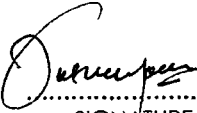


REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

6/9/2016  
CASE NO 69898/14

(1)	REPORTABLE: Yes / No	Choose an item.
(2)	OF INTEREST TO OTHER JUDGES: Yes / No	Choose an item.
(3)	REVISED.	
30/8/2016		
DATE		SIGNATURE

In the matter between

RIAN SWART

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

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J U D G M E N T

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MOOSA AJ:

INTRODUCTION:

[1] The Plaintiff was involved in an accident on the 1<sup>st</sup> March 2012, he lodged his claim with the defendant on the 6<sup>th</sup> December 2013 and summons was served on the defendant on the 26<sup>th</sup> September 2014.

[2] The matter was set down for trial on the 19<sup>th</sup> August 2016 and on the trial date both merits and quantum remained in dispute.

[3] In chambers counsel indicated that on the morning of the trial the following issues were resolved:

[3.1] Merits conceded 100% in favour of the plaintiff.

[3.2] Defendant tendered an undertaking to pay plaintiffs future medical expenses.

[3.3] Plaintiff's claim for general damages was rejected and referred to the Health Professions Council for adjudication.

[3.4] Later during the hearing it was confirmed that the plaintiff would not be pursuing a claim for past medical/hospital expenses.

[4] The only issue requiring adjudication being the question of the plaintiff's loss of earnings and earning capacity.

[5] Defendants counsel indicated that defendant would seek a postponement of the matter in order to afford the defendant an opportunity to file expert reports.

[6] In opposition, plaintiff's counsel confirmed that the defendant had notified the plaintiff of its intention to call experts at a pre-trial held two days before the trial date. On enquiry defendants counsel and legal representative were unable to provide any reason as to why the defendant had not been able to procure expert reports timeously in terms of the court rules.

- [7] The speculative supposition by defendants counsel that if defendant were given the opportunity to file expert reports, this would possibly assist the plaintiff in his claim for general damages, simply had no factual merit. The defendant had knowledge of the plaintiffs claim for almost two years before the matter was set down for trial to obtain expert opinion to test this supposition and to consider plaintiffs loss of earnings and earning capacity. No explanation was tendered why this was not done.
- [8] The Road Accident Fund (RAF) provides a social security net to the country and economy by making available compulsory social insurance cover to all users of South African Roads. It follows therefore that in ensuring that a complainant is fairly compensated the RAF and its representatives are legally and morally bound (my emphasis) to not waste public funds in tardy litigation.
- [9] I accordingly found no reason to entertain the defendant's application for a postponement and further prejudice the plaintiff. The hearing of the matter to proceed on the basis of the plaintiff's expert reports.

#### **LOSS OF EARNINGS / LOSS OF EARNING CAPACITY**

##### **The claim:**

- [10] The plaintiff's amended particulars of claim seek compensation of R1 500 000.00 in respect of loss of earnings and earning capacity. An actuarial report dated 8<sup>th</sup> August 2016 assessed the capitalised value of the plaintiffs earnings/ capacity in the sum of R1 407 026.00 without the application of contingencies.

**Common cause facts:**

[11] It is common cause that in the accident the plaintiff sustained soft tissue injuries to his cervical spine, lumbar spine, an injury to his left scapula and a laceration to the left acromioclavicular joint. Plaintiffs evidence that the soft tissue injury was in fact a “hanging arm” and that the brachial plexus is the same as an amputated arm was not disputed by the defendant

[12] Pre morbidly the plaintiff was a fully qualified firefighter and paramedic with no physical impediments. That pre –morbidly plaintiff suffered personal problems viz; the suicide of his child, divorce, frustration at work having to do paper work , depression resulting in plaintiff resigning from his employment as a fireman and accepted employment at ER24 as a paramedic at a decreased remuneration.

[13] Post morbidly the plaintiffs experts confirm that he is compromised physically to do the job as a firefighter/ paramedic and plaintiff is emotionally and psychologically affected and that his Post traumatic stress disorder (PTSD) has contributed to his inability to do the job that he was trained to do rendering him compromised and vulnerable.

[14] Between the periods March 2012 to May 2013 plaintiff was employed at ER24 as a basic ambulance assistant earning a basic salary of R6609.00p/m pre-accident and earning an average of R10 930.73 p/m.

[15] From June 2013 to date (post-accident) plaintiff has been employed as a First Aid instructor at Safety Training Academy earning R4200p/m with no benefits.

**Evidence:**

[16] Plaintiff and Dr Pretorius (Industrial psychologist) gave testimony and the following evidence was led:

- [16.1] That Plaintiff accepted employment at ER24 as a paramedic at a decreased remuneration level on the basis that the anticipated overtime that plaintiff would realistically be able to earn would yield an expected earnings of between R12000 to R15000 p/m. This was undisputed by the defendant.
- [16.2] That the accident occurred on the first day that Plaintiff started employment with ER24.
- [16.3] The plaintiff testified that due to the injuries sustained in the collision he struggled to lift patients, to stand and travel for prolonged periods of time and that he experienced concentration problems as he has pain in his back and neck every day. He further testified that he is very anxious when driving and due to these complaints he is no longer able to attend to duties as a paramedic/ ambulance man or firefighter
- [16.4] As a result plaintiff was tasked with a more administrative type position resulting in him resigning due to frustration of not being able to do the type of work that he testified he was born for. In this regard plaintiff tendered as evidence 39 certificates bearing testimony to his abilities and predisposition as a firefighter/ paramedic.
- [16.5] Plaintiff testified that post morbidly he is now only suited to participate in an academic and not a practical way as a firefighter and that in his residual capacity he is severely vulnerable and compromised. This was corroborated by Dr Pretorius

- [16.6] Under cross examination the plaintiff's testimony was not dented in any way, defendant made a dismal attempt to suggest that the plaintiffs psychological sequelae are as a result of the suicide of the plaintiffs son. Plaintiff confirmed that he was indeed traumatized by the death of his son but it his major depression and psychological sequelae arise from his accident related physical limitations, the Post traumatic stress disorder (PTSD) and his impecunious financial position.
- [16.7] Plaintiff was cross examined on the issue of approximate overtime shifts that a paramedic may attend to. Plaintiff responded that he was used to working under pressure and that with one patient in accident a paramedic could spend up to 13 hours. He further testified that there could be between 250 -350 calls per month. The defendant presented no alternative.
- [16.8] It was further suggested to the plaintiff that the reason why plaintiff's earnings had dropped at his current employment was because the company had financial problems. This issue was corrected by Dr Pretorius who testified that the financial difficulties of the plaintiff's employer would only further exacerbate the plaintiff's vulnerability in the open labour market.
- [16.9] Dr Pretorius testified that because of the plaintiffs limitations as a result of the sequelae of the accident plaintiff is very vulnerable, that he cannot find alternative employment at a better level . The academy where plaintiff is employed is located in Stilfontein where all their clients are miners and that the mines have cut down.

[16.10] That the plaintiffs position at the academy is that he is accommodated , that he currently instructs on theoretical issues whilst other trainers come in to do the practical's. In these economic times companies have a lot of people to choose from and thus with the plaintiffs limitations he would be severely compromised and vulnerable.

[16.11] Under cross examination Dr Pretorius testified that having regard to the objective facts and the extracts of all the other supporting experts that a significantly high post morbid contingency should be applied to the calculations of the plaintiff's loss of earnings. Defendant did not dispute this.

#### **Contingencies:**

[17] It is instructive that the defendant made no submission on contingencies to be applied. Under cross examination of the plaintiff the defendant alluded to the fact that the postulated earnings of the plaintiff could have been reduced. The defendant had no basis upon which to speculate and peg such reduced earnings. Defendant was directed to address this issue in its argument on contingencies, however the defendant simply did nothing.

[18] Plaintiff's counsel pointed out that in formulating their calculations actuaries Human and Morris had used the sum of R7500 as the plaintiff's current earnings whilst plaintiff was in fact only earning R4500. This calculation therefore was to the detriment of the plaintiff. In so doing, fortifying the recommendation by Dr Pretorius that substantially higher contingencies should be applied in calculating loss of earnings.

[18] The defendants earning capacity being uncontested, the plaintiffs contention that the applicable contingencies of 10% in respect of past loss of earnings and 35% in respect of future loss of earnings being completely uncontested provides no room for intervention.

[19] The Appeal court in the matter of **Van Der Plaats v South African Mutual Fire and General Insurance Co Ltd 93) SA 105 (A)** found as follows:

*"In an action for damages for bodily injuries caused by the negligence of the defendant or the driver of a motor vehicle insured by the defendant, in assessing damages, the amount allowed by way of deduction for contingencies is variable and is very closely connected with the circumstances of the particular case in which the trial Judge has to exercise his discretion."*

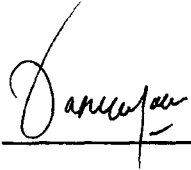
[20] There is no evidence before me to justify a deviation from the claim and calculation presented by the plaintiff.

In the result I make the following order:

1. The defendant is ordered to pay the Plaintiff the sum of R1 307 134.00 in full and final settlement of the plaintiff's claim in respect of past and future loss of earnings/capacity.
2. The Plaintiffs claim in respect of general damages is formally rejected by the defendant and is separated from the remainder of the plaintiffs claim and is postponed *sine die* for referral and adjudication by the HPCSA.
3. The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996, to compensate plaintiff for 100% of the cost of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff resulting from injuries sustained by the plaintiff as a result of the accident that occurred on the 1<sup>st</sup> March 2012.
4. The defendant is ordered to pay the plaintiffs taxed or agreed party and party costs including the costs of the examinations and obtaining the plaintiffs medico-legal reports, as well as the qualifying and reservation fees of Dr Pretorius ( Industrial psychologist) on the High Court scale up until and including the 19<sup>th</sup> August 2016.
5. There is no Contingency Fee Agreement applicable.



DATED AT JOHANNESBURG ON THIS THE 30<sup>TH</sup> DAY OF AUGUST 2016



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**MOOSA AJ**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

Plaintiff:

Adv P J Vermeulen

Instructed by Savage Jooste and Adams

Defendant:

Adv M Pienaar

Instructed by T M Chauke Inc

**DATE/S OF HEARING:** 19 August 2016

**DATE OF JUDGMENT:**