REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 73306/2014

In the matter between:

NDIPHE ZEPHANIA MTILA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] 25 July 2011 at around 06h00 on the N1 Road, between Klapmuts and Kraaifontein, a collision occurred between a motor vehicle bearing registration number […] and another vehicle bearing registration number […]. At the time the plaintiff was a pedestrian and was trapped between the vehicles involved.

[2] As a result of the collision, plaintiff sustained the following injuries:

2.1 a right tibial plateau fracture;
2.2 open left tibia and fibula fracture;
2.3 left femur fracture; and
2.4 soft tissue injuries.

[3] On 12 September 2016 the parties reached a settlement with regard to the merits on the basis that the defendant will be liable for 100% of the plaintiff's proven damages. For future medical expenses, the defendant has agreed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. The plaintiff has submitted supporting vouchers with regard to past medical and hospital expenses in the amount of R893,631.74. The defendant has, however, undertaken to make an interim payment in the amount of R663,775.96. The balance of these expenses are still to be reviewed by the defendant who will revert to the plaintiff. At the hearing it was indicated that the plaintiff gave the defendant 14 days to provide the plaintiff with a bill review. As a result, the issue of the balance of past medical and hospital expenses is postponed *sine die*.

[4] With regard to general damages, the parties have agreed on an amount of R800,000.00.

[5] The only issue remaining in dispute is the claim for future loss of income and or loss of earning capacity. The parties have put forward two calculations prepared by Prima Actuaries & Consultants ("Prima Actuaries"). The main issue in dispute is whether the amounts received by the plaintiff as disability benefits should be deducted from the amount determined for future loss of income.

[6] In their joint minute, the parties' industrial psychologists, Mr C Schoombee and Mr T Tsiu are in agreement that as a result of the injuries sustained, the plaintiff's is unemployable and that the subsequent disability benefits he received are due to the injuries sustained in the collision. The experts further agreed that after the plaintiff's employment with SA Five terminated, the plaintiff has not received any work related salary.

[7] In their joint minute, the orthopaedic surgeons, Dr F Liebenberg and Dr TS Bogatsu, are in agreement that because of his injuries, the plaintiff can only ambulate with the aid of a crutch.

[8] At the trial the only evidence led was that of Mrs Michele Cloete-Collopen ("Cloete-Collopen"), head of the Metal Industries Benefits Funds Administrators,

Permanent Disability Division. She is responsible for overseeing the processing of death and disability benefits and dealing with complaints lodged with the pension Funds Ombudsman. Her evidence is as follows.

[9] During the period of August 1997 to September 2011, the plaintiff worked for several companies within the metal industry and contributed as a member to the Metal Industries Provident Fund ("the Fund"). After the plaintiff sustained his injuries as a result of the collision, he applied for disability benefits. Mrs Cloete-Collopen testified that after the plaintiff's application was approved by the Fund, from February 2012 to June 2013 he received disability benefits in the amount of R4,412.20 per month. In July 2013 the plaintiff's disability benefits were increased to an amount of R4,676.77 per month, which he received from July 2013 to March 2014. In total the plaintiff received the sum of R117, 099.77 for the whole period the plaintiff received disability benefits. Thereafter the plaintiff withdrew from the Fund.

[10] Mrs Cloete-Collopen explained that in terms of the Rules of the Fund, in the event of a disability, a member is entitled to disability benefits calculated at 75% of his or her pensionable income. Mrs Cloete-Collopen further explained that in processing an application for disability benefits, there is a prescribed form which has to be completed by the employer and the employee before it is submitted to the Fund's medical advisor who will make a recommendation. Further that disability benefits are approved only once an employer has discharged an employee. In the case of the plaintiff, his employer had confirmed that he was discharged from work on 17 July 2011. During the period of receiving disability benefits, the plaintiff was a member of the Fund since his contribution to the Fund were deducted each month from the disability benefit he received.

[11] She further testified that at time the plaintiff withdrew from the Fund, his disability benefits were due for review and he was expected to submit certain additional documents in order for the disability benefits to continue being paid. Instead of submitting the required documents, the plaintiff elected to withdraw from the Fund because he alleged that he was in dire straits. As a result of such withdrawal the plaintiff was paid an amount of R233,144.62.

[12] Mrs Cloete-Collopen denied that the Fund issued medical certificates for medical boarding. She testified that what is issued is a letter which states that a disability benefit has been approved and that payment will begin. She denied that the Fund provided temporary disability benefits. She further testified that in terms of the Rules of the Fund, a member cannot be over-insured. In the event that a member receives a disability benefit and another benefit from another source, the disability benefit is off-set in order to make sure that the member only receives 75% of his or her pensionable salary.

[13] Prima Actuaries has done two calculations of the plaintiff's loss of earnings by ignoring the disability benefits received by the plaintiff (scenario 1); and deducting the disability benefits received by the plaintiff from the amount calculated ("scenario 2).

[14] Before dealing with whether under the circumstances of this case the disability benefits received should be deducted or not, it is apposite to note that the parties were not in agreement as to whether the calculations done by Prima Actuaries in 2019 (exhibit "F") or in 2020 ("exhibit "G") should be considered. As correctly pointed out by counsel for the plaintiff, it makes sense in my final analysis to consider the latest calculations. Further, as suggested by plaintiff's counsel and not disputed by the defendant, I am of the view that a contingency deduction of 5% for past loss and 10% post-morbid appears to be fair and reasonable and should be applied.

[15] The only remaining issue to be decided is whether the disability benefits received should be deducted from the total amount awarded for loss of income.

[16] On behalf of the plaintiff it was argued that the disability benefits in the total amount of R350,244.39 received by the plaintiff before the plaintiff withdrew from the Fund, should not be deducted from the amount awarded for loss of earnings as they were in the form of an insurance.

[17] On behalf of the defendant it was argued that since there was no proof that the plaintiff was not medically boarded, the disability benefits should be deducted from the amount awarded for loss of income.

[18] The general rule is that a claimant cannot recover more than his/her actual loss. Further, a claimant cannot receive double compensation[1] and the wrongdoer should not be relieved from liability on account of the claimant's independent efforts or the generosity of a third party[2]. From the evidence of Mrs Cloete-Collopen it is apparent that the disability benefit was intended to provide financial assistance to a member who is no longer able to work and earn a salary.

[19] Taking into accoount that the plaintiff was rendered unemployable as a result of his injuries which qualified him to receive the disbility benefits, there is a causal link between the benefits received and the claim for loss of earnings. In *Dippenaar v Shield Insurance Co Ltd*[3] the *Appellate Division* as it then was held that

"When capacity to earn is sought to be proved by the plaintiff by means of a contract of employment, the monetary value of the contract can only be assessed when one looks at the contract as a whole. In this regard it is clear that, if in terms of such contract there is a compulsory deduction from salary plus a contribution by the employer in order to pay the employee money as sick leave or as a pension, it is the intention of the parties that that money shall be paid when it is due, in terms of the contract. In fact the "income" of the employee is in terms of the contract not confined to his salary… but includes also sick pay or pension when such pay or pension is due. If monetary value is sought to be put on the earning capacity based on this contract, every benefit received under the contract, such as a pension, must therefore be considered, as was done by the trial Court in the present case".

[20] Should the disability benefits received not be deducted from the award made would result in the plaintiff being double compensated[4]

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[1] *Zysset v Santam Ltd* 1996 (1) SA 273 (C) 278A-D.
[2] *Zysset v Santam Ltd* supra: 278F.
[3] 1979 (2) SA 904 (A) at 920D-E.
[4] See *Boutell v RAF* 2018 (5) SA 99 (SCA) a matter which dealt with whether a retirement annuity should be deductible. In *Moropane v RAF*, unreported judgment, North Gauteng High Court, case

[21] I am of the view that the disability benefits received by the plaintiff should be deducted from the award made.

[22] In the result, an order is granted in terms of the Draft Order marked **"X".**

NP MNGQIBISA-THUSI

Judge of the High Court

Appearances

For Plaintiff: Adv Mashaba (instructed by MacRobert Inc)

For Defendant: Adv Malesa (instructed by Molaba Attorneys)

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number 3650/2014 ZAEPEHC 32(4 August 2016) where the court held that a State disability grant should be ignored in the calculation of loss of earnings.