

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

1/6/2016
Case No: 7510 / 2013

In the matter between:

GEORGE JABULANI TSOTETSI

Plaintiff

and

ROAD ACCIDENT FUND

DATE WHICHEVER IS NOT

REPORTABLE : YES/NO

OF INTEREST TO OTHER JUDGES : YES/NO

REVISED

Defendant

JUDGMENT

1/6/2016

SIGNATURE

HOLLAND-MÜTER AJ:

[1] The plaintiff, an adult male person, was involved in a motor vehicle accident on 25 June 2010. He was 36 years of age at the time of the accident, currently 42 years old. He was employed as a truck driver at Spaza Hardware, Lenasia, Johannesburg.

[2] He was injured whilst on duty and taken to the Lenmed Hospital, Lenasia. He was in hospital for 3 months. He sustained an open fracture of the left tibia and fibula which resulted in a series of operations whilst in hospital. This is the serious injury resulting in the plaintiff to be confined to the permanent use of crutches. He also suffered some minor injuries to his hand and a whiplash to the neck, these injuries not of a permanent nature. The injuries

are as follows:

- (a) Whiplash injury to the neck;
- (b) Head injury, although not serious with no permanent sequella;
- (c) Back injury with muscle spasms;
- (d) Injury to the upper limbs;
- (e) Injury to the hand; and
- (f) Fractures to the left tibia and fibula (already mentioned).

[3] Four pre-trials took place between the parties, the important pre-trial being the 3rd that took place on 21 October 2015. See the minutes of this meeting in the Bundle: Index to Pleadings on p 23 -26. The merits of the matter was conceded 70/30 in favor of the plaintiff. It was further recorded on the 4th pre-trial held on 14 April 2016 that only the quantum of damages was to be adjudicated on 25 April 2016. See p 27-28 of the bundle above.

[4] The matter came before me on the 25th of April 2016 and proceeded on the 26th and 28th of April 2016. The parties submitted written heads of arguments at the end of the proceedings. The matter was at first set down for trial on 26 October 2015, but was postponed until 25 April 2016 because defen-

dant indicated that it did not intend to deal with the matter before the claim submitted by the plaintiff in terms of the provisions of the Compensation for Occupational Injuries Act, 130 of 1993 was not finalized. There will be referred to this as the COIDA award. The entry on the court file on 26 October 2015 indicates that the costs for that day was to be costs in the cause.

- [5] At the beginning of the trial on 25 April 2015 the defendant indicated that the defendant wants the matter to be postponed again pending the final COIDA award.
- [6] After hearing arguments, my ruling was that the matter should proceed as it is not necessary to wait for the final determination by the Commissioner with regard to the COIDA award. All that needs to be done is to inform the Commissioner of any award made by this court when finalizing the COIDA award. It is an almost daily occurrence in this court that matters are finalized without any final COIDA award available.
- [7] The plaintiff testified and although he was cross examined, in detail, he impressed the court as an honest witness. There is no need to make any credibility finding on his evidence.

- [8] The plaintiff confirmed the injuries sustained in the accident as set out in the particulars of claim and expert reports. The most serious injury is that to the left leg, open tibia and fibula fractures and, as recorded by the orthopaedic surgeon on behalf of the defendant, Dr Gantz, a 30% probability of amputation of the plaintiff's lower leg. See Bundle: Expert's reports on p 117.
- [9] The probable amputation of the lower leg was also mentioned by Dr Kana at the Lenmed Hospital as early as on the date of the accident. See p 19 in the bundle of pleadings. Dr Kana repeated this fear during later treatment of the plaintiff during July 2010. See p 22 in the Index Bundle. The plaintiff confirmed this during his evidence, but stated that he was afraid of losing his leg.
- [10] The plaintiff explained how he tries to manage the chronic discharge from the left leg. He described it as "rotten". See Dr Kumbirai's report on p 54. This is also evident from the other experts and it is described as '2 draining sinuses' by Dr Gantz on p 116. Dr Lekgwara describes it as 'pus oozing from the leg'. See p 13. Dr Gantz examined the plaintiff on 6 November 2014 (more than 4 years after the accident) and found that the tibia was 'united

with displacement' and that the wound developed 'sepsis'. He therefore concluded the 30% probability of an amputation of the leg. This all amounts to the unanimous opinion by the experts that the plaintiff is totally unemployable as a result of the accident. It must be mentioned that the plaintiff was a truck driver before the accident and can no longer continue as a driver. His level of education and age in all likelihood contributes to this opinion.

[11] After closing of the cases by both parties, the plaintiff moved for an amendment of par 9 in the particulars of claim, to substitute the amounts previously claimed. The defendant opposed the amendment sought by arguing that it was prejudicing the defendant. The court allowed the amendment in that it was a mere amendment to the amounts claimed. I can mention that amendments like these often occurs and there can be no prejudice to the defendant in any way.

[12] The parties made oral submissions and also in their heads as to the amount to be awarded for (1) general damages and (2) for the loss of future earnings. I am indebted to counsel for these written submissions. I will now deal with the quantum to be awarded for the damages to the plaintiff.

FUTURE MEDICAL EXPENSES:

- [13] This is covered by the Undertaking as provided for in terms of section 17(4)(a) of the Road Accident Act, the Undertaking limited to 70% of any future medical expenses incurred by the plaintiff which are accident related.

GENERAL DAMAGES:

- [14] The court is, when awarding an amount for the *non-patrimonial or non-pecuniary damages* (the 'general damages'), guided by the fundamental principles which relate to the assessment of these kind of damages. I do not intend discussing these principles in detail, suffice to state the following:

14.1 The age, sex, status, and relevant physical and psychological characteristics of the plaintiff may influence the award, eg physical state and other aspects of the plaintiff at the time of the accident as to endure pain or not etc. For more see **Klopper, The Law of Third Party Compensation 1st Ed on p 144.**

14.2 The judge or magistrate will assess the award to what he/she deems to be *fair and reasonable* under the circumstances, the fairness and

reasonableness towards the plaintiff and the defendant, i.e. the Fund.

14.3 The list is not exhaustive, but include the pain endured, the intensity of the pain, the disfigurement of the body of the plaintiff, loss of amenities, shortened life/working expectancy of the plaintiff etc. See **Klopper p 150 on.**

14.4 Previous comparable awards, adjusted to reflect current values, are also taken into account when calculating the reasonable and fair award to be made for general damages. See **Road Accident Fund v Marunga 2003 (5) SA 164 SCA at 169 E-F.**

[15] The injuries sustained by the plaintiff are listed above. The most serious injury is the open fracture to the tibia and fibula, the fracture is not united at present. It is almost certain that after six years, the fracture is still not united and the constant ooze from the open wound is of serious concern. The 30% probability of an amputation has to be taken into account. The plaintiff will in all probability never walk without crutches again. He may even need a prosthesis in future should his leg be amputated. He is considered totally unemployable in future by all the experts. This impacts on his personal life

and he is dependable on others for many things in his daily life. It was clear from his movements in court that his balance was affected, he almost fell from the witness stand when leaving it because of his lack of balance and walking on crutches.

[16] The plaintiff was a healthy man before the accident. He played social soccer before the accident and did his own gardening. He was financially independent and cared for his family. See the reports by both occupational therapists. There is no need to repeat the contents of the reports. Suffice to state that both orthopaedic surgeons calculated the plaintiff's WPI (whole person impairment) to be at least 30%. The plaintiff's left leg shows a 7 cm shortening and septic non-union of the open fracture to his left leg. See both orthopaedic reports.

[17] Various case law was referred to by the counsel in their heads and during argument in court. I do not intend to summarize all the cases, but will refer to the most applicable cases. The two most similar cases in my view are:

17.1 Msiza v Road Accident Fund 2014 (7E2) QOD Vol 7 where the plaintiff suffered the amputation of a leg above the knee, with lacera-

tions to the scalp. She was unable to walk as a result of the amputation because she did not have a prosthesis. She used a walking frame to move about. She lost the ability to do any type of work and could not perform any house hold duties. She was awarded R 700 000,00 during 2014, the equivalent today almost R 772 000,00.

17.2 Protea Assurance Co Ltd v Lamb 1970 (2E3) QOD 117 A where the plaintiff, aged 29 at the time, sustained injuries to his legs involving a closed fracture of the left femur and a compound fracture of the right tibia and fibula. After several skin grafts over several years, he had to wear a built up shoe with limited movement of his knee and ankle. His personality changed and he gave up all extra-mural activities such as playing rugby and dancing. He underwent various procedures during the following 4 - 5 years after the accident. He was awarded R 20 000,00 for general damages after appeal, the converted value today almost R 1 222 000,00. Mr Dube on behalf of the defendant submitted that the court should only award R 400 000,00 for general damages in his heads of argument, but in par 2.13 of his heads recommended an amount of between R 400 000,00 and R 500 000,00 for

general damages. I have already mentioned above that the plaintiff moved for an amendment of the monetary values in the particulars of claim, the amendment granted by the court after hearing arguments from both counsel.

- [18] I am therefore satisfied that an award of **R 850 000,00** less 30% apportionment will be a reasonable and fair award for general damages in this matter. The amount after applying the 30% apportionment is **R 595 000,00**.

FUTURE LOSS OF EARNINGS:

- [19] The plaintiff's actuarial calculation was done by GRS Actuarial Consulting and was available when the trial commenced on the 25th of April 2016. Counsel for the defendant informed the court on the 26th of April that the defendant will need two to three weeks to obtain their actuary's calculation and requested a postponement therefore. The request was refused and by some 'miracle' the calculation was available on the 28th of April. No reason for the sudden availability of the report was tendered. When the two calculations were compared, the total loss of income were R 27 230,00 apart on a figure of R 2 359 800,00 by the defendant's actuary and R 2 332 570,00 by

the plaintiff's actuary. No contingencies were applied by the actuaries.

[20] Both counsel made their submissions as to the percentage of contingencies to be applied by the court. The plaintiff applied a 5% contingency on the past loss and 10% on the future loss, a total loss of R 2 165 202,20. The defendant applied a 10% pre-morbid and 15-20% post-morbid contingency arriving at a total loss of R 1 611 940,00 - R 1 517 120,00. See the respective written heads of arguments by both counsel.

[21] When applying a certain percentage as to the contingencies, the normal percentage is 5% pre-morbid and 10% post-morbid unless there are specific contingencies taken into account. See **Klopper supra on p 198**. The normal percentages applied in cases are 5% pre-morbid and 10% post-morbid. To apply a higher percentage contingency, specific circumstances need be present, such not in this matter. I could find no reason why not to apply the percentage submitted by the plaintiff's counsel. I therefore find that the plaintiff should be compensated as follows:

Pre-morbid (income if the accident did not occur);

Past loss: R 510 168,00 less 5% = R 484 659,60.

Future loss: R 1 907 785,00 less 10% = R 1 717 006,60

Total loss pre-morbid had the accident not occurred: R 2 201 666,20

Post-morbid (income now that the accident occurred):

Past loss: R 38 383,00 less 5% = R 36 463,85.

Future loss: none.

Loss of future earnings to be awarded:

R 2 201 666,20 (Pre-accident) less R 36 463,20 (post accident)

= R 2 165 202,40.

This amount should be apportioned by the 70/30 apportionment as agreed to by the parties at the 3rd pre-trial, the amount to be **R 1 515 641,60.**

COSTS:

[22] Costs normally follows success. The plaintiff was successful and should be awarded costs of the action. Counsel for the plaintiff submitted that such order should be on a higher scale than the usual in view of the defendant's alleged delaying tactics during the trial. After considering the arguments by both counsel, I am however not inclined to go that far to impose a punitive cost order.

ORDER:

The following order is made:

- [1] The defendant is to pay the plaintiff the amount of **R 2 110 641,60** (Two Million One Hundred and Ten Thousand Six Hundred and Forty One Rand and Sixty Cents) in respect of damages for personal injuries sustained by the plaintiff in a road accident on 25 June 2010, the amount payable on or before 28 June 2016;
- [2] The defendant is ordered to furnish an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Act, 59 of 1996, in respect of future accommodation in a hospital or nursing home or treatment of/or rendering services or supply goods to the plaintiff, George Jabulani Tsotetsi, arising from injuries sustained in the above mentioned motor vehicle accident which occurred on 25 June 2010;
- [3] The defendant must make payment of the plaintiff's agreed or taxed party and party costs on a High Court scale which costs shall inter alia include the following:
 - 3.1 The fees of senior/junior counsel on a High Court Scale;

3.2 The costs of the expert witnesses' medico-legal reports and the actuarial report of which notice has been given, the costs to include the preparing of the joint minutes and addendums between the experts;

3.3 The costs shall include the costs for the 26th of October 2015, the 25th and 26th of April 2016 and the 28th of April 2016 on a party and party High Court scale;

[4] The following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs:

4.1 the plaintiff shall serve the notice of taxation on the defendant's attorney of record;

4.2 the plaintiff shall allow the defendant 10 (ten) court days to make payment of the taxed costs from date of settlement or taxation thereof;

4.3 should payment not be effected timeously, the plaintiff will recover interest at the rate of 10,5 % per annum on the taxed or agreed costs from date of allocator to date of final payment.

[5] Should the payment of the capital amount of **R 2 110 641,40** not be effected on 28 June 2016, the plaintiff will be entitled to recover interest on the said amount at the rate of 10,5% per annum from 1 July 2016 to date of final payment.



HOLLAND-MÜTER AJ

BY ORDER OF COURT
REGISTRAR OF THE HIGH COURT
PRETORIA