

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

Case Number: 74930/2014

15/12/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

N N S

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The plaintiff, a 29 year old male, claims damages in respect of injuries he sustained in a motor vehicle collision that occurred on 26 July 2013.

[2] The parties have settled the merits of the plaintiff's claim and certain of the heads of damages. The only two issues that remain in dispute are general damages and the plaintiff's loss of income and/or earning capacity.

[3] In respect of the plaintiff's past loss of income, the parties have agreed on an amount of R 97 729, 00.

EVIDENCE

Loss of income / earning capacity

[4] The plaintiff, who is a citizen from Swaziland and does not have a work permit, suffered the following injuries as a result of the accident:

- i. right femur - subtrochanteric; and
- ii. fracture of the mandible and left zygoma.

[5] The plaintiff has the following qualifications:

- i. a Grade 12 level of education;
- ii. a mechanical fitting certificate; and
- iii. Grade 2 and 3 trade test.

[6] In the joint minute of the orthopaedic surgeons, Mr M L Makgato and Ms E du Plooy, the plaintiff's residual work capacity, was summarised as follows:

"7.13. **We conclude** that when competing in the open labour market, Mr. S. is not a fair competitor and is disadvantaged in terms of efficiency and ability to perform his job demands independently in comparison to a normal healthy person, the same age for a similar job."

[7] The aforesaid conclusion is in accordance with the evidence of the plaintiff. The plaintiff testified that he earned approximately R 15 000, 00 prior to the accident. As a result of the injuries he suffered in the accident, he finds it difficult to perform at the same pace than he did prior to the accident. He has difficulty squatting, which difficulty affects his work capacity negatively.

[8] In order to enhance his performance, the plaintiff has appointed an assistant. The assistant is, however, not as experienced as the plaintiff and the plaintiff spends valuable time supervising the work done by the assistant.

[9] His net income has, after 3 years, remained at R 15 000, 00. Having regard to the inflation rate, the plaintiff's ability to earn an income has indeed been compromised.

[10] Based on the joint minutes of the Industrial psychologists, both parties have obtained actuarial calculations in respect of the plaintiff's future loss of income / earning capacity.

[11] The plaintiff relied on the actuarial calculations provided by the actuary appointed by the defendant in calculating the plaintiff's future loss of earnings / earning ability. Four scenarios were proposed, which results in the following losses:

- i. Scenario 1: R 1 208 051 (applying a 20% pre- and 45% post-accident contingency deduction);
- ii. Scenario 2: R 985 986, 20 (20% pre- and 40% post-accident deduction);
- iii. Scenario 3: R 763 921, 90 (20% pre- and 35% post-accident deduction); and
- iv. Scenario 4: R 541 857, 60 (R 20% pre- and 30% post-accident deduction).

[12] From the above it appears that the basis for the calculation remains the same, whereas the difference in the total loss is occasioned by the difference in the post-accident contingency deduction.

[13] Ms Smit, counsel for the plaintiff, submitted that scenario 3, with a contingency spread of 15%, represents a fair and adequate compensation for the loss the plaintiff has suffered in respect of future earning capacity. It is common cause that the plaintiff will still earn an income in future. Due to the injuries he sustained in the accident his earning capacity has, however, been compromised.

[14] Mr Matladi, counsel for the defendant, did not agree. He contended that the contingency spread should be 30 %. In support for the higher contingency deduction, Mr Matladi relied on an unreported decision in which the fact that a foreign national did not have a work permit, was considered. [See: *Lesaoana v Road Accident Fund* (113512011) [2013] ZAFSHC 39 (7 March 2013)]

[15] Counsel for the defendant in the *Lesaoana* matter, referred to two judgments of the then Appellate Division in support of his contention that the plaintiff's income is illegal because he had no work permit. [See: *Santam Insurance Ltd v Refugson* 1985 (4) SA 843 AD; *Dlamini en Ander v Protea Assurance Company Ltd* 1974 (4) SA 906 A] In both judgements it was held that a claim for loss of support based on earnings emanating from an illegal activity, is not sustainable.

[16] Notwithstanding reliance on the case law, *supra*, Counsel for the defendant in the *Lesaoana* judgment, submitted that the plaintiffs claim for loss of income should merely be reduced. The court agreed and awarded 70% of the plaintiffs claim.

[17] In relying on the *Sanlam and Dlamini matters*, *supra*, Counsel's contention that the claim for loss of income should merely be reduced is clearly incorrect and not supported by the two Appellate Division decisions. Similarly, Mr Matladi's reliance on the *Lesaoana* matter as authority for his contention that the plaintiff's claim should be reduced because his income was derived from an illegal activity is not sustainable and clearly incorrect.

[18] The two leading Appellate Division cases on the subject held otherwise and is consequently the prevailing law that should be applied, if applicable.

[19] In the *Sanlam* matter, the widow of the deceased that was killed in a motor vehicle collision lodged a loss of support claim. The deceased earned his income from a panel beater business that he had been operating for 20 years prior to his death. The deceased, however, did not have the necessary licence to operate a panel beater business. The court held that the "illegality" precluded the widow to rely on the illegal income as a basis for compensation.

[20] The *Sanlam* matter is, however, distinguishable from the matter *in casu*. In the *Sanlam* matter the defendant specifically pleaded reliance on the "illegality" defence. Consequently, the issue was fully canvassed during the trial. *In casu* the defendant did not rely on the "illegality" defence. Although the plaintiff admitted during evidence that he did not have a work permit, the defendant chose not to amend its plea in order to rely on the illegality defence.

[21] In the *Dhlamini matter* the defence of illegality was not pleaded and the issue was not fully canvassed during the trial in the court *a quo*. On appeal, the parties, however, referred to the relevant statutory framework and the issue was fully canvassed during argument. The Court in dealing with the issue, held as follows at 915 G-H:

".....Namens appellant is aangevoer dat respondent nie in sy pleitstukke die verweer geopper het wat nou ter sprake is en dat die Hof a quo ook nie na enige wetgewing verwys het. Ek vind dit onnodig om op hierdie betoog in te gaan omdat by 'n appel soos hierdie die partye sekere feite voorle en daarvolgens 'n regspraak beslis het."

[22] *In casu* this court was not called upon to decide the illegality issue. Mr Matladi merely referred to the *Laseoana* judgment in support of his argument that the plaintiffs claim for loss of income should be reduced because he did not have a work permit. His submission is not supported by the prevailing legal position and a reduction will not be applied herein.

[23] In determining fair and reasonable compensation for loss of income or earning capacity, the court has a wide discretion to be exercised judicially depending on the facts of the matter.

[24] Zulman JA, with reference to various authorities, summarised the prevailing legal principles in *Road Accident Fund v Guedes* 2006 (5) SA 583 SCA at 586 H - 587 B as follows:

"It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example President Insurance Co Ltd v Mathews). 2 The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO). 3 The court necessarily exercises a wide discretion when it assesses the quantum of damages due to

loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is useful basis for establishing the quantum of damages. Even then, the trial Court has a wide discretion to award what it believes is just (see, for example, the Bailey case and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd)."

[25] Having regard to the facts *in casu*, I am of the view that an amount of R 600 000, 00 will adequately compensate the plaintiff for his future loss of earning capacity.

General damages

[26] Both counsel referred to various decisions in respect of the amount of general damages that was awarded to plaintiffs with injuries similar to that of the plaintiff herein.

[27] Although other authorities are helpful, each case should be decided on its own facts.

[28] The plaintiffs orthopaedic injuries are severe. Mr Makgato remarked as follows in the joint minute of the occupational therapist:

"7.12 Mr. Makgato further notes that the client has an unfavourable orthopaedic prognosis. Dr. Schnaid (orthopaedic surgeon for the plaintiff) notes that due to on-going symptoms of the lumbar spine, dysfunction and superimposed disc degeneration is likely to occur. Considering the prognosis Mr. Makgato notes that it is highly likely that he will experience deterioration in his physical capacity and he will find his duties as a mechanic increasingly difficult to do in the future. It is probable that his physical capacity will diminish and he will eventually only perform light duty or semi-sedentary work with reasonable accommodation."

[29] The plaintiff testified that he enjoyed playing soccer prior to the accident, an activity that he can no longer enjoy due to the injuries he sustained in the accident. The plaintiffs enjoyment of life and the amenities thereof has no doubt been seriously compromised and he should be adequately compensated for this loss.

[30] In the premises, I am of the view that an amount of R 550 000, 00 would be fair and reasonable compensation in the present circumstances.

ORDER

In the premises, I make an order in terms of the order marked "X" attached hereto.

JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Plaintiff : Advocate A E Smit
Instructed by : N J BELCHER ATTORNEYS

Counsel for the Defendant : Advocate Matladi
Instructed by : DIALE MOGOSHTWA ATTORNEYS

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG LOCAL DIVISION, PRETORIA

CASE NUMBER: 74930/14

In the matter between:

N. N. S.

PLAINTIFF

and

ORDER

1. The defendant is ordered to pay the plaintiff an amount of R 1247 729,00 on or before 31st **of January 2017** by direct transfer into the trust account of Plaintiff's attorneys:-

Account Number : NJ BELCHER ATTORNEYS
Bank : FNB (Trust Account)
Branch code : 250205
Account number : [...]
Ref : NJB/MVA/10

2. In the event that the Defendant fails to pay the aforesaid amount on or before the 31st of January 2017, the Defendant shall be liable for interest at the prescribed rate from the aforesaid date to the date of payment.
3. The Defendant is to provide an Undertaking to the Plaintiff in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for 100% of the costs of the future accommodation in a hospital or nursing home for the treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising out of the injuries the Plaintiff sustained in the motor vehicle collision giving rise to this suit.
4. In the event that the Defendant fails to furnish such an Undertaking, the Defendant shall be liable for the costs attendant in obtaining such an Undertaking.
5. Defendant is ordered to pay Plaintiff's taxed or agreed party to party costs on the High Court Scale inclusive of senior-junior counsel and reservation and/or qualifying fees if any of the following expert(s):-

- | | |
|-----------------------------|----------------------------|
| 5.1 Dr. BT Nyathi | - Dentist; |
| 5.2 Radiologist | - |
| 5.3 Dr. Schnaid | - Orthopaedic Surgeon; |
| 5.4 Dr. Malaka | - Industrial Psychologist; |
| 5.5 Dr. Segwapa | - Neurosurgeon; |
| 5.6 Mr. Makgato | - Occupational Therapist; |
| 5.7 Clemans Murfin & Roland | - Actuary; |

6. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorneys of the record; and

- 6.1. The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs referred to above into the Plaintiff's attorneys' trust account.

BY ORDER OF COURT