



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 5746 /2015

In the matter between:

JACOBUS JOHANNES MARITZ

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 8 NOVEMBER 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 7 MARCH 2023. The date and time for hand-down is deemed to be 7 MARCH at 15:30.

[1] The plaintiff claims damages arising out of bodily injuries sustained in a motor vehicle accident? on 26 February 2012. On 7 February 2017, this court ordered that the defendant was liable for payment of 100% of the plaintiff's proven or agreed damages. The defendant was also ordered to provide the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 for future medical expenses.

[2] The defendant rejected the serious injury assessment report (RAF4) of the plaintiff on the basis that the "...*Dr's report confirms that there are no serious injuries (soft tissue injuries, X-ray show no abnormalities on cervical spine.*" According to the Rule 37A pre-trial minutes, the plaintiff

abandoned the claim for general damages due to non-qualification as per the Health Professions Council of South Africa's decision dated 30 November 2021. In this case I am only called upon to adjudicate the issue of loss of earnings/earning capacity.

- [3] The issue to be adjudicated upon in this dispute is whether the plaintiff has made up a case for loss of earnings/ earning capacity, and if so, how much damages must this court award to him in compensation.
- [4] It is undisputed that the plaintiff was involved in a motor vehicle accident as a result of which he sustained some injuries. According to the report dated August 2014 of Dr Oelofse, an orthopaedic surgeon, the plaintiff drove himself to the hospital 2 days after the accident. He was assessed and treated at the emergency unit. He complained of pain in the neck. His X-rays revealed no abnormalities. According to him it seems that the plaintiff was treated conservatively with analgesics for muscle spasms of the cervical spine. He was discharged the same day.
- [5] Dr Oelofse also noted that the plaintiff had pains in the neck which gradually increased over time. The plaintiff followed this issue of the pain with his doctor on several occasions. The X rays taken again later revealed no abnormalities. Dr Oelofse opined that the injury sustained by the plaintiff had an impact on his productivity and working ability. He also opined that although the plaintiff returned to his occupation post the accident, he had difficulty completing his tasks with ease. He opined that the plaintiff will most probably only work until the age of 60 or even younger.
- [6] Dr Oelofse diagnosed the plaintiff with C6-C7 disc lesion with chronic headaches; chronic muscle spasm; left radicular symptoms and mild to advanced spondylosis of C6-C7.

- [7] The plaintiff further reportedly bumped his right knee on the dash board of the vehicle he was driving during the accident. He did not experience any pain on the knee until approximately 3 months later. The plaintiff experienced an increase in the pain when sitting with bent knee or walking for long periods of time.
- [8] Ms Van Biljon, an occupational therapist opines that due to the injuries and its sequelae the plaintiff should be accommodated in a light duty/sedentary position.
- [9] According to Dr Jacobs, an industrial psychologist, the plaintiff received all his income in full after the accident and there is consequently no past loss of income. In his opinion it is highly unlikely that the plaintiff will be accommodated in suitable sedentary position. While he opines that there was no past loss of income, he is of the view that the accident changed his capacity to earn income and the defendant ought to compensate him for its future loss.
- [10] On the other hand, the contention of the defendant is that the plaintiff should not be compensated for any loss of income. This contention is premised on the view that the plaintiff did not sustain serious injury, what he sustained was typical whiplash (straining injury of the cervical spine).
- [11] During the hearing, Counsel for the defendant handed from the bar the findings of the Appeal Tribunal constituted pursuant to the Road Accident Fund Regulations, 2008.¹ The plaintiff did not object to the handing in of the findings. The findings therefore became part of the record. The evidence reveal that the defendant formally rejected the serious injury assessment report. The basis for the rejection according to the defendant is that *“the Dr’s report confirms that there are no*

¹Published under GN R770 in GG 31249 of 21 July 2008.

*serious injuries (soft tissue injuries, x-ray show no abnormalities on cervical spine)."*²

- [12] The following was set out in the letter of the Registrar emanating from the Appeal tribunal;

DISCUSSION POINTS (INTERPRETATION OF THE FACTS/INFORMATION)

- *"The history is typical of whiplash (straining injury of the cervical spine)*
- *The MRI scan showed mild or early spondylosis at the C6/7 level, consistent with the patient's age. The pathology is described as "minimal". By the radiologist. No features of injury of the vertebral column were identified.*
- *The patient thus appears to have sustained a whiplash injury, which is not serious...*
- *Dr Schutte's rating of 8% WPI is incorrect. The correct rating for whiplash injury, without verifiable radiculopathy, would be 1% or 2%.*
- *The Tribunal panel disagrees with Dr Oelofse assertion that the patient may have to undergo spinal fusion in the future, as a result of the injury he sustained in the accident. If he undergoes surgery, it will be attributable to ordinary age-related spondylosis, rather than the effects of the injury he sustained in the accident.*
- *...*

TRIBUNAL FINDINGS

- *The claim for compensation for general damages is based on Dr Schutte's assertion that the patient sustained a C6/7 lesion, with radiculopathy. The radiculopathy was not confirmed. (The patient complains of intermittent paraesthesia in the left hand, while the MRI scan shows 'minimal narrowing of the right sided-neural foraminal'). the MRI scan finding of minimal pathology of the C6/C7 disc,*

²See Rejection notice in terms of regulation 3(3)(d)(i) –page 67 of the paginated record.

with no features of acute trauma (minimal bulging of the disc, but no rupture/disruption (is fully consistent with ordinary spondylosis that would commonly be seen in a patient of this age.

- *Considering the description of the injury and the paucity of objective findings, it is clear that the patient sustained whiplash injury, which is non-serious....*
- *Narrative Test 5.1 Physical impairment- the patient sustained a straining of the cervical spine(whiplash). The MRI scan showed a C6/7-disc lesion, described as 'minimal' by the radiologist. This lesion is consistent with early age related degenerative spondylosis. the injury of the cervical spine is not serious, being included in the Minister of Transport's list of non-serious injuries.*
- *...*
- *...*
- *In the light of the above, it is the Tribunal's viewpoint that the injuries sustained by the patient did not result in significant long-term life altering consequences."*

[13] As a starting point, it is necessary to indicate that a decision by the Appeal Tribunal constitutes an administrative action as defined in the Promotion of Administrative Justice Act, 3 of 2000. Section 6(1) of this Act provides that any person may institute proceedings in a court or tribunal for judicial review of an administrative action.

[14] Regulation 3(4) and 3(13) of the Act lays down the procedure by which the Appeals Tribunal may enquire into a dispute. Any person feeling aggrieved by its decision may take the said decision to court on review. The plaintiff in this case chose not to take the findings and decision of the Appeals Tribunal on review in terms of PAJA as indicated above.

[15] It is against this backdrop that this matter has to be adjudicated upon. It is also necessary to touch on the classification of damages in our law.

All non-patrimonial loss such as pain and suffering, loss of amenities is classified as general damages. Forms of damages that remain prospective up to the date of the hearing like future medical expenses and future loss of earnings/earning capacity are also classified as general damages. Patrimonial loss on the other hand refers to damages such as medical and hospital expenses already incurred as well as past loss of income and these are classified as special damages. Simply put, past loss of earnings is classified as special damages while future loss of earnings is classified as general damages.³

[16] The following is also relevant as set out in Corbett(*supra*)⁴

“Before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant's wrongful act...”

It is necessary to mention that the claim of the plaintiff for future loss of earnings is based on the reports of Drs Schutte and Oelofse. Their assertions were refuted by the tribunal. Specifically, the assertion by Dr Schutte that the patient sustained a C6/7-disc lesion, with radiculopathy, which apparently remains unconfirmed and the opinion of Dr Oelofse that the plaintiff may have to undergo spinal fusion. It is specifically asserted by the tribunal that if the plaintiff was to undergo surgery it would be attributable to ordinary age related spondylosis rather than the effects of the injury sustained in the accident.

[17] The plaintiff bears the onus to prove his damages. It is necessary to take note that according to regulation 13 the decision of the tribunal is both final and binding. The plaintiff chose not to have the decision set aside. I am of the view that in the absence of the review of the decision of the tribunal, I have to accept that the plaintiff suffered whiplash which is not categorised as a serious injury. It has not been established that

³See Quantum of Damages, Vol 1 Corbett 4th ed, Gauntlett at pages 2-4.

⁴ p 30.

the whiplash had profound life changing consequences on the life of the plaintiff.

[18] The assessment of the damages suffered were not based on the fact that the plaintiff sustained a whiplash but on the refuted opinion that he sustained a C6/7-disc lesion injury. The objective evidence by way of MRI scan showed a C6/7-disc lesion and the radiologist described same as minimal.

[19] Logic thus dictate that if the premise upon which the assessment is based is flawed, then in that case the relief sought cannot succeed. It has not been established that the plaintiff will be unable to earn a living, either on a temporary or permanent basis. In a claim for future loss of earnings, the plaintiff must establish on evidence that he would have earned an income but for the injuries sustained. It is my considered view that the injury sustained, being non-serious have not resulted in a permanent impairment of earning capacity. I am thus not satisfied that the plaintiff has succeeded to prove the claim for the loss of future earnings. In respect of past loss of earnings, it is common cause that the plaintiff suffered no such loss. The plaintiff has thus failed to prove this head of general damages.

[20] I accordingly order as follows:

ORDER

1. The plaintiff's claim is dismissed with costs.

P.E. MOLITSOANE, J

Counsel on behalf of Plaintiff: Adv. JC Coertzer
Instructed by: Honey Attorneys
BLOEMFONTEIN

Counsel on behalf of Defendant: Adv. Mkwanazi
Instructed by: State Attorney
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