

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 52204/2010

DATE: 20 JUNE 2014

in the matter between:

SIPHO RAYMOND SIMELANE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

TEFFO, J

Introduction

[1] The plaintiff, Mr Sipho Raymond Simelane, born on [...], instituted a claim for damages in terms of the Road Accident Fund Act 56 of 1996 (“the Act”) against the defendant. This claim arises from the injuries the plaintiff sustained in a motor vehicle collision which occurred on 28 April 2006 along the N2, Ermelo - Piet Retief public road when the motor vehicle with registration letters and numbers C[...] there and then driven by BMK Nkovu at the time (“the insured vehicle”) and in which the plaintiff was a passenger, collided head on with the motor vehicle with registration letters and numbers D[...] there and then driven by one MW Dlamini at the time.

[2] The defendant admits full liability for the proven or agreed damages suffered by the plaintiff. The defendant has tendered a section 17(4)(a) of Act 56 of 1996 undertaking in settlement of the claim for estimated future hospital, medical and ancillary expenses which the plaintiff has accepted. The heads of damages that remain for determination are the claims for past loss of earnings, future loss of earnings or loss

of earning capacity and general damages.

[3] Only the plaintiff filed medico legal reports by experts and the reports were admitted by consent into the record as evidence.

[4] The parties agreed to argue the case on the disputed heads of damages as a stated case on the basis of the admitted facts, medico legal evidence and opinions. Accordingly no *viva voce* evidence was led by the parties.

[5] The injuries sustained by the plaintiff in the aforesaid collision are summarised as follows: a left hip dislocation and a fracture of the left calcaneus (foot). The plaintiff was initially taken to Piet Retief hospital before he was transferred to Itshelejuba hospital where he was admitted for a week. He does not recall for how long he was admitted at Piet Retief hospital. He was treated by means of a closed reduction of the left hip in theatre and circular cast of the left foot. He does not recall for how long was he in a plaster of paris. Upon discharge he was issued with a walking frame and crutches. He attended follow up visits at Itshelejuba hospital where wounds were dressed and pain medication given. He currently takes pain medication when necessary for the left hip and foot pain.

[6] The plaintiff was 40 years old when he was involved in an accident. He was working as a tractor driver underground at Sasol mine. He never returned to work post accident. He has since then remained unemployed and never sought any form of employment.

Past loss of earnings

[7] After the accident the plaintiff received his normal basic salary for four months. However, that was stopped and in 2007 he was paid a once-off payment of R80 000, 00. His service ended. He could not return to his position as he would not pass the safety test. On the basis of this information I find that the plaintiff did not suffer any past loss of earnings.

Future loss of earnings and/or loss of earning capacity

[8] According to Dr Sombili (The Orthopaedic Surgeon) the plaintiff has post-traumatic osteoarthritis of the left hip with part of the left femoral head missing. He also has a left calcaneal fracture malunion with bone loss. He was assessed by his doctor at work who told him that he would no longer be able to drive a tractor again. Dr Sombili opined that it would be impossible for the plaintiff to depress a clutch pedal with the malunited fracture of the left calcaneus and the post-traumatic osteoarthritis of the left hip. His view is that the plaintiff is therefore permanently disabled as a tractor driver.

[9] The results of Ms A Phasha (Occupational Therapist)'s assessment of the plaintiff revealed the following:

“9.1 He presented himself with decreased sitting tolerance due to pain in his left hip.

9.2 He deviated from the norm range during repetitive squat and repeated trunk flexion. He reported pain to his left hip upon completion of repeated trunk flexion and squatting. Squatting task was inadequate. He also reported pain to his left foot after completion of this task.

9.3 He was unable to sustain standing and stooping positions during the Valpar 9. It was clear that he avoided taking weight on his left side.

9.4 His walking speed is significantly below the norm and this was not without pain to his left hip and left foot.

9.5 His mobility/agility skill with regard to his lower limbs has been negatively influenced by the accident in question. He displayed difficulty walking forward and backward, and squatting. Walking on toes and crawling induces pain to his left toes. Kneeling, crawling, stooping, and crouching also triggers pain to his left hip.

9.6 He was able to occasionally lift weight in the early range of medium. Carrying was severely limited.”

[10] Ms Phasha opined that the plaintiffs overall work rate does not meet open labour market standards.

[11] According to Ms Phasha, the plaintiff is only suited for sedentary and occasional aspect of light category work. She opined that the plaintiff is precluded from job tasks requiring squatting, walking on uneven terrain and climbing as well as frequent sitting. She is of the view that the plaintiff would not be able to change gears with his left foot. He is thus not suited for his pre-accident job as underground tractor driver or any other occupational driving due to reasons related to the accident. She also opined that plaintiffs ability to secure work within solely sedentary with limited aspects of light work will probably prove challenging considering his level of education and his limited skills base.

Earning scenario pre-accident

[12] According to the plaintiff, he would have remained in his work position and capacity as an underground tractor driver but for the accident. The plaintiff was diagnosed with TB and HIV post accident. According to Dr Pretorius, the Industrial Psychologist, the plaintiffs reported illnesses would have impacted on his work performance and early retirement was very probable.

Earning scenario post accident

[13] The plaintiff is still employable in sedentary to light positions as discussed *supra*. He does not have the necessary qualification and experience for this kind of work. He is no longer able to perform or work in the same and similar pre-accident position as an underground tractor driver. His services were terminated on medical grounds due to injuries sustained in the accident.

[14] Dr Pretorius is of the view that if the plaintiffs reported TB and HIV sicknesses are considered in combination with his accident related difficulties then it is doubtful whether the claimant will secure employment in the open corporate labour market in the future.

[15] The plaintiffs experts' evidence remains uncontested. It is clear from all the experts' reports referred to *supra* that the difficulties experienced by the plaintiff post accident will lead to loss of earnings. Plaintiff has been deemed fit for sedentary to light jobs but due to personal reasons such as education and skills as well as health difficulties, he is unlikely to secure such positions.

[16] The legal position relating to a claim for diminished earning capacity is trite. In *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A), Rumpff CJ articulated the principle as follows:

"In our law under the lex aquilia, the defendant must make good the difference between the value of the plaintiffs estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to be part of a person's estate and the losses of impairment of that capacity constitute a loss, if such loss diminished the estate"

[17] In *Southern Insurance Association v Bailey* 1984 1 All SA 98 (A) the following was said:

"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial judge is 'tied down by in exorable actuarial calculation'. One of the elements in assessing that discretion is the making of a discount for 'contingencies or vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case"

[18] It is clear from the information at hand that the plaintiffs earnings pre accident are unclear but as per the employer certificate from his employer, he received a basic monthly salary of R8 838,00 per month

(allowances, overtime, etc, not clear). Collateral earnings for the last six months (taking into account that plaintiffs employment was terminated on 15 June 2007), from January to June 2007, range from R529,49 to R8 838,14.

[19] It is not clear from the documents filed of record as to what the nature of the once-off payment of R80 000,00 is.

[20] There are some discrepancies with regard to the plaintiff's level of education. According to Ms Phasha, the Occupational Therapist, the plaintiff dropped out of school in grade 10 due to financial constraints and did not undergo any further training. According to Dr Pretorius, the Industrial Psychologist, the plaintiff obtained grade 12 in 1985. These discrepancies were neither addressed nor resolved by the plaintiff.

[21] Actuarial calculations were made on the basis of the opinion and postulations made by the plaintiffs Industrial Psychologist who relied on the reports of the plaintiffs experts. No contingencies were applied.

[22] Counsel for the plaintiff proposed a contingency deduction of 10% for the past loss uninjured income and 25% for future loss uninjured income. On the other hand the defendant's counsel submitted that the actuarial calculations do not have a consideration for a cab. He further submitted that given the uncertainties about the plaintiffs salary pre-accident, his level of education and the fact that he was diagnosed with TB and HIV post accident, a contingency deduction of 10% should be applied to the past loss of R859 900.00 for the uninjured income. Further to the above he also proposed that because the amount of R80 000, 00 that was paid to the plaintiff when his service was terminated, was not accounted for and included in the actuarial calculations, it should be added to the amount of R74 100, 00 for the past loss for the injured income.

The proposed calculation will thus be as follows:

Past loss	Uninjured income
	R859 900, 00
	Less
	10%
	Contingency deduction
	<u>R85 990, 00</u>
	R773 910, 00

Past loss

Injured income

R74 100, 00

Add

R80 000, 00

R154 100, 00

Past loss

Uninjured less injured Income

R773 910, 00

Less

10%

R154 100, 00

R619 810, 00

[23] I agree with the proposal by the defendant's counsel that the amount of R80 000,00 should be included in the calculations. It was the plaintiffs duty to find out why it was paid, whether it was an advanced benefit or not. To avoid a situation where the plaintiff would be paid twice for the loss, it should be deducted. Parties are agreed that a 10% contingency deduction for the past loss uninjured income should be made. I accept the proposal as it is reasonable in the circumstances.

[24] I do not agree with the defendant's counsel that the actuarial calculations should have included a cap. The statutory cap as provided for in s 17(4)(c)(i) was introduced by section 6 of the Road Accident Fund Amendment Act, 19 of 2005 ("the Amendment Act") which came into operation on 1 August 2008. The accident in which the plaintiff was involved took place in April 2006. Surely the Amendment Act does not apply with retrospective effect. I also concur with the plaintiffs counsel's submission that the earnings of the plaintiff are far below the threshold as prescribed by the Minister. Furthermore, although the defendant was furnished with the plaintiff experts' reports long before the trial, they chose to do nothing and accepted them as they are.

[25] On the future loss the defendant's counsel proposed that based on the uncertainties referred to *supra* the general rule is to apply a 50% contingency deduction but that should be spread at 30% for the uninjured and

70% for the injured. Although I agree that there have been some uncertainties in the information given by the plaintiff and his experts and that the plaintiffs Industrial Psychologist also proposed high contingency deductions, I am of the view that a contingency deduction of 40% to the future uninjured income will fairly and appropriately compensate the plaintiff for his loss.

[26] The plaintiffs future loss of earnings or loss of earning capacity is therefore calculated as follows:

Past loss of income	R619 810, 00	
Future loss uninjured		
	R1 375 100, 00	Add
	less	
	40%	
	<u>R550 040, 00</u>	
	R825 060, 00	<u>R825 060, 00</u>
Total loss of income		R1 444870, 00

General damages

[27] Counsel for the plaintiff submitted that an award between R600 000, 00 and R650 000, 00 will fairly compensate the plaintiff for the injuries sustained in the motor vehicle accident. A number of cases were referred to. Counsel for the defendant disagreed and argued that the appropriate award in the circumstances should be between R400 000, 00 and R450 000, 00. I have considered the cases referred to by the parties and having taken into account the severity of the injuries sustained, the plaintiffs age and the pain that he suffers on the left hip and foot which persists since the accident, I am of the view that an amount of R500 000, 00 is appropriate in the circumstances.

[28] The award to be made to the plaintiff is calculated as follows:

28.1 Future medical and hospital expenses

An undertaking in terms of

section 17(4)(a) of Act 56 of

28.2 Past loss of earnings

NIL

28.3 Future loss of earnings/

loss of earning capacity R1 444 870, 00

28.4 General damages R500 000, 00

Total R1944 870, 00

[29] Accordingly, I grant judgment in favour of the plaintiff against the defendant as follows:

29.1 Payment of the amount of R1 944 870, 00 to the plaintiff in full and final settlement of the plaintiffs claim.

29.2 Interest on the said amount of R1 944 870, 00 at the rate of 15,5% per annum 14 days from date of judgment to date of final payment.

29.3 The amount as mentioned above is payable into the trust account of the plaintiffs attorney of record and the details thereof will be furnished to the defendant.

29.4 The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 28 April 2006, after such costs have been incurred and upon proof thereof.

29.5 The defendant is ordered to pay the plaintiffs costs on the High Court scale either as taxed or agreed, to date hereof such costs to include the costs of counsel and quantifying and reservation fees, if any, of the following experts:

29.5.1 Dr S Sombili;

29.5.2 MsAPhasha;

29.5.3 Dr Pretorius; and

M J TEFFO (Ms)

JUDGE OF THE GAUTENG DIVISION, PRETORIA

COUNSEL FOR PLAINTIFF: L NGWETYA NA

INSTRUCTED BY: T M N KGOMO & ASSOCIATES

C/O NDOBELA & LAMOLA INC

COUNSEL FOR DEFENDANT: R J KOKELA

INSTRUCTED BY: A P LEDWABA INC

DATE OF HEARING: 11 MARCH 2014

DATE OF JUDGMENT : 20 JUNE 2014