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

Case Number: **36893/2020**

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
22 NOVEMBER 2022**

In the matter between:

FANYANA MOHAMI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The plaintiff, an adult male, born on 26 June 1992, sustained injuries in a motor vehicle accident that occurred on 7 December 2018 and instituted this action for the payment of damages arising from the injuries.

[2] The merits of the plaintiff's claim was settled on the basis that the defendant is 100% liable for the plaintiff's agreed or proven damages.

[3] The defendant conceded that it should issue an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to the plaintiff in respect of the plaintiff's claim for future medical expenses.

[4] The defendant has rejected the plaintiff's RAF4 form in respect of the serious injury assessment. In the result the plaintiff's claim for general damages must be postponed *sine die*.

[5] In the premises, only the plaintiff's claim for past loss of earnings and future loss of earning ability formed the subject matter of the trial.

PAST LOSS OF EARNINGS AND FUTURE LOSS OF EARNING ABILITY

[6] The parties agree that the plaintiff's past loss of earning amounts to R 12 279, 00.

[7] In respect of the plaintiff's future loss of earning ability, the parties agree on the following values:

7.1 income but for the accident R 6 003 587, 00; and

7.2 income having regard to the accident R 1 984 755, 00.

[8] The only contentious issue between the parties is the contingency deductions that should be applied in both scenarios.

Facts

[9] The plaintiff filed various expert reports, the contents of which is not in dispute between the parties.

[10] The plaintiff suffered an open wound to his left hand which caused the extensor tendons of his left hand to severe. Dr Engelbrecht, an orthopaedic surgeon, examined the plaintiff and reports that the plaintiff sustained an 8cm laceration to the second dorsal web space of his left hand. According to the hospital records, an exploration and repair of the left hand of extensor digitorum communis as well as an extensor indices proprius was performed on 14 December 2018. The plaintiff, after discharge from hospital, followed up at a hand clinic and underwent occupational- and physiotherapy until March 2019.

[11] Prior to the accident the plaintiff was employed as a machine operator working with steel which demands medium physical strength. The plaintiff was employed on a contract basis.

[12] Upon return to work, the plaintiff found it difficult to perform the tasks associated with his job as a machine operator. As a result of the injury the plaintiff sustained to his left hand he presents with a tremor of the left hand, loss of grip strength, as well as stiffness of the left index and middle fingers. The sequelae of the plaintiff's injury to his left hand is confirmed by the occupational Therapist, K Cumming.

[13] K Cumming reports that the plaintiff can only perform frequent handling of loads up to 6 kilogram and occasionally up to 10 kilogram. This places the plaintiff in the light physical work category and does not meet the standard expected from the plaintiff in his current employment. The plaintiff, furthermore, has a reduced tolerance for elevated work and fine motor tasks involving the left hand. The plaintiff's work involves, *inter alia*, the turning of knobs which demands fine motor task ability.

[14] The plaintiff furthermore reported experiencing constant pain when utilising his left hand which in turn leads to slow work performance.

[15] The plaintiff's work-related difficulties were confirmed by his supervisor, Mr T Letsipha. The plaintiff is clearly not coping within his current accommodative position.

[16] Mr L De Almeida, human resource manager at the plaintiff's employer confirmed that the plaintiff, due to the reduced strength in his left hand, is no longer expected to carry heavy loads at work.

[17] Notwithstanding the aforesaid difficulties, the plaintiff secured a fixed term contract on 26 May 2021.

Contingency deductions

[18] Ms Strydom, counsel for the plaintiff, submitted that the normal contingency deduction of 15% should apply to the plaintiff's earnings but for the accident. Ms van Zyl, the legal representative on behalf of the defendant, contended that a 17½% contingency deduction accords with the formulae suggested by Robert J Kock in the leading authority on contingencies, to wit The Quantum Yearbook.

[19] I agree. In the result, the plaintiff's income but for the accident amounts to R 4 952 959, 28.

[20] In respect of the contingency deduction applicable to the plaintiff's income having regard to the accident Ms Strydom submitted a 50% deduction whereas Ms van Zyl, when making submissions to court, concede that a deduction of 40% will be reasonable in the circumstances.

[21] The plaintiff is currently employed in a sympathetic work environment. It is common cause that the plaintiff's work pace is slower and that he struggles to meet the demands of his job. The fact that his employer accommodates him insofar as the carrying of heavy loads are concerned is also significant.

[22] The Industrial Psychologist, B Maritz reports as follows in respect of the plaintiff's post-accident employability:

"13.3.14. The writer believes that the plaintiff's current position is the most lucrative position for him, and it is suggested that he maintains this employment tenure for as long as possible."

13.3.15 *However, the probability for him to do so seems minimal, and following a conservative approach, he will most likely become unemployed within the next three to five years.*

13.3.16 *When the plaintiff become unemployed for whatever reason (dismissal, resignation, retrenchment, etc), he will most probably find it increasing difficult to secure and sustain alternative employment.*

13.3.17 *Furthermore, he will most likely experience prolonged periods of unemployment, and there will always be a lack of productivity and motivation present in the plaintiff's working standards (should he secure employment).*

13.3.18 *He will always be in need of an accommodating/sympathetic employer, resulting in him competing unfairly within the labour market, compared to his uninjured peers.*

13.3.23. *Best case scenario, the plaintiff will most likely remain in his current accommodating position until he becomes unemployed (within three to five years)."*

[23] For purposes of the calculation of the plaintiff's future loss of earning ability, I requested the actuary to utilise the plaintiff's current income. Having regard to the very real risk that the plaintiff will not be able to find work that falls within his capabilities and experience pre-accident, I agree with both counsel that a higher than normal contingency deduction is fair and reasonable in the circumstances. The plaintiff's future career opportunities are infinitesimal, to say the least.

[24] In my view, a 45% contingency deduction post morbid will adequately compensate the plaintiff for his loss of earning ability in future.

[25] In the premises, the plaintiff's post-morbid earnings amounts to R 1 091 615, 25 resulting in a total loss of R 3 873 623, 00.

ORDER

In the result, I make the following order:

1. The Defendant is ordered to pay to the Plaintiff an amount of R 3 873 623, 00 in full and final settlement of the Plaintiff's claim for Loss of Earnings, payable into the Plaintiff's attorneys of record trust account with the following details:

Account Holder: Ehlers Attorneys

Bank Name: FNB

Branch Code: 261550

Account Number: [....]

2. The Defendant shall be liable for interest on the aforementioned amount, in the event of failing to pay on the due date, in which event the Defendant will be liable to pay interest on the outstanding amount at a rate of 7.75% per annum calculated from the 15th day of date of judgment until final payment.

4. 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, for the costs of future accommodation in a hospital or a nursing home or treatment of or rendering of a service or supplying of goods to the injured after such costs have been incurred and on proof thereof, relating to the injuries sustained by the Plaintiff on 7 December 2018.

5. The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court scale, subject to the discretion of the taxing master, which costs will include, but will not be limited to the following:

5.1 The reasonable taxed costs of the following experts:

5.1.1 Dr Engelbrecht – Orthopaedic Surgeon

5.1.2 Dr Pienaar – Plastic Surgeon

5.1.3 Kelly Cummings– Occupational Therapist

5.1.4 Talia Talmud – Industrial Psychologist

5.1.5 G Jacobson – Actuary

5.2 The costs for accommodation and transportation (as per the prescribed AA rates) of the injured to the medical legal examination(s) arranged by Plaintiff.

5.3 The costs for accommodation and transportation (as per the prescribed AA rates) of the injured to attend a consultation in preparation for Trial on 31 October 2022 and to attend Trial on 1 November 2022.

5.4 The costs for preparation of Plaintiffs bundles of documents for trial purposes, as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles and to load same on CaseLines.

5.5 The costs for preparation of Plaintiffs bundles of documents for experts, as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles.

5.6 The costs of Adv Karin Strydom briefed and appearing for trial, including but not limited to the following:

5.6.1 Preparation for Trial;

5.6.2 Consultations with Plaintiff's Attorney in respect of Preparation for Trial;

5.6.3 Drafting heads of argument;

5.6.4 Day fee for 1 November 2022;

5.6.5 A reasonable fee for attending a 30 minute argument on 3

November 2022.

5.7 The costs of the Affidavits completed by all of the Experts listed in paragraph 5.1 above.

6. The Defendant is ordered to pay the Plaintiffs taxed and/or agreed party and party costs within 14 days from the date upon which the accounts are taxed by the Taxing master and/or agreed between the parties.

7. The Defendant shall be liable for interest on the aforementioned amount of the Plaintiff's taxed and/or agreed party and party costs, in the event of it failing to pay on the due date, in which event the Defendant will be liable to pay interest on the outstanding amount at the prevailing rate of interest, as determined from time to time, in terms of the Prescribed Rate of Interest Act, 55 of 1975, as amended, from date of allocator or agreement to date of final payment.

8. The Plaintiff's claim for General Damages is separated and postponed *sine die*.

**N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DATE HEARD:

03 November 2022

DATE DELIVERED:

22 November 2022

APPEARANCES

For the Plaintiff:	Advocate K Strydom
Instructed by:	Ehlers Attorneys

For the Defendant:	Advocate E Van Zyl
Instructed by:	State attorney Pretoria