


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2484/2013

9/2/2016

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO
(3)	REVISED.
9 February 2016 DATE	
 SIGNATURE	

In the matter between

M.C METSOAMERE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MADIMA, AJ

[1] The plaintiff is a 45 year old male in the employ of the South African National Defence Force ("SANDF") as a procurement officer. He lives in Mhluzi, Middleburg, in Mpumalanga Province. The defendant is the Road Accident Fund ("RAF").

[2]. On the morning of 22 November 2010 at about 07:16 the plaintiff was the driver of motor vehicle with registration letters and numbers BJL 755 MP ("the insured driver") when a collision occurred between his vehicle and another motor vehicle with registration letters and numbers DTX 579 MP ("the insured vehicle") driven by one V.N Kotsane ("Kotsane").

[2]. In his particulars of claim the plaintiff alleges that Kotsane was the cause of the collision due to his negligent driving. Kotsane, according to the plaintiff *inter alia*, drove his motor vehicle at an excessive speed and created the circumstances that caused the collision, he failed to keep a proper lookout, he failed to control his motor vehicle and failed to avoid the collision.

[3]. The plaintiff was taken to the Midmed Hospital in an ambulance where he stayed for three and not five days as stated in his particulars of claim. His injuries included injuries to his chest, right clavicle and left hand. He was found to experience difficulties sleeping on the affected side. He feels pain when carrying, lifting and pushing heavy objects, and finds it difficult to work with hands above shoulder height. He was treated at the hospital and upon his discharge was provided with pain killers and anti-inflammatories and wore a sling for three weeks thereafter.

[4]. The defendant naturally denies that Kotsane was the cause of the collision. For its part the RAF states that it was the plaintiff that caused the accident in that *inter alia* he failed to keep a proper lookout and travelled at an excessive speed.

[5]. The plaintiff seeks compensation against the defendant in the amount of R1 300 000.00. Of this amount R100 000.00 is for past medical expenses, R400 000.00 is for future medical expenses, R300 000.00 is for loss of income, R400 000.00 is for future loss of income and R100 000.00 for general damages.

[6]. In preparation for the trial the plaintiff secured the services of Drs Oelfse Medico-Legal Services who examined him and provided a medico-legal report in preparation of the trial. The doctors' report states that the plaintiff sustained chest injuries and injury to the right clavicle as well as on his left hand

[7]. The medico legal report also states that the plaintiff's neurological examination revealed a mild atrophy of the scapular muscles, as well as soft tissue injury to the right clavicle and shoulder joint. There is residual pain and discomfort.

[8]. The report further states that there is a 10-20% loss of workplace productivity of the plaintiff. His duties as procurement officer entailed standing, walking and handling light objects. He is hampered, because of his injuries from carrying heavy objects. His overall productivity as stated in the report has decreased by up to 20%.

[9]. The plaintiff also provided another report by Burger Radiologists Inc who stated that the plaintiff has internal fixation of the fracture of the shaft of the third metacarpal bone with plates and screws. Dr Labuscagne & Partners also provided a report on behalf of the plaintiff. The doctors reported that a plate and screws could be noted in position in the third metacarpal and the old fracture in this region has healed

with a modelling deformity. They conclude that there is a slight cortical thickening in the medial aspect of the fifth metacarpal.

[10]. The plaintiff was further examined by Dr Theo Enslin who also provided a comprehensive report. In this report the doctor recommended that the plaintiff be examined by an occupational Therapist, Industrial Psychologist, Clinical Psychologist, a Plastic and Reconstruction Surgeon as well as an Orthopaedic Surgeon. Dr Enslin concluded that the plaintiff has suffered serious long term impairment which will warrant an award for damages. The plaintiff's work output will remain limited and will continue to affect him in future. He will benefit from future conservative and possibly surgical treatment.

[11]. The parties appeared before me on 11 February 2015. They had earlier agreed on certain heads of damages. Pursuant to that agreement I *inter alia* made the following order:

1

- 1.1. The defendant is to pay the Plaintiff's attorneys the sum of R559 277.43 (Five Hundred and Fifty Nine Thousand Two Hundred and Seventy Seven Rand and Forty Three Cents) in respect of past medical and hospital expenses (R24 833.43); general damages (R150 000.00) and loss of income as a soldier of the National Defence Force (R384 444.00), as partial finalisation of the Plaintiff's claim;

The Plaintiff's Attorneys' trust account details are as follows:

Account Holder:	Van Zyl Le Roux Inc
Branch:	ABSA Van der Walt Street
Branch Code:	323345

Type of Account: Trust Account

Account Number: 0030 147774

- 1.2. In the event of default on the above payment , interest shall accrue on such outstanding amount at 09.00% per annum calculated from due date until the date of payment;
- 1.3. The judgment with respect to the issue of loss of income in the capacity as salesman for ASSUPOL is reserved.

2

- 2.1. The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4) (a) of Act 56 of 1996, in respect 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 the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 22 November 2010.
- 2.2. if the Defendant fails to furnish the undertaking to the Plaintiff on due date, the Defendant shall be held liable for the payment of the taxable party and party additional costs incurred to obtain the undertaking.

3

The Defendant to pay the Plaintiff taxed or agreed party and party costs in the above mentioned account, for the instructing and correspondent attorneys, which costs shall include, but not to be limited to the following:

- 3.1. All reserved cost to be unreserved, if any
- 3.2. the fees of Senior Counsel;
- 3.3. the cost of obtaining all expert medico- legal and any other reports of an expert nature which were furnished to the Defendant;
- 3.4. the reasonable taxable qualifying, preparation and reservation fees of all experts, if any;
- 3.5. the reasonable traveling and accommodation cost, if any, incurred in transporting the Plaintiff to all medico-legal appointments, and attendance at court for trial purposes;

- 3.6. the above-mentioned payment with regard to costs shall be subject to the following conditions
- 3.6.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorneys of record; and
- 3.6.2. the Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs.

No contingency fee agreement exists between the Plaintiff and the Plaintiff's attorneys.

Loss of Assupol earnings past and future

[12]. As per my above order, what remained to be determined was the issue of loss of past and future commission income of the plaintiff in his capacity as a salesman for Assupol.

[13]. Dr A.C Strydom, an Industrial Psychologist states in her report that the plaintiff started work as a part-time consultant for Assupol on 1 May 2010. The plaintiff received a commission of R1 000.00 for each policy sold. He sold on average five policies and thus made R5 000.00 per month in commission. Plaintiff was a good salesman and was rated 7/10 by Assupol. There were no additional benefits at Assupol such as increases or prospects of promotion, medical aid or pension. There was no overtime as the plaintiff worked at his own time and pace. The plaintiff ate was he killed.

[14]. In the report the plaintiff stated that pre-morbid he earned between R4 000.00 and R5 000.00 per month in commission. Post-morbid the plaintiff's output was reduced to 4/10 as he now could no longer drive long distances to find clients. He

only is able to sell between 2 and 3 policies per month. The plaintiff has however retained his job at Assupol. Post-morbid the plaintiff earns between R2 000.00 and R3 000.00 per month commission. Dr A.C Strydom based her findings on collateral information obtained from one Ms Madihlaba, a manager at Assupol.

[15]. Dr A.C Strydom concluded in his report that the plaintiff pre-morbid would have continued selling policies on a part-time basis and would have been able to increase his earnings in this regard. The plaintiff continues to perform some work for Assupol as before the accident however based on collateral information he earns an average of R2 000.00 per month which is about R24 000.00 per annum. In the same report Dr A.C Strydom makes reference to a report by Dr L.A Oelofse who noted that *"this patient will be able to work until the normal retirement age of 65 after successful treatment."* This evidence was also not challenged by the defendant.

[16]. The expert reports presented on the pre and post morbidity of the plaintiff went largely unchallenged. I recall vividly enquiring of the legal representative of the defendant whether he was sure he had no further questions for the plaintiff during cross examination.

[17]. The question is whether a court is bound to accept the unchallenged evidence of a witness. It is a well-established principle in law that generally, a party must challenge in cross examination the evidence of any witness of the opposing party if she wishes to argue that evidence given on a particular issue should not be accepted. See *Browne v Dunn* [1894] 6 R.67. HL. Failure to cross examine a witness on a particular important point may lead the court to infer that the cross examining party

accepts the witness' evidence, and it will be difficult to suggest that the evidence should be rejected.

[18]. As already stated above the plaintiff testified that he earned R5 000.00 per month in commission before the accident. He testified that he now earned between R2 000.00 and R3 000.00 per month as a result of his inability to drive long distances to source clients.

[19]. I have no reason to doubt the evidence of the plaintiff. There was nothing in his evidence that indicated that he was economic with the truth. He was not confronted and challenged by the defendant's legal representative on his evidence.

[20]. It is trite that the court can reject the unchallenged evidence of a witness only when there is doubt about the credibility of a witness and her evidence. The question I ask myself is whether the plaintiff's evidence was tainted in anyway. Does the court have any reason to disbelieve the witness' evidence?

[21] Although the witness did not provide any proof of his earnings pre and post morbid, I am persuaded to accept his evidence for two reasons. The first is that his credibility and evidence was not challenged by the defendants. The second reason is that the plaintiff is a credible witness.

[22]. The actuarial report on loss of income states that the loss in past earnings pre-morbid was in the order of R280 364.00. The report makes a contingency deduction of 5% and results in the total loss of past earnings at R266 346.00. Post-morbid the

loss in past earning amounts to R94 022.00 and allowing a 5% contingency deduction results in the amount of R89 321.00. The difference between the two amounts pre and post morbid is R177 025.00. The defendant did not dispute these actuarial calculations.

[23]. With regard to the loss of future earnings the amount pre-morbid is calculated at R1 097 634.00. Allowing a 15% / 25% contingency deduction leaves the amount of R932 989.00.00. Post-morbid the amount drops to R369 884.00 and allowing a 15% / 25% contingency deduction leaves an amount of R277 413.00. The difference between the two amounts is in the order of R727 750.00 and allowing a 15% / 25% contingency deduction leaves an amount of R655 576.00

[24]. The difference in the loss of past earnings of R177 025.00 added to the loss of future earnings of R655 576.00 amounts to R832 601.00 which represents the pecuniary loss, past and future for the plaintiff. These calculations were not challenged by the defendant.

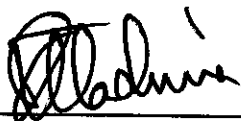
[25]. As I have stated above, my hands are tightly tied. I cannot disregard the unchallenged evidence of the expert reports as well as that of the plaintiff that I have found to be credible.

[26]. In the circumstances I make the following order:

[26.1]. The defendant is liable to pay to the plaintiff the amount of R832 601.00.

[26.2] The above amount is to be paid into the Trust Account of the plaintiff's attorneys referred to in paragraph 11 above, within 30 days.

[26.2]. In the event of default on the above payment, interest shall accrue at 09.00% per annum calculated from due date until the date of payment;



TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Plaintiff:
Instructed by

Adv N Diedericks SC
VZLR Attorneys
Pretoria
Tel: 012 435 9444

On behalf of the Defendant:

Instructed by:

T.M Chauke Incorporated
Pretoria
Tel: 012 326 8711/2
5261

Dates of Trial:
Date of Judgment:

11 February 2015
9 February 2016