

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

Case number: 13367/2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
6 MAY 2022

MARCO ROSARIO MODA

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

JUDGMENT

LESO AJ

INTRODUCTION

[1] Plaintiff claims damages against the defendant following a motor vehicle accident that occurred on 25 September 2014 at the corner of CR Swart Drive & Edeen Street, Kempton Park between a motorcycle bearing registration number and

letters [...] driven by the plaintiff and the motor vehicle bearing registration numbers and letters [...] driven by the insured driver Jacob Mabushi.

ISSUES IN DISPUTE

[2] The matter was before the court for the determination of merits and quantum. Because there was no opposition in this case, the court's consideration is on the plaintiff's case only.

Merits

[3] The plaintiff claims that the insured driver was negligent because he turned in front of him while he had right of way. The plaintiff claims that the insured driver is solely responsible liable for the plaintiff's agreed or proven damages.

Quantum

[4] The matter was before the court to determine the following claims:

4.2 Past and future loss of earnings and earning capacity at the amount of R1, 024,044.50;

4.3 Past medical expenses in the amount of R45, 940. 65 as per the heads of argument. This amount is however different from the amount reflected in the vouchers submitted by the plaintiff as well as the amount on the draft order which was later presented after the hearing;

4.4 Future medical expenses for all the necessary medical treatment and care as a result of the accident which occurred on 25 September 2014.

BACKGROUND

[5] The plaintiff's counsel moved a motion that the respective experts' evidence be admitted as evidence in the absence of the oral evidence. Having heard the submissions by the plaintiff's counsel and having analysed the plaintiff's documentary evidence which is used in support of the plaintiff's respective claims including the counsel's heads of arguments, the plaintiff was allowed to proceed on documentary evidence in terms of Rule 38(2). Consequently, I made the ex tempore judgment as follows:

5.1 The Defendant is ordered to pay 100% of the plaintiff's proven and/or agreed damages.

5.2 The defendant is liable for the past hospital and medical expenses in the amount of R 45 940.65 which shall be paid to the plaintiff.

5.3 The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for 100% payment of future accommodation in a hospital or nursing home and future medical treatment or rendering of services or supplying of goods as a result of the injuries sustained by the plaintiff in the motor vehicle accident which occurred on 25 September 2014.

5.4 Judgment in respect of the plaintiff's claim for loss of earnings is reserved.

5.5 Plaintiff's claim in respect of General Damages has been postponed *sine die*.

[6] Having heard the submissions of the plaintiff's counsel and having perused the documentary evidence in support of the plaintiff's claim for loss of earnings, I was not satisfied with the plaintiff's counsel's submissions on this particular damage. Consequently, I reserved judgment primarily to analyse the plaintiff's evidence as well as the counsel's submissions.

EVIDENCE ON LOSS OF INCOME AND EARNING CAPACITY

[8] For the purpose of this damages, the reports which are relevant to assist in determining the plaintiff's claim are as follows:

- 8.1 Orthopedic Surgeon, Dr. Oelofse;
- 8.2 Occupational Therapist, Work Health;
- 8.3 Industrial Psychologist, Wessel Van Jaarsveldt;
- 8.4 Actuarial report, Johan Sauer.

[10] The plaintiff was Fifty Five(55) years old self-employed Diesel mechanic at the time of the pre-accident. The Orthopaedic Surgeon, Dr. Oelofse assessed the plaintiff on 18 November 2020 and diagnosed the plaintiff with Left Shoulder Injury and united distal clavicle fracture, painful subluxed acromioclavicular joint, post-traumatic osteoarthritis of the acromioclavicular joint, Right knee injury with residual pain, lateral meniscus injury, decreased knee strength and post-traumatic osteoarthritis of the knee joint. The expert recommends treatment and opines that there is a definite probability for the degeneration in the plaintiff's left AC joint and right knee joint to progress to end-stage osteoarthritis. The expert reports that the plaintiff has a medical history of Diabetes Mellitus and a fracture of the right 5th digit.

[11] The Orthopaedic Surgeon reports that the plaintiff complained that he was struggling to do his duties because he cannot carry or lift heavy objects because of the injuries on his shoulder, and he cannot stand or walk for long due to the injuries on the right knee. Dr. Oelofse reports that the plaintiff will always have a permanent deficit and he must be accommodated in a permanent light-duty and sedentary working environment. The expert opines that the plaintiff will probably not be able to work beyond the age of 65 and he will lose income because he must attend medical treatment. The Orthopaedic Surgeon reported that the plaintiff was booked off from work for two(2) months while the Occupational Therapist reports that he reported that the plaintiff did not report to work four days after the accident.

[12] The Occupational Therapist reports that the plaintiff presented the challenges with his left shoulder and right knee as well as neck and lower back. He reports that the plaintiff's level of work falls within the medium physical range and his post-accident work in a diminished state may be classified as light to medium work. His duties include the following:

- 12.1 assessing vehicles and consulting with customers;
- 12.2 taking vehicles into the shop;
- 12.3 Ordering parts and writing invoices;
- 12.4 Taking payments from the customers and occasionally assisting with physical repairs of motor vehicles.

[13] The Occupational Therapist reports that from the assessment result the plaintiff does not meet the dynamic strength requirements of both levels of work due to the fact that he is permanently unsuited to medium and heavy. He reports that currently, the plaintiff continues with his work as a mechanic because his son assists him however it is anticipated that he will probably not be able to run his business for as long as he wanted if the accident had not occurred. The expert opines that the plaintiff will not be able to reach his pre-accident work potential due to the right knee and left shoulder challenges and should the business for any reason close down, he will struggle to secure and retain employment in a formal open labour market as he has always been a manual labourer. The expert opines that the plaintiff will be limited to some extent even in a managerial /administrative role and he postulate that the plaintiff is most likely to grow his business until such time the company was ready to appoint more employees in order to spread the workload. The expert concludes that the plaintiff's problems will have a negative impact on his earning potential. He defers to the Industrial Psychologist to commend on loss of earnings suffered by the plaintiff.

[14] The Industrial Psychologist, Wessel Van Jaarsveld conducted an assessment on the plaintiff on 01 June 2020 and completed an addendum report on 30 April 2021. The expert indicates that the plaintiff reported that he was earning an annual salary between R167 455.92 and R360 000.00 as a Diesel Mechanic. The plaintiff did not provide supporting evidence on the income. The expert reports that the plaintiff had already ready reached his career ceiling and he would have remained in his pre-morbid role had it not been for the accident. The expert reports that the plaintiff was unable to gain any income during his hospitalization and recuperation period, nevertheless from the records provided he receive an income of R 16 082.00 in October 2014, R25 072.00 in November and R 11 068.00 in December 2014.

[15] The Industrial Psychologist reports that the plaintiff has managed to retain his employment status since the accident occurred his salary has since increased since the accident because his son is conducting the physical work and he earns an average income of R 271,020.00 per annum although he did not state his exact remuneration. The experts conclude that the plaintiff's physical and cognitive capabilities are negatively affected by the injuries the plaintiff sustained during the

accident. He will likely continue in his pre-morbid role however he might need to scale down from his work and appoint additional employees sooner than expected. The experts postulate that the plaintiff might experience further future lack of productivity and motivation and future treatments will impact his earning capacity as he will need to close business or appoint another business during recuperation periods.

[16] The Actuary calculated the plaintiff's past loss of earnings for R 317 209.00 and Future loss of earnings for R 416 248.00 and the total loss of earnings is calculated at R 733 457.00 with no contingency application on the above amounts.

ANALYSIS

[17] The burden is on the plaintiff to prove loss of earnings and earning capacity on a balance of probabilities. I will grant the relief sought by the plaintiff only when I am satisfied that the plaintiff has successfully discharged the onus of proof.

[18] I now turn to consider whether the plaintiff has discharged his burden of proof. To a great extent, the plaintiff's case rests on factual information. The collateral information on the business operations of the plaintiff is limited and the plaintiff did not take the court in his confidence by providing evidence to support his claims for the loss of income save for the affidavit which indicates his income. Despite the fact that the sequelae of the accident have not deterred the plaintiff from earning an increased income after the accident, I have no doubt that the plaintiff's injuries and the sequelae thereof will have a negative impact on his work capabilities as a self-employed mechanic as reported by the Occupational Therapist.

Past loss of income

[19] On the claim for past loss of income, the report of the Occupational Therapist and the Industrial Psychologist differs in as far as the report on the period the plaintiff did not report for work while he was recuperation from the accident. In any event, the evidence before me indicates that the plaintiff received an income in 2014 every month preceding the accident. Consequently, the evidence before me does not

support the plaintiff's claim of past loss of income. It is important to note that the final analysis of an award for damages cannot be based upon speculation but the basis for the award must be supported by evidence.

Future loss of income

[20] On the claim for future loss of income, the factual information as reported by the experts remains undisputed although not corroborated or supported by evidence. The plaintiff has deposed an affidavit that briefly indicates the income from his business. From the evidence before me, the plaintiff's income has increased with the help of his son. The Industrial Psychologist postulates that the plaintiff will probably suffer a loss of income because he must take time off to undergo medical treatments and he will retire before 65 years. The limited information and evidence, in this case, have crippled me to assess the prospects of the plaintiff save to state equally, that the circumstances of the plaintiff's case support the probability that he might earn an income until and beyond retirement. Having considered all probabilities on the plaintiff's prospects of earning an income I will then apply contingencies in order to carter the uncertainties in the plaintiff's prospect. The court's discretion in the application of contingencies was highlighted in *AA Mutual Association Ltd v Maqula 1978(1) SA 805*, where the court stated that the law is settled in that a trial court has a wide discretion to award what it considers a fair and adequate compensation to the injured party for his bodily injuries and their sequelae.

[21] Having considered carefully and cumulatively all the relevant circumstances of this matter, as sketched above, I have concluded that 10% contingency on Future loss of income(pre-morbid) and 15% contingency on Future loss of income(post-morbid) will address the uncertainties of the plaintiff's prospects in life.

CONCLUSION

[22] The plaintiff failed to prove that he is entitled to claim past loss of earnings and therefore he is not entitled to such award.

[23] Plaintiff is entitled to claim loss of future earnings to amount of R calculated as follows :

23.1 Future loss(had the accident not occurred) : R 1 286 430 - 10%
= **R 1 157 787;**

23.2 Future loss(now that the accident has occurred): R 870 182 –15%
=**R 739 654.7;**

23.3 Total Future loss of income =**R 418 132.3**

[24] HAVING RESERVED JUDGMENT ON THE BALANCE OF THE CLAIM AS PER PARAGRAPH 5 AN ORDER IS NOW MADE AS OUTLINED IN THE PARAGRAPHS BELOW.

24.1 The plaintiff's claim for past loss of earnings is dismissed.

24.2 The defendant shall pay the Plaintiff an amount of R 418 132(FOUR HUNDRED AND EIGHTEEN THOUSAND ONE HUNDRED AND THIRTY-TWO RANDS).

24.3 Should the Defendant fail to pay the Plaintiff's party & party costs as taxed or agreed with 180 (One Hundred and Eighty) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at the applicable rate per *annum*, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

such costs shall include:

24.4 the costs incurred in obtaining payment of the amounts mentioned above;

24.5 the costs of senior-junior counsel, including senior-junior counsel's charges in respect of her full-day fee for 17 AUGUST 2021 on the High Court Scale, as well as full preparation, heads of argument.

24.6 the costs to date of this order, which costs shall further include the cost of the attorney which includes necessary preparation for trial.

24.7 the costs of all medico-legal, radiological, actuarial, addendum and RAF4 forms obtained by the Plaintiff, as well as all expert reports furnished to the Defendant and/or to the knowledge of the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles, irrespective of the time elapsed between any reports by an expert;

24.8 the costs and expenses incurred of transporting the Plaintiff to and from the medico-legal examinations.

24.9 the costs of holding all pre-trial conferences, judicial management meetings and preparation thereto, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including senior-junior counsel's charges in respect thereof,

24.10 the costs of and consequent to compiling all minutes in respect of pre-trial conferences, including senior-junior counsel's charges;

24.11 costs in respect of obtaining all documents and lodging of the Plaintiff's claim;

24.12 The amounts referred to in paragraphs 2, 4 and 5 will be paid to the Plaintiff's attorneys, Corne Nell Incorporated, by direct transfer into their trust account, details of which are the following: Cornè Nell Incorporated, ABSA Bank, Account number:[...], Branch code: 63 20 05.

JT LESO

Acting Judge of the High Court

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| Date of Hearing: | 17 August 2021 |
| Judgment Delivered: | 06 May 2022 |
| For the Plaintiff: | Cornè Nell Incorporated |
| Plaintiff's representative: | ADV. W BOTHA |

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| Contact No: | 082-782-0041 |
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| For the Defendant: | Unrepresented |