REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 40191/16
25/10/2019

In the matter between:

SCHALK WILLEM PETRUS BURGER Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGEMENT

MNGQIBISA-THUSI. J

[1] The plaintiff, Mr Schalk Willem Petrus Burger, has instituted an action against the defendant, the Road Accident Fund for damages suffered as a result of injuries sustained in a motor vehicle collision which occurred on 15 August 2015 along Lynwood Road, Pretoria.

[2] At the time of the collision the plaintiff was the driver of the motor cycle which collided with a motor vehicle bearing registration number [….], driven by a certain Mr Shibango.

[3] In his particulars of claim the plaintiff alleges that the collision was caused solely by the negligence of the insured driver who failed, *inter alia:*

3.1 to exercise proper but effective control of the motor vehicle;

3.2 to exercise June consideration to other road users;

3.2 to apply his brakes timeously or all.

[4] In its plea, the defendant denies that the insured driver was negligent and in the alternative pleads that the plaintiff's negligence contributed to the collision.

[5] It ls not in dispute that the plaintiff sustained the following injuries in the collision:

5.1 soft tissue injury to the left shoulder and upper arm;

5.2 soft tissue injury to the humerus;

5.3 soft tissue injury to the left elbow; and

5.4 bruises and abrasions on the body.

[6] The defendant has conceded merits 100% in favour of the plaintiff. Further, the defendant has given an undertaking with regard to future medical expenses as envisaged in s 17(4)(a) of the Road Accident Fund Act. With regard to general damages, the matter has been referred to the Health Professions Council of South Africa to determine whether the plaintiff has sustained a serious injury and the issue has been postponed *sine die.*

[7] It is common cause that the plaintiff was previously involved in an accident where he sustained certain injuries in 2013. Further that subsequent to the accident which is the subject matter of this case, plaintiff was involved in another accident in February 2018 where he sustained fractures to his left shoulder, pelvis and ribs. Furthermore, it is common cause that the plaintiff was diagnosed with bipolar 25 years ago.

[8] The only issue to be decided is whether or not the plaintiff suffered any loss of earnings as a result of the collision.

[9] By agreement between the parties, the following experts reports of the plaintiff, except that of its industrial psychologist, are admitted by the defendant:

9.1 Dr D Maree (orthopaedic surgeon);

9.2 **Ms W** Van der Walt (occupational therapist);

9.3 Ms C Bates (physiotherapist);

9.4 Mr L Roper (clinical psychologist);

9.5 Ms C Oosthuizen (biokinetics).

[10] Dr Maree, the orthopaedic surgeon, reports that the plaintiff sustained soft tissue injuries to his left shoulder and elbow in the accident. He further reports that the plaintiff had old injuries from the previous accident. Dr Maree further reported that the terrible was 100% functional. Dr Maree recommended that the plaintiff underwent conservative treatment and surgery to the shoulder and elbow his pain will be lessened by up to 80-90%. With regard to the 2018 accident, Dr Maree reported that the plaintiff had sustained injuries to his left wrist, right shoulder and a fractured pelvis.

[11] Mr Roper, the clinical psychologist, reported that the injuries the plaintiff sustained in the accident exacerbated his pre-accident psychological problems. Mr. Roper further reported that the plaintiff had informed him that she consulted a psychiatrist and is currently taking medication for his psychological problems. Further that the plaintiff reported that he had undergone surgery on both his shoulders June to the injuries sustained in the previous accident. Mr. Roper reported also that after the accident which is the subject matter of this case. The plaintiff had informed him that he had returned to work after three weeks. He also reported that he had worked as an estate agent until August 2016.

[12] Ms Van der Walt, the physiotherapist, reported that the plaintiff qualified for sedentary and light with limitations for working with his arms lifted and unsupported. She further reported that the plaintiff's blood pressure was high, but that this was not related to the injuries he sustained in the accident. She further reported that the plaintiff's pre-existing neck, low back and right shoulder injuries would also impact on his physical work. Ms Van der Walt reported that before and after the accident the plaintiff was doing light sedentary work. According to Ms Van der Walt the plaintiff to work as an estate agent and credit controller. She recommended that plaintiff would benefit from rehabilitation to restore strength to the left shoulder.

[13] Mrs Nicolene Kotze, the plaintiff's industrial psychologist, testified as follows. She consulted with the plaintiff on 7 June 2016. During the consultation the

plaintiff informed her that he had been diagnosed with bipolar some 25 years ago and was taking medication for the condition. This condition was confirmed by Dr Fine, the psychiatrist, who reported that the plaintiff has a long history of psychiatric treatment for bipolar mood disorder before the accident. Further that as a result of the injury on his left shoulder he was unable to ride a bicycle and this frustrated him because he cannot exercise. She admitted that riding a bicycle is not completely excluded. The plaintiff further informed her that at the time of the accident he was self- employed as a consultant and an estate agent until August 2016. Miss Kotze testified that looking at the plaintiff's injured and uninjured state the he could have earned the same salary. She was of the opinion that the plaintiff qualified to do light sedentary work which is what plaintiff was doing before the accident. She further testified that at the time of the accident plaintiff was unemployed and found it difficult to obtain employment due to his age, market related issues and would therefore have opted for any job. She testified that in his injured state the plaintiff was not suited for medium to having duty.

[14] During cross examination Ms Kotze could not give an explanation for her opinion of the plaintiff's inability to do heavy duty in light of the occupational therapist's report that when he assessed the plaintiff, he could not stoop or work below knee level. She further testified that the plaintiff left his real estate job because he could not sell properties and that as a result he found a job as a credit controller which is sedentary work. However the plaintiff was declared redundant. She was of the opinion that it was the position which the plaintiff occupied, and the plaintiff, which was rendered redundant. Mrs Kotze could not provide evidence confirming her opinion about the plaintiff's redundancy as she had not consulted with the plaintiff's employer in order to obtain collateral evidence about the plaintiff's employment. Mrs Kotze did however, concede that there is also a possibility that the plaintiff could have been redundant due to his non-performance. Further Mrs Kotze testified that even though Dr Maree had recommended surgery in order to alleviate his pain, without surgery the plaintiff could still do the job he did before the accident but with some difficulties. Mrs Kotze however cautioned that one also has to take into consideration the plaintiff's age, the labour market conditions were there is

high unemployment and his psychological difficulties, rather than concentrating on the plaintiff's physical condition.

[15] Furthermore, Mrs Kotze testified that the plaintiff had informed him that in 2014 he was self-employed as he could not get a job as a credit controller and later opted for consultancy and real estate agent. She further testified that even though the plaintiff had told the occupational therapist that he had been a sales representative, that job would be more physical than what the plaintiff had been doing before the accident. Mrs. Kotze asserted that in her opinion the plaintiff qualified for sedentary light work. She denied that the fact that the plaintiff had divorced twice had any impact on his ability to work. Mrs Kotze could not, however, explain how the effects of the injuries plaintiff sustained in 2015 should be distinguished from the injuries sustained in the collision the plaintiff was involved in 2018.

[16] Mrs Kotze did not make a good impression as an expert witness. Her testimony seemed to be tailored to suit the plaintiff's case and not to assist the court (see in this regard *Glenn Marc Bee v The Road Accident Fund* (093/2017) [2018] ZASCA 52 (29 March 2018). During her testimony she tried to discount the findings of the other experts with regard to the fact that despite his injuries, the plaintiff was still able to perform as before.

[17] From the evidence before me, the following appears:

17.1 that at the time of the collision (15 August 2015) the plaintiff was 58 years old and unemployed since November 2017 when he was rendered redundant as a credit controller.

17.2 that a::, a result of the collision, the plaintiff had sustained soft tissue injuries to his left elbow, shoulder and humerus.

17.3 that prior to the accident of 15 August, 2015, the plaintiff had sustained unspecified intelligence in a motor vehicle accident in twenty thirteen. Further, subsequent to the relevant collision, the plaintiff was involved in an accident during February 2018. As a result of which he sustained fractures to his left wrist, right shoulder, pelvis and ribs;

17.4 that at the time of the accident the plaintiff presented with bipolar which had been diagnosed twenty-five years ago;

17.5 that the general opinion of the medical experts consulted with was that

despite his injuries the plaintiff would still be in a position to do sedentary and light work post-accident. It is not in dispute that prior to the twenty fifteen accident, the plaintiff worked as a real estate agent which he left in August 2016 and according to his industrial psychologist's evidence, because he was unable to sell houses;

17.6 that after the accident the plaintiff was able to return to his job as a real estate agent, despite his injuries even before receiving treatment recommended by Dr Mare; and

17.7 that after leaving his estate agent's job, the plaintiff, according to his industrial psychologist evidence was able to secure employment as a credit controller until he was made redundant in November 2017.

[18] In order for the defendant to be liable for the loss suffered by the plaintiff, the plaintiff bears the onus to prove, on a balance of probabilities, that as a result on the 2015, he has suffered loss of earning capacity and that as a result his patrimony has been diminished *(Rudman v Road Accident Fund* 2003 (2) SA 232 (SCA).

[19] Counsel for the plaintiff argued that the plaintiff had proven that as a result of the accident the plaintiff's and the propensity was compromised. Counsel submitted that due to the fact that the defendant did not have any expert reports that the findings of the plaintiff's experts, the plaintiff's experts' findings and conclusions should be admitted. Plaintiff's counsel further submitted that in accordance with the defendant's counsel, which postulates that around one must take his fifteen as a financing, the mere fact that the plaintiff was bipolar and had sustained injuries in a previous accident should not be held against him.

[20] On behalf of the defendant's counsel submitted that consideration should be taken of the fact that the plaintiff, over and above the injuries sustained in the 2015 accident, had sustained even more success in the student the accident of February 2018. According to counsel, it would be difficult for the defendant to distinguish between the *sequelae* as a result of the 2015 accident and those of the 2018 accident. The defendant's counsel further argued that, the mere fact that after the accident the plaintiff was able to perform the job in performed before the accident and even secured other employment, is

indicative of the fact that the plaintiff did not suffer from any loss of incapacity. Counsel further argued that the failure by the plaintiff in that he testified order to provide collateral evidence with regard to being rendered redundant, does not mean that the older thousand was made redundant was because of the injuries he sustained.

[21] As indicated above. Onus is on the plaintiff to prove on a balance of probabilities that he has suffered loss of incapacity and the extent by which is a state has been diminished as a result of the injuries sustained in the accident. As correctly pointed out by counsel for the defendant, the fact that the plaintiff was able to return to the job he did prior to the accident even before receiving the necessary recommended medical treatment, suggests that even after the accident the plaintiff still retained his earning capacity.

[22] Furthermore, all of the plaintiff's experts have reported that with his injuries the plaintiff was capable of performing sedentary and light work in that his work capacity has not been compromised and that could continue working until the age of his retirement. As Dr Mare has postulated if the plaintiff were to undergo surgery and conservative treatment, the prognosis was good and the pain the plaintiff suffers would be alleviated.

[23] The evidence of the industrial psychologist that in the event of the plaintiff not securing sedentary light work he would be compromised in light of the occupational therapist's report that the plaintiff was not in a position to do heavy duty work, is of no moment if one bears in mind that the assessment from which this conclusion was drawn was done in July 2018 after the plaintiff had sustained further and serious injuries in February 2018.

[24] From the evidence presented, I am not convinced that the plaintiff has proven that he has suffered any loss of an incapacity. The plaintiff is unemployed not as a result of the injuries sustained, but as a result of being rendered redundant for whatever reason. One should also, when considering his redundancy, take into account not only the fact that the plaintiff has mental difficulties but also his age and the conditions in the job market. Further, these factors could also account for the failure of the plaintiff to secure employment.

[25] Furthermore, I am satisfied that the plaintiff has presented sufficient evidence with regard to his alleged diminished patrimony as a result of the injuries

sustained in the accident of August 2015.

[26] The defendant has sought, in terms of Rule 39(6) of the Uniform Rules of Court, in the event that I make a finding that the plaintiff has not proven is loss, to order absolution from the instance. Counsel for the defendant submitted that from the evidence presented, the plaintiff has not made out a case that as a result of the injuries sustained in the August 2015 accident, he has suffered loss of earning capacity.

[27] In *Gordon Lloyd Page & Associates v Rivera* 2001 {l) SA 88 (SCA) at para [2] the court stated that:

> "[2] The test for absolution to be applied by a trial court at the end of the plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H in these terms:
>
> > *'...(W)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA
> > 307 (T))'.
>
> This implies that a plaintiff has to make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim

to survive absolution because without such evidence no court could find for the plaintiff *(Marine & Trade Insurance Co. Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one *(Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' *(Gascoyne (foe cit))* - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (Ruta Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of the plaintiff's case, in ordinary cause of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice''.

[28] The question is whether the plaintiff, in the face of the application for absolution, has made out a *prima facie* case to prove its claim of loss of earning capacity against the defendant.

[29] It was up to the plaintiff to show that as a result of the injuries he sustained in the accident which occurred in August 2015, he has been rendered unemployable or that his employability has been compromised. It is not in dispute that, despite his injuries the plaintiff did return to work within three after the accident. Further that the plaintiff secured employment as a credit controller in August 2016 until November 2017. As indicated above, the plaintiff has not presented evidence to the effect that as a result of the injuries he sustained he was rendered redundant and as a result has been unable to find other employment due to his injuries.

[30] I am satisfied that the plaintiff suffered any loss as a resulting of any loss of earning capacity.

[31] In the result the following order is made:

'Absolution from the instance is granted, with costs'.

NP MNGQIBISA-THUSI
Judge of the High Court

Appearances:

For Plaintiff: Advocate JR De Beer (instructed by Surita Marais Attorneys)
For Defendant: Advocate M Putuka (instructed by Borman Duma Zitha Attorneys)