2 that the Judge tries to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

[23] It is manifest that either approach involves guesswork to a greater or lesser extent. However, the court cannot for this reason adopt a non possumus attitude and make no award.

[24] The inherent difficulties and uncertainties therein manifest, it has generally been accepted that it is preferable to make an assessment based on actuarial calculations rather than to take a blind plunge into the unknown.

---

<sup>8</sup> Case no. 2237/2013 reported on the 22<sup>nd</sup> of April 2015 in the High Court of South Africa (Gauteng Division, Pretoria)

[25] I prefer this approach

[26] Where the actuarial approach is adopted, the traditional method entails a four-stage process as follows:

26.1 Calculate the present value of the future income which the plaintiff would have earned but for the injuries and the consequent disability.

26.2 Calculate the present value of the plaintiffs future income, if any, having regard to disability.

26.3 Subtract the figure obtained under 26.2 from that obtained under 26.1.

26.4 Adjust the figure obtained as a result of this subtraction in the light of all *relevant factors and contingencies.*”

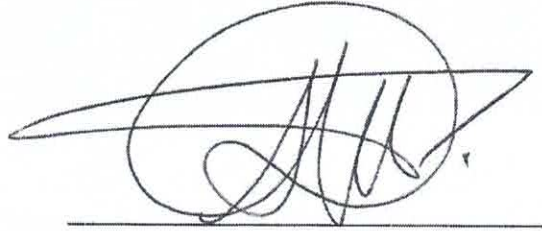
[16] In my view since according to the expert opinion referred to above the Plaintiff has retained his inherent physical requirement of his pre incident work and has reached maximum recovery therefore there is no need for an award for future medical expenses. This claim must therefore fail.

[17] Again the Plaintiff himself opined to the experts that his retrenchment was not influenced by the injuries he sustained in the incident in question therefore this court cannot order that he be compensated for the future income which he would have earned but for the injuries and the consequent disability. In any event, the Plaintiff have been compensated for his injuries and he has fully recovered.

[18] In short, the Plaintiff is currently unemployed because he was retrenched and he was completely healed.

[19] I am of the view that the Plaintiff has failed to discharge the onus of proving on the balance of probabilities that he is entitled to the relief he seeks.

2. The Plaintiff's claim for future medical expenses is dismissed.
3. The Plaintiff is to pay the Defendant's costs.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a series of loops and a long horizontal stroke extending to the left. The signature is written over a horizontal line.

Judge of the High Court  
Makhoba J

Counsel for the Applicant	:	Adv Mataboge
Instructed by	:	Mathebula & Jona Inc
Counsel for the Respondent	:	Adv Vobi
Instructed by	:	State Attorney Mr Ngcobo
Date of hearing	:	23 August 2021
Date judgment delivered	:	13 September 2021