

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



(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	<u>REVISED</u>
..... DATE	..... SIGNATURE

**CASE NO: 48272/2014**

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2016 -05- 13
JUDGE'S SECRETARY REGISTRAR'S CLERK
GRIFTER VAN DIE HOE HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between

**DIBAKENG SONNYBOY MOTHOA**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**J U D G M E N T**

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**MALI J:**

- [1] The plaintiff is a fifty six year old male former general worker with grade 6, as his highest academic qualification. The plaintiff is the Road Accident Fund. The plaintiff sued the defendant for damages resulting from injuries he sustained in a motor vehicle accident.

- [2] The claim in respect of general damages was settled in an amount of R200 000.00. The defendant further agreed to furnish the plaintiff with an undertaking in respect of future medical expenses in terms of **section 17(4)(a) of the Road Accident Fund Act 56 of 1996**. Consequently, the only issue for determination is the claim for loss of income. The defendant challenges the plaintiff's claim.
- [3] On 2 December 2009 the plaintiff who was 49 years old at the time; was hit by a motor vehicle with unknown registration number, driven by the unknown driver. The accident occurred at or near Auto –Tyre & Exhaust, Marble Hall, and Limpopo at the plaintiff's former work place.
- [4] The accident occurred whilst the plaintiff was changing the wheel of a stationery car. On 3 December 2009 he was admitted at Louis Pasteur Hospital in Pretoria. He was absent from work for a period of 5 days. Upon his return to work he resumed his normal pre-accident duties until he resigned in September 2014. This is as a result of him not being able to cope with the pain anymore. According to the defendant there is no basis for plaintiff's resignation from work; hence the claim for loss of income is impugned.
- [5] According to the medical reports the plaintiff suffered bodily injuries described as follows:
- 5.1. Left ankle (soft tissue injury);
- 5.2. Right knee injury.

## LOSS OF INCOME

- [7] The plaintiff must prove that he will probably suffer financial loss or diminution of his income. In **Sandler v Wholesale Coal Suppliers Ltd**<sup>1</sup> it was stated that:

*“It is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the Court of the duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African Courts”.*

- [8] In **Rudman v Road Accident Fund**<sup>2</sup>, the Court said:

*“There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.”*

- [9] The plaintiff, according to the report of the Specialist Surgeon, **Advocate/Dr Gerhard Kaiser** (“Dr Kaiser”), states that the extent of the plaintiff’s injuries are extremely severe as far as he has suffered ostratritis on his right knee. As a result the plaintiff’s knee was replaced and will require another replacement in a period of 5 years.

- [10] Dr Kaiser further reported that the plaintiff finds it extremely difficult to continue with his activities. He is unemployed and depends on his wife’s income.

- [11] **Dr Gwen –Mare Beatrix Cloete** (“Dr Cloete”) the occupational therapist at paragraph 4.5 of her report dated 19 January 2016 , paginated page 18, reported as follows:

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<sup>1</sup>1941 (A) 194

<sup>2</sup>2003(2) SA 234 (SCA) at para [11]

*“The Candidate’s current incident-related complaints according to the client-*

- *Left lower back pain*
- *Right knee pain*
- *Non-intrusive-left ankle pain*
- *Not being able to sleep on the left side of his body due to pain in his left lower back, especially in winter.*
- *Struggles to stand for more than 30 minutes*

*His right leg hurts when he walks for more than 30 minutes”*

[12] Dr Cloete at paragraph 5.2.3 of her report states that the client is able to safely lift a capacity which requires heavy duty. She further noted that the client’s worker role as a general worker is classified as a medium physical demanding job.

[13] At paragraph 5.5.3 Dr Cloete reported that functional impairment noted was consistent with the impairment related to the client’s diagnosis. In respect of the plaintiff’s loss of amenities of life, at paragraph 6.7. page 24 Dr Cloete states;

*“The injuries sustained in the accident have caused a moderate loss of enjoyment in the client’s life. Prior to the incident he was a general worker who enjoyed spending time with his family, doing karate, and playing soccer. Pre accident he was independent in all self- care tasks. He would assist his wife with household chores. He also enjoyed gardening in his small garden at home.*

*Following the accident he remained independent in all relevant day to day activities although he does experience pain when he needs to engage in tasks that require flexion of his lower back and when placing weight through his right knee for a period of time. Post injury the client*

now struggles to maintain his garden and home tasks due to pain. His worker role has also been affected. He reported that he is unable to do karate and play soccer because of the pain in his left lower back and right knee while running, weight-bearing on his right leg; and when he needs to flex his left lower back during the game. **At present the client would benefit from assistance incorporating joint protection principles and energy conservation techniques in order to facilitate better joint hygiene for his lower back and preserve the joint integrity of his right knee. A work visit and home visit would also further assist his overall comfort levels.**(own emphasis).

Overall, it is of the writer 's opinion that the client's documented injuries to date, seems to have had a moderate impact on his work, leisure and home spheres"

[14] According to the plaintiff's counsel the above observations show that the plaintiff did not exaggerate during his examination by Dr Cloete. It has to be borne in mind that this report was compiled on 19 January 2016, more than 5 years from the date of accident.

[15] Dr Ben Moodie ("Dr Moodie") the Industrial Psychologist; in his report dated 22 February 2016 at page 15 he states as follows;

*"Even though in theory he might be able to continue with his previous job which is classified in the medium physical capacity, the fact that he resigned 5 years post-accident as a result of him not being able to cope with pain any longer, is indicative of the severity of the pain and that as he ages the pain will become worse to such an extent that the total knee replacement will be inevitable as indicated by the Special Surgeon.*

*Due to his los scholastic school qualification and work experience in any other lighter type of work (sedentary/ clerical) then he would not be able to obtain work in such a field. He is already 56 years of age and it is*

*unlikely that he would be trained in such a field in order to obtain permanent employment. He would, as a result of this, be extremely compromised in terms of trying to obtain any form of employment."*

- [16] The defendant's case is that there was no basis for the plaintiff's resignation from work. The defendant did not call any witnesses and it neither submitted any experts report.
  
- [17] It was submitted on behalf of the defendant that none of the plaintiff's expert reports recommended his resignation from work. It is common cause that the plaintiff resigned 5 years post accident. In my view if the plaintiff's intention was to exploit defendant's fund he would have resigned immediately after the accident. Instead he persevered under challenging circumstances caused by the pains resulting from the accident; until the pain was no longer bearable.
  
- [18] It appears that the defendant counsel is oblivious to the conclusion of Dr Ben Moodie, the Industrial Psychologist. Dr Moodie in dealing with plaintiff's post-accident income carefully considered his potential scholastic school qualification, his age *inter alia* and found that the plaintiff would be extremely compromised in terms of trying to obtain any form of employment. The plaintiff's limited future working capacity as a result of lessened competitive edge is well articulated by Dr Moodie. Dr Moodie's report is informed by Dr Kaiser' report the Specialist surgeon. It would seem as though little, if any, preparation had been given to the defendant's case.
  
- [19] Having regard to the above the plaintiff has proved that due to the injuries he sustained will suffer future loss of income.
  
- [20] In *casu* the plaintiff's past and future loss earnings and his earning capacity have been calculated by **George Schwalb** of GRS Actuarial Consulting as at 22 February 2016. The basis of the calculation and the

assumptions made were undisputed and not counter-attacked. According to the report, the plaintiff's past income if the accident did not occur is **R528 226** and future income is **R766 080**, thus bringing the total income to **R1,294, 306**.

[21] Dr Schwalb's calculation that the accident did occur, is **R391,140** in respect of past income and **NIL** for future income. Thus living the total income at **R391,140**. The above figures do not take into consideration contingencies.

[22] Contingencies have been described as the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned.<sup>3</sup> In his book *The Quantum Yearbook*, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of employment, promotion prospect, divorce etc.

[23] Koch refers to the following as some of the guidelines a regards contingencies:

- "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.

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<sup>3</sup> AA Mutual Insurance v Van Jaarsveld 1974(4) SA 729 (A)

- Sliding scale: 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on **Goodall v President Insurance**<sup>4</sup>. 1978 (1) SA 389.
- Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[24] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[25] In this matter, as earlier stated there are no opposing expert reports from the defendant. I did not understand counsel for the defendant to be arguing that the actuarial report was incorrect, biased and unfair or based on incorrect principles.

[26] Under the circumstances therefore, I am of the view that 5% contingency should apply in calculation for past income and 15% contingency for future income. The said contingencies are equitable and will serve to balance the interests of both parties.

[27] The plaintiff's claim is calculated as follows:

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<sup>4</sup>1978 (1) SA 389



General Damages	R200 000.00
Past Income	R130 232.00
Future Income	R651 168.00

[28] Accordingly I make the following order:

28.1. The defendant is ordered to pay the plaintiff the sum of R981, 400.00 (Nine hundred and eighty one thousand four hundred rand)

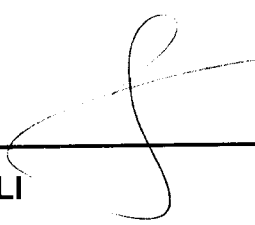
28.2. The defendant is ordered to provide the plaintiff with an undertaking for future medical expenses in term of **section 17(4)(a) of the Road Accident Fund Act 56 of 1996**;

28.3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs, which shall include

28.3.1 the costs of counsel;

28.3.2 the costs of obtaining the reports of and the reasonable taxable preparation and/or qualifying fees of the following experts;

1. Dr G H R Kiaser (Specialist Surgeon)
2. Gwen-Marie Cloete (Occupational Therapist)
3. Ben Moodie (Industrial Psychologist)
4. Geogre Schwalb (Actuary Consulting)



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**NP MALI**  
**JUDGE OF THE HIGH COURT**  
**PRETORIA**

## **APPEARANCES**

**FOR THE PLAINTIFF:** Adv. JA du Plessis

Instructed by: O Joubert Attorneys

**FOR THE DEFENDANT:** Adv. T Lekalakaia

Instructed by: TsebaneMolaba Incorporated

Date of hearing: 22 February 2016

Date of judgment: 13 May 2016