

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

Case Number: **69417/2017**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 18 July 2023

SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

LEBOGANG SOLOMON DIALE

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

REASONS IN TERMS OF RULE 49(1)(c) OF THE UNIFORM RULES OF COURT

JANSE VAN NIEUWENHUIZEN J:

[1] On 2 May 2023 this court granted an order by default against the defendant for the payment of R 3 456 401, 00 in respect of damages that the plaintiff suffered as a result of injuries he sustained during a head on collision between two trains.

[2] Subsequent to the order and on 11 May 2023, the defendant filed a notice in terms of rule 49(1)(c) requesting reasons for the order. The reasons are set out herein.

Injuries

[3] The plaintiff, an adult male born on 20 November 1985, suffered the following injuries as a result of the train accident:

- 3.1 a C4/CS and CS/C6-disc injury resulting in chronic pain and spasms;
- 3.2 C4-6 spondylosis;
- 3.3 L4/LS-disc injury with residual pain and muscle spasms; and
- 3.4 a soft tissue shoulder injury.

[4] The orthopaedic surgeons, Dr Oelofse and Dr Deacon, examined the plaintiff on 3 July 2019 and opined that the plaintiff suffered serious injuries to his cervical and lumbar spine and would in all probability require future surgery on his neck and lumbar spine. Due to the injuries the plaintiff will suffer chronic pain for the rest of his life and has a 25% chance of having to go on early disability.

Future medical expenses

- [5] Due to the plaintiff's injuries and the sequelae of the injuries the orthopaedic surgeons and the occupational therapist, Monique van Wyk, recommended future medical treatment and devices to assist the plaintiff in his day to day living.
- [6] The capitalised value of the recommended treatment and devices appear in the actuarial certificate of the actuary, Johan Sauer and amounts to **R 1 697 044, 00.**

Loss of earnings and earning capacity

- [7] The plaintiff's highest qualification is a Grade 11 which he obtained in 2004. Prior to the accident the plaintiff was self-employed as a vendor with an estimated income of R 6 500, 00 per month.
- [8] The impact that the injuries he suffered in the accident has on the plaintiff's employability is summarised by Monique van Wyk as follows:

"Mr Diale has always been reliant on his physical attributes to secure and sustain occupation within the open labour market. He would probably have been able to continue in his nominated self-employment endeavour in future

without any limitations expected. This has been negatively impacted by the accident injury sequelae, curtailing his competitiveness in the open labour market and rather causing him to be a more vulnerable and compromised job seeker when compared to his pre-morbid level of functioning and / or other able bodied peers of similar education and skill set. This is further exacerbated by the presence of chronic pain syndrome which with the probability (at least 75%) for suffering from chronic pain in his back for the rest of his life. Orthopaedic opinion indicates that even successful treatment, deficits will remain (page 20). Within this scenario, the writer concurs with the orthopaedic opinion pertaining to his curtailed retirement age, especially should his occupational duties not vigilantly adhere to the above indicated accommodations.”

- [9] Based on the opinions of the orthopaedic surgeons and the occupational therapist, Nicolene Kotzé, an industrial psychologist, postulated the plaintiff's pre- and post-morbid income scenarios. Pre-morbid, the industrial psychologist opined as follows:

“Given that Mr Diale has only ever worked as a Vendor and was motivated to continue with his vending activities prior to the accident, as well as the fact that he had reportedly been operating in a self-employed capacity for an extended period of time when the incident under consideration occurred, it is considered reasonable to presume that he, but for the accident, would have continued with his self-employed activities. It is, therefore, accepted that he would likely have continued to earn on par with his reported net income at the time of the incident plus annual inflationary increases.”

- [10] In respect of the plaintiff's post morbid earning ability, the industrial psychologist stated the following:

“When having regard to the afore discussion it appears that although Mr Diale has been rendered significantly more vulnerable, he would be able to continue with his pre-incident work activities except for carrying heavy bags of potatoes.

....

“..writer is of the opinion that when having regard to the treatments suggested by the experts, he will be absent from work which will lead to a total loss of earnings and hence writer’s opinion that he first receives treatment before embarking on vending again. He indicated to writer that there was no one at home who could assist with his venture. Writer defers to the experts for a justified period in this regard. In addition, it may initially be necessary to first provide him with the necessary funds to buy the first lot of stock to start his vending again. Since he has to start up his business from scratch, writer doubts that he would be able to earn as per the postulated pre-incident income noted by writer and it might be that he would only be able to earn equivalent to his actual pre-incident income, also in lieu of the fact that he would at some point on time only be able to work shorter hours/flexi hours which would have an adverse effect on his income earned.”

- [11] In view of the postulations contained in the report of the industrial psychologist, the actuary provided a calculation in respect of two scenarios, to wit: retirement age at 70 and retirement age at 65. In respect of retirement age at 70 and applying a 5% contingency deduction in respect of both pre- and postmorbidity earnings, the past loss of income amounted to R 222 307. Applying contingency deductions of 15% pre-morbidity and 30% postmorbidity the plaintiff’s future loss of income amounted to R 1 024 691, 00 with a total loss of earnings of R 1 246 998, 00.
- [12] The same contingency deductions were applied in the age 65 scenario and the total loss amounted to R 1 272 075, 00.
- [13] The difference in retirement age is due to the fact that self-employed individuals normally retire at a later stage in their life’s.
- [14] Ms Ferguson, counsel on behalf of the plaintiff, submitted that an average between the calculations would reflect fair and reasonable compensation for the plaintiff’s loss in this regard. I agreed and awarded an amount of **R 1 259 357, 00.**

General damages

[15] Ms Ferguson referred to awards in matters where similar injuries were sustained by the plaintiffs. I will refer to the present-day value of the amount that was awarded. The authorities are:

15.1 *Schoeman v RAF* (69242/2015) ZAGPPHC 1203
(12 October 2017): R 638 000, 00

15.2 *Ramolobeng v Lowveld Bus Services (Pty) Ltd and Another* (29835/09)
[2015] ZAGPPHC 31 (3 February 2015) R 818 000,
00

15.3 *Oosthuizen v Road Accident Fund* (1663/2015) [2016]
ZAGPPHC 798 (9 September 2016) R 770 000,
00

15.4 *Stemmet v Padongelukkefonds 2004* (5C4) QOD
60 (AF) R 400 000,
00

15.5 *Barend Johannes Coetzer v Road Accident Fund* 2017
(7C5) QOD 34 (GJ) R 630 000,
00

[16] The plaintiff suffered acute pain in his neck and back immediately after the accident, which pain persisted for at least 2 to 3 weeks after the accident. The plaintiff still suffers from chronic pain due to the injuries he sustained during the accident. The pain is accompanied by persisting muscle spasms in his back and neck, as well as his shoulders. The muscle spasms in his shoulders are more severe on the left than the right side. As is evident from the report by the orthopaedic surgeons, the plaintiff will have to undergo surgery in future. Due to the surgery and the rehabilitation period thereafter, the plaintiff will suffer additional pain.

[17] Insofar as the plaintiff's psychological well-being is concerned, the plaintiff suffers from a sombre mood due to continuous pain and discomfort he experiences. The sequelae of the injuries suffered in the accident altered the plaintiff's lifestyle and he has a reduced capacity to freely partake in pre-

accident tasks. The financial constraints caused by the plaintiff's inability to generate an income, causes anxiousness and anger. The plaintiff told the occupational therapist that *"this thing has changed my life, I'm always full of anger. I'm always wondering why this thing must happen to me."* If one considers that the plaintiff was in the prime of his life when the accident occurred, his high levels of frustration and anger is understandable.

[18] The injuries suffered by the plaintiff in the accident has had a devastating effect on his amenities of life and the plaintiff should be duly compensated for the loss.

[19] Having had regard to the awards in similar matters, the pain the plaintiff has suffered and will suffer in future and the impact the injuries has had on the plaintiff's enjoyment of life, I considered the amount of **R 600 000, 00** to be fair and just compensation in the circumstances.

Total award

[20] Although the total amount of the award should be **R 3 558 401, 00**, Ms Ferguson prepared a draft order in terms of which the plaintiff only claimed the amount of **R 3 456 401, 00** and such amount was granted.

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

DATE HEARD:

02 May 2023

DATE DELIVERED:

18 July 2023

APPEARANCES

For the Plaintiff:

Advocate R Ferguson

Instructed by:

Wehmeyers Attorneys

For the Defendant:

No appearance