


REPUBLIC OF SOUTH AFRICA



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

18/11/16

CASE NO: 23163/14

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

In the matter between:

BHEKI CHARLIE MZOBE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

NONYANE, AJ:

- [1] This is an action for damages arising from a motor vehicle collision which occurred on 28 October 2012 on the N17 road between the towns of Springs, Gauteng Province and Leslie, Mpumalanga Province.

- [2] Three vehicles were involved in this collision and the plaintiff who was the driver of one of the motor vehicles sustained injuries to his head, cervical spine and lumbar spine
- [3] I have been informed that the defendant has conceded 90% of the merits and the plaintiff is entitled to 90% of his proven damages.
- [4] At the commencement of the trial the defendant objected to the plaintiff's RAF 4 report and both Counsel for the plaintiff and defendant agreed that the issue of general damages be referred to the Health Professions Council of South Africa.
- [5] The defendant's Counsel was also not *ad idem* with the plaintiff's Counsel interpretation of the expert reports and wanted expert witnesses to be called. On enquiry by the Court as to whether the defendant does not admit the expert reports it then transpired that the defendant does not have issues with the expert reports *per se*, but with how the plaintiff's Counsel interprets them. The issue of the interpretation of the expert reports was then left to the Court.
- [6] The following medico-legal reports procured by the plaintiff were admitted into evidence without the need to call individual expert witnesses:

Dr L.F Oelofse	-	Orthopaedic surgeon
Dr J Scheltema	-	Neurosurgeon
Dr L Berkowitz	-	Plastic and Reconstructive surgeon
Sonet Strydom	-	Neuropsychologist
Ms N Doorasamy	-	Occupational therapist
Dr K Roux	-	Psychiatrist
Dr Sulman & Partners	-	Specialist Radiologist
Dr BK Cheyip	-	Neurologist
Meryll Shein	-	Industrial Psychologist
M S Jacobson	-	Actuary

[7] The defendant did not procure any medico-legal report. I am required to determine the issue of past medical expenses, future loss of earnings and earning capacity.

[8] The plaintiff claims an amount of R1 213 683.00 for future loss of income, an amount of R226 134.37 for past medical expenses and an undertaking in terms of the Road Accident Fund Act 56 of 1996 as amended (hereinafter referred to as "the Act") for future medical expenses.

Future Loss of Earnings and Earning Capacity

[9] The plaintiff has a grade 11 level of education. His work experience ranges from being a waiter, a cook and a call centre agent. At the time

of the accident he was working as a call centre agent, selling cell phone contracts and telemarketing.

- [10] He resumed his duties one month after the accident and in 2015 was promoted to sales support, solving problems which agents in branches experiences. Before the accident he was doing his job without any problems but after the accident he experienced lower back pains, headaches, short memory and he is unable to sit or stand for prolonged periods.
- [11] The plaintiff's claim for future loss of income is based on the actuarial calculations of M S Jacobson of Gerard Jacobson Consulting Actuaries.
- [12] The actuarial calculations of the plaintiff's income were made on the assumption that he will continue working until the age of retirement and calculated on two different basis, that is:-
1. Basis I: Ceiling in line with A3 Paterson level and working a full day
 2. Basis II: Ceiling in line with A3 Paterson level and working half day from 2016
- [13] The total amount of future loss suffered by the plaintiff on assumption that he will continue to work for the full day is R497 975.00 (Basis 1)

and his loss if he works for half day from 2016 is R1 213 683.00 (Basis 2).

- [14] The defendant's Counsel contested the amount claimed and argued that the plaintiff's future loss of income is as calculated on the first basis, that being R497 975.00.
- [15] He argued that the plaintiff's future loss of earnings and earning capacity should be dealt with in line with what is stated in the industrial psychologist's report, in particular the fact that the plaintiff, post morbid, got a promotion and is now earning more than he was before the accident.
- [16] He refuted plaintiff Counsel's contention that the promotion was a sympathetic one to accommodate the plaintiff's post accident physical limitations. He argued that the promotion was for a specific purpose which was to solve problems which agents in the branches were experiencing. I tend to disagree with defendant's Counsel on this point.
- [17] The industrial psychologist clarified this point in his report. He stated that although the plaintiff is regarded as having been promoted he has actually taken a knock in his salary as he is now not earning any commission. The plaintiff told the industrial psychologist that he took the position because he could not cope with his previous position which required him to be in a seated position for prolonged periods and he

feels more able to cope with his new position because it requires less overtime work and he is able to stand and sit at will. The industrial psychologist further noted that the plaintiff has taken a loss in real earnings and has been accommodated by his employer.

[18] Defendant's Counsel further argued that the recommendation by the psychiatrist, Dr Roux, for psychiatric and psychotherapy treatment of two - five years and the occupational therapist's, Narischa Doorasamy, comment that the plaintiff will be reliant on intensive rehabilitation, surgical and conservative treatment and the use of assistive devices to maintain and improve his level of functioning and alleviate pain in the axial skeleton is indicative of the fact the plaintiff condition will improve and therefore he is not a candidate for a half day work. He submitted that the plaintiff is working full day and should be compensated on Basis 1 calculation and not Basis 2 calculation as it is not supported by facts and is based on assumptions only.

[19] The psychotherapy that defendant's counsel refers to, will only help in as far as the plaintiff's depression is concerned but will not address the plaintiff's neurosurgical issues. The neuropsychologist's evaluation revealed that the plaintiff's post-morbid results showed a below expected rate of learning compared to his estimated pre-morbid level of high average performance.

- [20] Counsel for the plaintiff argued that the actual future loss of income and earning capacity sustained by the plaintiff is as calculated on Basis 2. She contended that Basis 2 calculation is based on assumption supported by the expert report.
- [21] She referred me to the report of the orthopaedic surgeon who diagnosed the plaintiff with a C4-C5 disc lesion with impingement on plate C5-C6 and soft tissue injury on the lumbar spine.
- [22] On the functional capacity of the patient to do a normal (full) day work, the orthopaedic surgeon opined that the back and neck pain that the plaintiff still complains about, despite having had a fusion, makes it difficult for him to cope with his current type of employment.
- [23] The neurosurgeon, Dr J Scheltema, diagnosed the plaintiff with a minor concussive head injury with a grade 4 whiplash injury to the cervical spine that needs further management. On his ability to work, the neurosurgeon opined that the injuries to the cervical spine and the chronic pain that the plaintiff has will limit his working hours and believes that the patient cannot currently work more than a 5 hour shift. He is of the opinion that the plaintiff only qualifies for half day work which will have an impact on his salary.
- [24] The neurologist diagnosed the plaintiff with neuropsychological impairment. He is also of the opinion that the plaintiff's employability

has been markedly affected by his injuries, more so that the nature of his job entails prolonged sitting posture.

[25] The occupational therapist's findings indicate that the plaintiff is limited in his ability to meet his pre accident inherent job demand of prolonged sitting in a sedentary position on a daily basis. She is of the opinion that due to problems of the cervical and lumbar spine injury, the plaintiff will be limited in his ability to maintain the seated or static postures for a full 8 hour work day.

[26] I am not convinced by the defendant's Counsel submission that the plaintiff should not be compensated on Basis 2 calculations because it is not supported by the facts and is based on assumptions only. It is clear from the above that Basis 2 calculation is based on assumption supported by the expert reports and the amount claimed represents a fair value of the loss sustained by the plaintiff.

[27] It is quite evident from the medico-legal reports that the injuries sustained by the plaintiff and its sequelae have impaired his cognitive functions, mood and severely affected his spine. His future earning capacity has in no doubt been affected and has as a result sustained a loss of future income as calculated on Basis 2.

Past and Future Medical Expenses

- [28] The plaintiff also claims an amount of R226 134.37 for past medical expenses and an undertaking in terms of Section 17(4) of the Act for future medical expenses.
- [29] The plaintiff's claim for past medical expenses is supported by vouchers and the defendant's Counsel did not raise any counter argument to the plaintiff's past and future medical expenses.
- [30] I have gone through the vouchers and I am satisfied that the amount claimed represent the correct figure for past medical expenses incurred by the plaintiff.
- [31] It is also evident from the medico-legal reports that the plaintiff will require future medical treatment.
- [32] The damages amount should accordingly be adjusted in terms of the merits settlement agreement of the parties and the plaintiff has to be awarded 90% of his proven damages.

Costs

- [33] On the issue of costs, the plaintiff's counsel, although in agreement with the issue of general damages being referred to the Health Professions Council of South Africa, argued that the defendant had a

window opportunity of more than a year to reject the plaintiff's RAF 4 report but only waited until the eve of the trial to reject it.

[34] Plaintiff's counsel submitted that the defendant's conduct is prejudicial to the plaintiff and should be met with a punitive cost order. In this regard she referred me to the case of *J.E Meyer v Road Accident Fund* 2013 JDR 284 GNP wherein Potteril J awarded a punitive cost order against the Road Accident Fund for their failure to reject the RAF 4 report timeously but waited until the date of trial to reject it.

[35] The case cited above is distinguishable from the current one in that in the latter case the parties had reached settlement on all heads of damages except for general damages. The only issue that was to be determined was whether the court had jurisdiction to decide whether the injury is, in terms of section 17(1) of the Road Accident Fund Act, a serious injury.

[36] I am as a result not inclined to grant costs on a punitive scale.

[37] Having heard arguments from both counsel for the plaintiff and the defendant and taking all relevant factors in assessing the quantum of both future loss of earnings and earning capacity, I deem the following amount as adequate compensation, in accordance with the merits settlement:

- a. Future loss of earnings and earning capacity R 1 092 314.70
- b. Past medical expenses R 203 520.93

[38] In the results I make the following order:

1. Judgment is granted in favour of the plaintiff for payment of the sum of R1 295 835.63 within 30 days from the date of this order.
2. The defendant is ordered to pay interest on the sum of R1 295 835.63 at the rate of 10.5% from 31 days after the date of this order to date of payment.
3. An undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 1996 (as amended) to be furnished by the defendant for payment of 90% of the plaintiff's future medical expenses.
4. The defendant is ordered to pay the plaintiff's costs of suit including the costs of counsel and the following experts:
 - a. Dr L.F Oelofse – (Orthopaedic surgeon)
 - b. Dr J Scheltema – (Neurosurgeon)
 - c. Dr L Berkowitz – (Plastic and Reconstructive surgeon)
 - d. Sonet Strydom – (Neuropsychologist)
 - e. Ms N Doorasamy – (Occupational therapist)
 - f. Dr K Roux – (Psychiatrist)
 - g. Dr Sulman & Partners – (Specialist Radiologist)

- h. Dr BK Cheyip – (Neurologist)
- i. Meryll Shein – (Industrial Psychologist)
- j. M S Jacobson – (Actuary)



**NONYANE AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH
AFRICA, GAUTENG
DIVISION, PRETORIA**

Counsel for the Plaintiff	:	Adv. D Strydom
Instructed by	:	Moss & Associates Inc.
Counsel for the Defendant	:	Adv. Z S Rasekgala
Instructed by	:	Tau Phalane Incorporated
Date of trial	:	06 October 2015
Date of Judgement	:	____ November 2016