REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 12696/2013
DATE: 7/3/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED
07/03/2016 _____
DATE SIGNATURE

In the matter between:

SHADRACK HASANI MKOBENI Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

SK HASSIM AJ

[1] The plaintiff claims compensation for bodily injuries sustained when a motor vehicle collided with him on 1 January 2010. He was roughly 30 years at the time.

[2] The defendant's liability to compensate the plaintiff has been settled. The defendant has undertaken to pay to the plaintiff 70% of his proven or agreed damages. During the trial I was informed that other disputes too had been settled. The defendant has provided an undertaking in terms of section 17 (4) of the Road Accident Fund Act, Act No 56 of 1996 (as amended), limited to 70%, for future medical treatment. The quantum of compensation for general damages has been agreed at R105 000.00 which is amount after the 30% for contributory negligence by the plaintiff has been deducted.

[3] The only issue that is outstanding is whether the plaintiff has suffered damages in the form of past and future loss of earnings. In this regard I have to decide the percentage, if any, to be deducted for contingencies.

[4] Apart from the plaintiff, three expert witnesses testified in support of his case. They were Ms M Kheswa an industrial psychologist, Ms Ferreira an occupational therapist and Dr K Bila, an orthopaedic surgeon.

[5] The defendant closed its case without adducing any evidence.

[6] The injuries suffered by the plaintiff consequent upon the collision are common cause. It is the outcome of the injuries and the impact they have on the plaintiff's earning capacity which is in issue here.

The plaintiff's qualifications

[7] The plaintiff was awarded a senior certificate in December 2002. The plaintiff's vision was to qualify as a paramedic. In 2003, he did a one-month

course at Stallion Security Academy.[1] In 2007, he obtained a Basic Computer Certificate after three-months study. On 12 August 2009 (after studying for six months) he successfully completed a "Fire Fighter One" course presented by City of Johannesburg at its Emergency Management Services Training Academy. This was a paramedic's certificate for fire fighters. He attended a course for a paramedic's qualification for one month. He referred to as a "Paramedic's Certificate". It turned out that the training institution he attended was a fake (as he described it).

[8] In addition to the Fire Fighting Certificate he obtained in 2009, he obtained a Hazmat Awareness Certificate. The course was part of the Fire Fighting qualification.

Plaintiff's employment history pre-accident

[9] The plaintiff had not been employed for any length of time before the accident. He had intermittently held temporary jobs. In his words he did "piece jobs". He was not in steady employment at the time of the accident. Nor has he been in steady employment since then.

[10] His work history prior to the accident can be summarised as follows:

a. 2003-2007 as a security guard at ADT. He earned R2 300.00 per month;

b. Masana Hygiene Services for approximately 8-9 months working as a cleaner. A pay slip for 30 April 2007 was introduced into evidence. He earned R1 500.00 there. He left in order to find a higher paying job.;

c. Johannesburg Fire station from 1 August 2008 to 27 January 2009 teaching fire safety to children. He earned R1 200.00 per month. He left in order to obtain a formal qualification in paramedics.

[1] Appears from report of the industrial psychologist.

d. On 1 December 2009 he started working at New World doing varied tasks, including packing of appliances. His wage was to have been R500.00 per week. His employment at New World became contentious.

[11] Plaintiff testified that he commenced working at New World at the beginning of December 2009. He worked there for 1-2 weeks and not any longer because the business closed for the festive season. He relayed to the occupational therapist that at New World his main duties consisted of packing stock such as televisions, music centres, microwaves, fridges and heaters. According to him New World, in a letter, offered to him permanent employment with effect from January 2010. He said that the contract was handed to him. He was however required to sign it only in January 2010. He earned R500.00 per week. A curious feature about the evidence surrounding his employment at New World is that the plaintiff told Ms Kheswa, the Industrial Psychologist that he was employed at New World at the time of the accident. Ms Kheswa however established from New World that he was offered employment and he signed the contract that was given to him on 1 December 2009. He, however, did not report to work on 2 December 2009. The contract was therefore terminated on 3 December 2009. On the whole, the plaintiff's evidence on his employment at New World is unsatisfactory.

Plaintiff's employment history post-accident

[12] Post-accident the plaintiff held a temporary position at Concorde Bakery as a driver. This was for a fixed period until January 2015. A payslip for the week 8 September 2013 to 14 September 2013 was introduced into evidence. According to this he earned a gross wage of R800.00 per week (net R792.00 per week).

[13] Even though the plaintiff holds a qualification in basic computers he has been unable to obtain employment where he can utilise the skill acquired.

The plaintiff's evidence on the sequelae of the injuries

[14] According to the plaintiff he experienced challenges in his job at Concorde Bakery. He was a driver delivering bread. He had to carry heavy crates of bread. He had no assistance. This resulted in pain.

[15] He was unable to secure formal employment after he left Concorde Bakery. He did "piece jobs". The obstacle to obtaining employment was his inability to lift heavy objects and the pain he experienced doing this. This was due to his injuries.

[16] He is unable to pursue the job of a fire fighter because he is unable to run. Since the accident he has been unable to stand for long periods. He is also unable to walk long distances because of the pain. The plaintiff's evidence suggests debilitating pain. However, the plaintiff does not take any medication for pain relief even though he has no allergies to medication. On the totality of the evidence I am unconvinced that the plaintiff experiences debilitating pain.

Dr Bila: The orthopaedic surgeon

[17] The plaintiff suffered a left foot fracture over the lisfrac joint. This was evident on X-rays. Also evident on X-rays were loose fragments of bone. According to Dr Bila these fragments could cause pain depending on where the fragments are in relation to the bone. Dr Bila testified that pain is graded from 1 being the lowest. Medication is not necessary to control grade 1 and 2 pain. Grade 3 pain is controllable with medication. Grade 4 pain is debilitating. On his assessment the plaintiff could experience Grade 1 pain after prolonged walking and standing. The grade 1 pain could increase to grade 2 or grade 3. The latter when heavy objects such as big appliances have been lifted. This pain (i.e. grade 3) will set in at the end of a day, but can be controlled with medication and the patient will be able to function.

[18] It is difficult to assess the true impact of the pain on the plaintiff's performance. This is because the plaintiff has not been taking any medication to control the pain. On the other hand, the failure to take medication is an indication that the pain is not severe, and is at least not debilitating. This means that the plaintiff is able to function. If the plaintiff was experiencing unbearable or debilitating pain, I would have expected him to have sought medical attention for the alleviation of the pain. I am not unmindful of Dr Bila's evidence that while the fracture has healed, the injury to the cartilage has poor prospects of healing. I have not overlooked the evidence that an injury to the cartilage causes pain. However the pain which the plaintiff experiences is either grade 1, 2 (medication is not required for this type of pain) or grade 3 (which can be controlled) under certain circumstances.

[19] On a physical examination of the lower limbs, Dr Bila's findings were:

> *"There was a normal gait*
>
> *There were no scars*
>
> *There was no LLD*
>
> *The hips, knees, ankles and feet were normal"*

Ms Ferreira: The occupational therapist

[20] Ms Ferreira the occupational therapist testified that the plaintiff will struggle to cope with medium occupations and will not cope with heavy occupations because these types of occupations are likely to aggravate the pain he feels in the foot. He will experience difficulties in coping with a job which entail repetitive foot movements, like in the case of operating a vehicle, loading and off-loading goods, and pro-longed periods of standing and lifting of medium or heavy weights. However, after appropriate treatment with the application of pain relieving strategies and joint care protection education, he will be able to cope with medium occupations until retirement. The plaintiff is able to walk

for 510m in 6 minutes without pain and he is able to stand continuously for 30 minutes without discomfort in the foot. He is able to assume stooping, kneeling and squatting postures. He cannot though squat for more than a few seconds. He experienced no difficulty in ascending and descending stairs. He was able to sit for approximately one hour without any problems. He is able to lift a weight of 17.5 kg with low effort. High effort is required to lift a weight of 25kg and he feels discomfort in the foot when he does this. Lifting a 32kg weight was his maximum effort. He will always be an unequal competitor in the open labour market. His work options have been significantly reduced since the accident. He is suited to sedentary, light and medium occupations. However, because of his work history of being a general worker, packer and driver he will not be able to secure sedentary types of employment due to his lack of office based experience. Ms Ferreira was not aware of the plaintiff's qualification in computers. She testified that this will change his prospects of obtaining employment.

The industrial psychologist: Ms Kheswa

[21] Ms Kheswa testified that even though the plaintiff holds a qualification in computers, his employment options are very limited in the open labour market because of his lack of experience and the high rate of unemployment in South Africa. In her opinion, it is unlikely that the plaintiff will be in a position to obtain sedentary employment and even if he can secure such work, it is uncertain whether he will be able to maintain it. Insofar as work of an administrative nature is concerned, according to Ms Kheswa, the plaintiff's inexperience weighs against him. His prospects of finding employment of an administrative nature may improve after three years of obtaining further qualifications. The possibility of obtaining further qualifications will depend on the availability of financial resources.

[22] Ms Kheswa had not investigated whether jobs which entailed teaching fire safety are available. In her opinion, even if such jobs existed, it would be

difficult for the plaintiff to secure a teaching position in the absence of a teaching qualification.

Has the plaintiff suffered a loss of earnings (earning capacity) and the contingency deduction?

[23] It is unfortunate that the defendant did not present evidence. Three things are clear to me on the conspectus of the evidence: First, the plaintiff does experience pain. The intensity thereof cannot be assessed because he does not used medication to relieve the pain. Second, he is unable to work under circumstances where he is required to stand or walk for long periods. His ability to lift heavy objects is considerably limited. Third, he has and he will suffer some loss of loss of earnings (or more correctly earning capacity). I am not satisfied that the plaintiff is unemployable.

[24] The difficulty that presents itself for me arises from the absence of evidence from the defendant as to the plaintiff's prospects of obtaining employment and the type of employment this could be.

[25] Over a period of seven years (i.e. 2003-2009, both inclusive) the plaintiff was employed for roughly five years and three months (four years at ADT, 9 months at Masana, six months at the fire station) and engaged in studies for roughly ten (10) months (one (1) month at Stallion Academy, three (3) months basic computer certificate, six (6) months for fire fighter one certificate and a Hazmat certificate). Thus over a seven-year period he was either studying or working for six (6) years and one (1) month. Viewed in this light, the periods of unemployment are not as erratic as they otherwise appear. Over a period of seven (7) years the plaintiff was employed for five (5) years and three (3) months.

[26] I am not satisfied that the plaintiff has demonstrated on a balance of probabilities that he was indeed employed at New World. I therefore disregard

this and consider him to have been unemployed at the date of the accident. This being so, on the evidence he was last employed in January 2009 at the Fire Station. In 2009, he attended the Fire Fighter One and Hazmat Certificate Course for six (6) months. The period of unemployment would have been after he finished the six-month course. Assuming that he commenced his course study on 1 February 2009 and completed it by the end of July 2009, his was unemployed for five months before the accident. While I have disregarded the employment at New World, what the offer from New World demonstrates is that the plaintiff was in a position to obtain employment in the unskilled labour market. The plaintiff's ambition and his record at obtaining certificates are two matters that feature in assessing fair and adequate compensation. Based on the plaintiff's desire to obtain formal training based on his history of successfully completing courses, it is likely that he would have continued in the endeavour of qualifying himself for something other than unskilled labour. It is curious that none of the experts investigated this. However, the plaintiff would have been unemployed for that period.

[27] Insofar as a contingency deduction for past loss is concerned the norm is 5%. However, in this particular case the plaintiff's employment was erratic, albeit that at times he was attempting to advance himself. The plaintiff's erratic employment as well as the fact that he was unemployed at the time of the accident moves me to increasing the norm to 15%.

[28] This brings me to the contingency deduction for future loss of earnings. In considering his earnings under the "but for the accident" scenario, I cannot leave his employment history out of account. I also have to take account of the fact that it is highly likely that the plaintiff would have attempted to further his qualifications, and while doing this he would have been unemployed. On the other hand, I must consider whether the improvement in his qualifications would substantially have benefitted him. It seems to me not, if regard is had to the fact that even after he had obtained the basic computer certificate in 2007

this did not improve his prospects of obtaining a job requiring such skills. I set the contingencies for future loss of earnings on the "but for" scenario at 15%.

[29] Turning now to the contingency deduction "having regard to the accident". The plaintiff's witnesses are too pessimistic as to the plaintiff's prospects of employment. The gravamen of the plaintiff's complaint is the pain in the foot. The plaintiff complains of pain that according to Dr Bila measures as Grade 1 pain. At worst he experiences Grade 3 pain, which can be ameliorated with medication. This will allow the plaintiff to function. Another method of reducing the pain according to the experts is reconditioning the muscles through, for example, physiotherapy. The occupational therapist expects that "after appropriate treatment with the application of pain alleviating strategies and joint care protection principles as well as the implementation of reasonable accommodations [*sic*] he will then be able to cope with medium occupations until retirement". I accept that the plaintiff will experience difficulty in coping in a job rated in the heavy category, e.g. picking up very heavy items.

[30] The defendant has sought to persuade me to allow a 30% contingency deduction. This is untenable. (Considering that the defendant argued for a 15% deduction on the "but for the accident" this translates into a 15% disablement.) In my view the defendant's assessment is far too optimistic. I consider a 40% contingency deduction to be fairer and more reasonable.

[31] In summary, I assess deductions for contingencies as follows:

(a) 15% on the plaintiff's past loss of earnings;

(b) 15% on plaintiff's future loss of earnings on the "but for" scenario; and

(c) 50% on plaintiff's future loss of earnings on the "having regard to scenario".

[32] The actuarial calculations were as at 24 July 2015. The plaintiff is directed to obtain an updated calculation of the plaintiff's loss considering the deductions for contingencies as provided in paragraph 31(a) to 31(c) above and to prepare a draft order reflecting the amount of the compensation payable for past and future loss of earnings taking into account the contributory negligence of 30%. The draft order shall supplement this order.

[33] Consequently I make the following order:

(a) The defendant is liable for 70% of the plaintiff's proven or agreed damages resulting from the injuries he sustained in the motor vehicle collision which occurred on 1 January 2010.

(b) The defendant must provide to the plaintiff an undertaking in terms of section 17 (4)(a) of the Road Accident Fund, limited to 70%, in respect of the costs of the plaintiff's future accommodation at a hospital or nursing home or for the treatment of or rendering of a service or supplying goods to him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 1st January 2010.

(c) The defendant is to pay to the plaintiff general damages in the amount of R 105 000.00;

(d) The defendant is to pay to the plaintiff past and future loss of earnings as recalculated by the actuary on the basis set out in paragraphs 31 and 32 above.

(e) The defendant is to pay the plaintiff's taxed or agreed party-and-party costs on the High Court scale, which costs shall include the following:

(i) Counsel's fees on the High Court scale;

(ii) The reasonable taxable costs of preparing the trial bundles in terms of the Practice Directive dated 8 June 2010;

(iii) The reasonable taxable traveling costs, costs of preparing for pre-trial conferences, the preparation of pre-trial minutes and the costs for attendance of pre-trial minutes and the plaintiff's attorneys costs for attendance at pre-trial conferences;

(iv) The reasonable costs of the plaintiff's attorney for preparation for trial.

(v) The reasonable taxable costs of obtaining all expert/medico-legal reports from the plaintiff's experts which were furnished to the defendant.

(vi) The reasonable taxable transportation costs incurred in attending medico-legal consultations with the parties' experts and trial, subject to the discretion of the Taxing Master;

(vii) All payments to be made into Chuene Attorneys's trust account held at Absa Bank, account number […], reference Mr. Baloyi/MVA/JM/8805

(f) The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

(i) The plaintiff shall serve the notice of taxation on the defendant's attorneys of record;

(ii) The plaintiff shall allow the defendant 14 (fourteen days) court days to make payment of the taxed costs from date of settlement or taxation thereof;

(iii) In the event of payment not being timeously made, the plaintiff will be entitled to recover interest at the rate of 9% on the taxed or agreed costs from date of *allocator* to date of final payment.

(g) Payment by the defendant of interest at the *mora* rate on the sum of the compensation 14 (fourteen) court days of the order relating to the damages is made an order of court.

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S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

24 February 2016