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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 12010/2014

DATE: 21 JANUARY 2015

Before: The Honourable Holland-Muter AJ

In the matter between:

THATO MOHLABA

Plaintiff

And

ROAD ACCIDENT FUND  
JUDGMENT

Defendant

[1] The plaintiff instituted action against the defendant arising from an accident that occurred on 2 July 2013 along the Mangope Road in Ga-Rankuwa within the jurisdiction of this court. The plaintiff was driving a motorcycle with registration number [B .....] GP and collided with a motor vehicle with registration number [X.....] GP driven by the insured driver.

[2] The merits of the collision was settled previously 100% in favour of the plaintiff and an undertaking as envisaged in section 17 (4) of the Road Accident Fund Act, No 56 of 1996, as amended, was tendered for the

plaintiff's future accident related medical treatment.

[3] The parties in addition to the above, placed the following on record at the beginning of the trial by agreement, namely that the defendant was to pay the following towards the plaintiff as a result of the accident as part of the plaintiffs claim:

3.1 The plaintiffs past medical and hospital expenses in the amount of R 74 706,00; and

3.2 The plaintiffs loss of past earnings in the amount of R 100 000,00.

[4] Counsel for both parties agreed that the only aspects to be adjudicated by the court were (i) the quantum of the plaintiffs general damages and ( i i ) the plaintiffs estimated future post morbid earning capacity, if any, and the amount to be awarded as damages for such a loss.

[5] At the beginning of the trial, counsel for both parties further agreed that the plaintiffs estimated pre-morbid earnings, as calculated by the defendant's actuary in the report dated 6 August 2015 comprises R 4 961 040,00. This is however on scenario 2 calculation by the actuary: *to enter the labour market*

*with grade 12 and a certificate level of education.* The actuary also calculated the position should the plaintiff enter the labour market with only grade 12 level of education. In the scenario 2, the actuary calculated the plaintiffs future loss at R 4 961 040,00 (the amount agreed to ) and in scenario 1 at R 3 923 535,00. Mr Malatji later in his written heads of argument denied such agreement. I have to disagree with him about what was agreed, but as will follow later, from the evidence is clear that the correct approach will be to work on the first scenario that of the plaintiff entering the labour market only with grade 12 level of education (the first scenario ).

[6 ] The plaintiffs injuries and sequelae are fully set out in the respective reports and joint minutes of the orthopaedic surgeons, Drs EM Mennen and DE Gantz. See the summary of the joint minute in the bundle: Index A - Pleadings Part D - 9: The injuries can be summarized as follows:

*“ the plaintiff sustained a right proximal radius and ulna fracture. A bony anklosis has formed between the proximal radius and ulna. On clinical examination the plaintiff has no pro-and supination of his forearm and his forearm remains in a fixed position 20 degrees pronation. The loss of the forearm pro- and supination of the plaintiff’s dominant hand will prevent him from working as a motorcycle mechanic. He has suffered a significant loss of*

*working capacity. He has suffered an injury to his right ulna nerve resulting in loss of sensation in his small and ring fingers and some loss of his intrinsic hand function*

[7] The orthopaedic surgeons regard the injury sustained to be serious within the application of the narrative test.

[8] The medico-legal reports by the orthopaedic surgeons and their joint minute were accepted by both parties as evidence in the matter.

[9] In his heads of argument on behalf of the plaintiff, Mr Lourens explained in detail the role of cross examination and how the evidence of expert witnesses should be approached. He also gave a explanation as to how mutually destructive versions should be approached. I am indebted to him therefore. Mr Malatji in his heads also assisted the court with valuable inputs. There is no need to merely repeat the heads in this judgment, but where necessary reference will be made to particular the case law referred to.

#### EVIDENCE DURING THE TRIAL:

[9] The plaintiff testified and called three expert witnesses namely Dr A Pauw ( clinical psychologist), Me A Greeff ( occupational psychologist) and Me L Van Gass (industrial psychologist). The defendant called two experts namely Me D Rocha ( occupational psychologist) and Me C J Nel (industrial psychologist). Joint minutes by the occupational psychologists and the industrial psychologists were filed. The

reports by the witnesses are found in the Bundle: Index C: Expert Documentation and the joint minutes in Bundle: Index D: Joint Minutes.

[10] From the evidence the following is clear: The plaintiff suffered serious injuries which has a permanent effect on his life, in particular his future earning capacity. The occupational experts agreed that as a result of the injuries sustained by the plaintiff in the collusion, the plaintiff is vulnerable and compromised in his capacity for sustaining occupation while having to rely on his level of physical fitness to secure an income; that he has limited capacity in terms of performing the occupation as a mechanic ( his occupation at the time of the accident); that he will not be able to perform the full tasks of a mechanic and that he will need coaching and education in respect of the environments for which he would be suitable in future. See occupa-

tional joint minute.

[11] The industrial psychologists were of similar view, more so after the plaintiffs results from the Tshwane University of Technology ( TUT ) became available during the trial. See exhibit 5. From these results it is more likely that the plaintiff would not have achieved a tertiary qualification, but that he would have entered the labour market with a grade 12 level of education. Nel, during cross examination, conceded that the plaintiffs level of earnings, with grade 12, will probably be comparable to the scale indicated for semi-skilled workers in the non-corporative sector as per Koch, Quantum Yearbook of 2015. See par 3.8 in the industrial psychologists' joint minute.

[12] Although the experts differed from one another on certain aspects, in my view these differences do not justify the total rejection of a particular witnesses' evidence. All of the experts are ad idem that the plaintiff has been injured to such an extent that his pre- and post morbid income situation are far apart and that he be compensated for this loss.

[13] In view of the above, I am of the view that the more probable scenario to work on would be the first scenario as calculated by the defendant's actuary. The more logical calculation of the plaintiff's future loss is to work on the assumption that he would have entered the labour market with only a grade 12 level of education equal to the upper quartile for semi-skilled workers per Koch 2015. See par [5] above.

[14] The post morbid earnings as calculated on behalf of the plaintiff as stated in the heads of argument by Mr Lourens ( par 21.2 of his heads ) are R 1 835 296,00 ( less 25% post morbid contingency in the amount of R 458 824,00 ) resulting in a net of R 1 376 472,00. If this is subtracted from the pre-morbid amount of R 3 584 612,00 ( first scenario future loss of R 3 982 902,00 less 10% contingency ), as in the defendant's updated calculation, the plaintiffs loss is R 2 208 140,00.

[15] According to par 22.5 of Mr Malatji's heads of argument, the plaintiffs loss is R 1 511 755,00 on a similar calculation. In his heads of argument, Mr Malatji made various calculations by using different contingency percentages, the amounts to vary between R 1 312 610,00 to R 1 710 898,00.

[16] The parties are therefore at least R 696 383,00 apart in this calculation.

[17] I am of the view that a fair approach will be to apply a 10/25% contingency spread on the amounts as calculated. The parties being R 696 383,00 apart, the more reasonable approach to add 50% ( R 348 192,50 ) of the difference to the lower amount, the plaintiffs future loss to be R 1 859 947,50.

[18] This award takes into account that the plaintiff is not totally incapacitated but has a residual working capacity. There were speculation as to the type of sedentary work within the working capacity of the plaintiff, but nothing concrete was presented to the court in this regard. It is however undisputed that the plaintiff did not suffer any head injury. The plaintiffs psychological functioning has been affected, but this can be improved by future therapy, the undertaking to cover future treatment. The extent of the recovery of the plaintiff is not clear, but it cannot be excluded that he will be able to improve in future. His depression can be addressed which will also improve his position. The court however has to take into account that he could be employed in future and allowed a higher post morbid contingency of 25% above. His pre-accident TUT results were not good, clouding the possibility that he would have progressed to a post grade 12 level of education even if the accident did not occur. From his evidence, the inference is justified that



the plaintiff was not a model student and he was evasive about his studies and progress. There is some doubt whether he would have progressed beyond grade 12 in any event.

[ 19] The question of the plaintiffs claim for general damages now needs attention.

Counsel for both parties provided the court with a comprehensive list of previous cases to consider as to the quantum of the general damages. During oral arguments after submitting their respective heads of arguments, Mr Malatji contended that R 400 000,00 for general damages will be reasonable. Mr Lourens replied that the award should be somewhere between R 500 000,00 and R 600 000,00.

[20] There are various factors/aspects to be considered when awarding damages for bodily injuries. The plaintiffs individual situation is the following:

- i He was 22 years old at the time of the accident.
- ii He has reached maximum medical improvement and his condition, but for his psychological improvement, and will have to live with the scars and restricted forearm movement for life.
- iii He can only be considered for sedentary and very light work. He cannot lift heavy objects ruling out various types of work in future.
- iv He is suffering from mild depression as a result of then accident.
- v He can no longer become a motorcycle mechanic.

vi He lost the use of his forearm to a great extent. This also impacts on his previous fondness to go fishing, camping, cycling etc.

vii It cannot be found that as a result of the accident, he cannot continue to study. His pre-accident results were poor.

[21] Turning to listed case law, some of the cases referred to are not applicable. Some refer to amputations, leg fractures, facial injuries etc. When making an award, the court must take care that the award is fair to both parties, give just consideration to all aspects applicable. See **De Jongh v Du Pisanie NO 2005 (5) SA SAC at 476 D par 60.**

[22] The closest to the matter before the court is the case of **Adv JP vd Berg no v Road Accident Fund** ( unreported on 17 February 2014 in GNP Case No 10528/2011. The plaintiff in that matter sustained similar injuries to his arm and was awarded R 500 000,00, in today's value R 531 489,00.

[23] I am of the view that an award of R 540 000,00 for general damages in this instance will be a reasonable and fair award. It must be remembered that the plaintiff is not totally incapacitated but will be able to do sedentary work. He however will have to make work of his depression and undergo the necessary treatment.

[24] The plaintiff's particulars of claim was amended and the amended pages were served on the defendant's attorneys of record on 16 November 2015. No objection

was received as the amendments were only to the amounts claimed. The amendments are allowed.

[25] I am indebted to both Mr Lourens and Mr Malatji for their professional handling of the matter and their comprehensive heads of arguments.

[26] The following order is made:

26.1 The defendant is to pay the plaintiff the amount of R 74 706,00 in respect of claim for past medical and hospital expenses, the amount agreed to between the parties;

26.2 The defendant is to pay the plaintiff the amount of R 100 000,00 in respect of the claim for past loss of earnings, the amount agreed to between the parties;

26.3 The defendant is to pay the plaintiff the amount of R 1 859 947,50 in respect of the claim for future loss of earnings;

26.4 The defendant is to pay the plaintiff the amount of R 540 000,00 in respect of the claim for general damages as a result of the injuries sustained by the plaintiff in the accident;

26.5 The defendant is to pay interest on the above mentioned awards, the total of the above mentioned claims are R 2 574 653,50 a tempore more as from 14 days from the date of the judgment to date of the payment; and

26.6 The defendant is to pay the plaintiffs costs of suit on a party and party scale,

including all costs occasioned by the matter standing down since 7 August 2015 and

the costs of the expert witnesses who testified in the matter.

Signed at Pretoria on January 2016.

HOELAND-MOTER AJ.

Dates of hearing:

2, 3,4 & 5 November 2015.

Oral arguments in court on 10 December 2015.