

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 70817/14

DATE: 19 May 2016

E.E. MTHEMBU

Plaintiff

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MABUSE J:

[1] This is a claim for payment of money.

[2] The plaintiff in this matter is an adult male who resides in Hlalanikahle, a section of Witbank, in the province of Mpumalanga. The plaintiff sues in this matter in his

personal capacity for the injuries that he sustained on 30 March 2011 when at about 06h58 the motor vehicle in which he was a passenger was involved in an accident on the N4 near Witbank.

[3] The defendant in this matter is a legal person who has been constituted as such by the provisions of s. 2 of the Road Accident Fund Act 56 of 1996 ("The Act"). The head office of the defendant is located at 3 I S, M, in Pretoria.

[4] By law the defendant is obliged to compensate people who sustain damages arising from injuries resulting from the driving of motor vehicles in the public roads of the Republic. Such incident which gave rise to a person sustaining injuries as a result of the negligent driving of a motor vehicle arose on 30 March 2011. The plaintiff was involved in the said incident.

[5] As a consequence of the said accident, the plaintiff sustained the following injuries as set out in the RA41 form and other available records, a comminuted fracture of the right femur which was treated by way of an open reduction and internal fixation.

[6] At the time of the accident, the plaintiff was employed as an assistant panel beater at The Dent Doctor in Witbank. Three months after the accident the plaintiff returned to his pre-accident employment where, according to the report that the plaintiff gave to Dr. Geoff Read, the orthopaedic surgeon, he continued with his pre-accident work duties which involved running around the workshop and carrying on heavy items.

[7] In his combined summons, issued by the registrar of this Court on 26 September 2014, the plaintiff claims payment of a certain amount of money in respect of past loss of earning ("reeds gelede verlies aan verdienste") and estimated future loss of earning capacity ("geraamde toekomstige verlies van verdienvermoe").

[8] At the inception of the trial, Mr. Marx, counsel for the plaintiff, indicated to the Court that the

dispute between the parties was whether the plaintiff was still employable in his pre-accident industry. In other words whether the plaintiff could still do his duties as an assistant panel beater as he used to do before the accident in question when he was asked to confirm, Mrs. Kgwale, the defendant's counsel, did not do so. In her turn she told the Court that the dispute between the parties was whether the plaintiff was, following the nature of the injury he sustained during the aforementioned accident, still employable.

[9] In support of the plaintiff's case, Mr. Marx handed the Court a bundle of experts' reports which the Court marked "A". The Court was informed that the defendant had admitted the reports and that the said bundle was handed in by consent. This was subsequently confirmed by Mrs. Kgwale. In addition Mr. Marx led the evidence of two witnesses, the plaintiff and one, Mrs. Geraldine Lourens.

[10] The plaintiff told the Court in his testimony that he sustained some injuries during a motor vehicle accident that took place during March 2011. The date of the said motor vehicle accident was not in dispute. Those injuries that he sustained were head injuries and a broken right femur. Having testified about the injuries he then testified about the history of his work. He left school at the age of 21 years. After leaving school he did piece jobs. He thereafter worked at a Woodmill where he did maintenance of Woodmill machines which involved having to change their chains and/or oil. From Woodmill he went into panel beating, the job that he had been doing. This was a job that required a lot of work. After the motor vehicle accident in question, he could not do it perfectly. All this is so because of the injury on his left femur. There is no chance of him getting another employment if he were to lose his current job. He was also unable to do work that required him to sit down because the hip would become painful if he had to rise. Moreover he

has not been trained in doing any type of work that will require him to sit down, especially in the panel beating industry.

[11] Mrs. Geraldine Lourens (“Lourens”), an occupational therapist, was the plaintiff’s second witness. Her expertise as such was never called into question. In her testimony she told the Court that, as an occupational therapist at Rita Van Biljon Occupational Therapist, she evaluated the plaintiff on 16 April 2015. After the interview she prepared a report which contained her observations about the plaintiff. The report was part of the bundle “A” presented to Court by Mr. Marx. The plaintiff’s pre-accident work was described as follows. The plaintiff’s main work tasks related to physical labour with regards to panel beating tasks within the workshop. That entailed him to work in elevated positions, to remove sections of the vehicles with two hands, more or less 15 kilograms. He would be required to work within a standing with forward bending position when removing the car doors or stripping the paint off the doors as well as repairing the dents with body filler. He reportedly made use of a machine known as the Dent Puller with bilateral hand control to remove dents in the vehicle’s panels. The plaintiff reportedly used a grinder and welder to attach the panels once they have been repaired which required the plaintiff to work with bilateral hand control. The plaintiff was required to perform between four and six jobs per day. After he has filled the dents the car is given over to the spray paint department.

[12] The plaintiff reported to have taken three months to recover from injuries he had sustained during the accident in question. He returned to work in October 2011 after three weeks paid leave and two months and one week unpaid sick leave. He reported to have returned in the capacity of his pre-accident title and tasks however the following work related problems were

experienced. He continued to have difficulties with lifting heaving items and pushing and pulling the equipment due to his pain with his lower right limb, especially at the right hip and knee-joint. He had difficulty sustaining prolonged kneeling, crouching and squatting positions due to pain within his right hip and right knee. No accommodation or adaptations were put into place for the difficulties he was experiencing. The plaintiff told Mrs. Lourens that he would like to start his own panel beating business. He also expressed his wish to join his brother in the coal making business.

[13] According to Mrs. Lourens's report the plaintiff retained the physical strength to handle frequently light to occasional medium tasks. He is therefore restricted with regards to his pre-accident and current working task as he is required to perform physical demands that fall within frequently medium to occasional heavy work demands. She opined that the plaintiff is negatively influenced not only by his pain levels within the right hip region and right knee but also due to his leg length discrepancy and the restricted range of motion within his right hip joint as well as the development of lumbar scoliosis. The plaintiff is reportedly influenced negatively by his pain and his leg discrepancy due to the femur fracture when walking and standing for prolonged periods. He has increased weight bearing on the left lower limb which increased his poor postural alignment. The plaintiff is hindered by his postural alignment that causes scoliosis within his lumbar spine. He presented with a sitting tolerance of 1 hour 40 minutes which would allow for him to apply adaptations to his working tasks, in other words sitting on a lower chair whilst removing the panels or sitting on a high chair whilst panel beating the panels. Even though the plaintiff is currently performing his tasks at work, he does so with accompanying pain and most likely, as observed in the evaluation, with compromised postures which could lead to

secondary pathology.

[14] Mrs. Lourens opined that the plaintiff has an unequal and unfair competitor with selected chores of working in the panel beating assistant position. According to Dr. LA Oelofse the plaintiff has been negatively impaired with regards to his productivity and working abilities due to the pain and leg length discrepancy as a result of the injuries sustained in the accident in question and would therefore benefit from sedentary working position. Finally, Mrs. Lourens opined that when considering the plaintiff's weight handling abilities and pathology of the right femur, the plaintiff would be best suited to perform frequently light to rarely medium work up to 9 kilograms especially whilst symptomatic. The plaintiff would therefore be appropriate for a storeroom assistant where he would be able to manage the stock of the company. It would also be necessary for him to be able to interchange his work tasks from a seated to a standing position frequently to relief pain symptoms. The plaintiff would also be appropriate for a position of a mechanical assistant that is required to assemble small parts on the vehicle once the panels have been placed. During her testimony Mrs. Lourens told the Court that the plaintiff would never be able to work. Her attention was drawn to the contents of paragraph 14.6.2 of her report. In her attempt to clear the question she introduced new evidence which was not contained in her report or any report and which caught the other side by surprise. Nothing however turned on this aspect.

[15] It is clear that the defendant's legal team has accepted that the motor vehicle accident has disadvantaged the plaintiff in one way or the other and that the plaintiff should be compensated for this disadvantage. That is clear from Mrs. Kgware's attempt to recalculate the amount that the Court should take into account in awarding the damages to a plaintiff. It is clear furthermore

that it never was the defendant's intention to completely oppose compensation to the plaintiff.

The problem seemed to have been the application of the contingency. It is clear that the plaintiff can still do some type of work he did before the motor vehicle accident but not at the same level and intensity as before. His difficulty is aptly captured in paragraph 5.7.11 of the Occupation Therapist's report in which she stated that:

"The plaintiff reported that he continues to have difficulties with lifting heavy items and pushing and pulling the equipment due to his pain within his lower right limb, especially at the right hip and knee joint. He also reported to have difficulties in sustaining prolonged kneeling, crouching and squatting positions due to the pain within the right hip and the right knee. "

[16] The Courts are not apt at calculations of figures for loss of income and have in most cases to depend on the parties themselves settling such an issue or alternatively calculations made by actuaries. For these reasons I requested the parties yesterday to furnish the court with a recalculated amount that the Court could take into account in the determination of an award that the Court may make to the plaintiff. I have received one new calculation. In the premises I must therefore find that the latest figures that have been placed before the Court are acceptable to both parties.

[17] Accordingly the amended draft order marked "XPS" is made an order of Court.

P.M. MABUSE JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff: Adv. DJ Marx

Instructed by:

Van Zyl L e Roux Inc.

Counsel for the defendant:

Adv. MM Kgwale

Instructed by:

Tau Phalane Incorporated

Date Heard:

18 May 2015

Date of Judgment:

19 May 2015

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case NO: 70817 / 2014

19 May 2016

Before the Honourable Justice Mabuse J
In the matter between:

EE MTHEMBU

Plaintiff

And

ROAD ACCIDENT FUND
DRAFT ORDER

Defendant

BY AGREEMENT BETWEEN THE PARTIES, IT IS ORDERED THAT:

The Defendant is liable to pay 100% (Hundred percent) of the Plaintiffs proven or agreed damages;

The Defendant is to pay the Plaintiff's attorneys the sum of **R500 000.00**, (Five Hundred Thousand Rand) with regards to the issue of general damages;
The Plaintiffs Attorney's trust account details are as follows:

ACCOUNT HOLDER:	V INC
BRANCH:	A V D W S
BRANCH CODE:	3
TYPE OF ACCOUNT:	T A
ACCOUNT NUMBER:	0

In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.50% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribe Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment.

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 **30 March 2011**.

If the Defendant fails to furnish the undertaking to the Plaintiff within 30 (thirty) days of this order, the Defendant shall be held liable for the payment of the additional taxable party and party costs incurred to obtain the undertaking.

The Defendant to pay the Plaintiffs taxed or agreed party and party cost, in the above mentioned account, for the instructing- and correspondent attorneys, up to and including the trial dates of 10 May 2016 and 18 May 2016, of which cost shall include, but not be limited to the following:

All reserved cost to be unreserved, if any;

The fees (preparation and day fee) of D Marx appearing as counsel, up to and including the trial dates of 10 May 2016 and 18 May 2016;

The cost of obtaining all expert medico legal-, actuarial, and any other reports of an expert nature which were furnished to the Defendant and/or its experts;

The reasonable taxable qualifying, preparation, reservation and attendance fees of all experts, including the cost of consultation fees with the legal teams;

The reasonable traveling- and accommodation cost, if any, incurred in transporting the Plaintiff to all medico-legal appointments;

The reasonable cost for an interpreter's attendance at court and at the medico legal appointments for translation of information;

The above-mentioned payment with regard to costs shall be subject to the following conditions:

The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

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 Plaintiff's attorneys.

AFTER HAVING HEARD COUNSEL FOR THE PARTIES AND EVIDENCE BEING LEAD, IT IS ORDERED THAT:

The Defendant is to pay the Plaintiff's attorneys the sum of with regards to the issue of loss of

income of R1, 483 513.00, (One million four hundred and eighty three thousand five hundred

and thirteen rand) with regards to the issue of loss income;

In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.50% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribe Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment.

By Order of the Court

REGISTRAR

For the Plaintiff: VZLR Inc - 012 435 9444 D Marx - 082 828 0629

For the Defendant: Tau Phalane - 012 346 4309 M Kgwale - 084 410 5388