



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
14/12/17
DATE SIGNATURE

Case No: 7835/2015

14/12/17

In the matter between:

Aubrey Keith Kinnes

Plaintiff

And

Road Accident Fund

Defendant

JUDGMENT

RANGATA AJ,

Introduction

[1] This action arises from a Motor Vehicle collision that took place on 03 May 2013. The Plaintiff, Aubrey Keith Kinnes, who was injured in the accident, is claiming an amount of R4 500 000.00 for damages suffered as a result of the said accident. The amount claimed comprises of the following heads of damages:

[1.1] Past Medical and hospital Expenses: R250 000.00;

[1.2] Future medical and hospital expenses: R500 000.00;

[1.3] Estimated future loss of earnings: R3 000 000.00; and

[1.4] General damages: R750 000.00.

[2] The merits have been conceded 100% in favour of the Plaintiff by the Defendant. All heads of damages have been settled with the exclusion of the claim for the loss of earnings. This Court is therefore called upon to decide only on the issue of the Plaintiff's loss of earnings.

[3] Both parties are in agreement regarding the extent of the reduced earning capacity as contained in the medical report by Dr V M Close, the Orthopaedic Surgeon, dated 16 October 2017. Dr Close estimated the Plaintiff's loss of work capacity in light duties post-morbidly to be in the region of 20%. Given the injuries sustained by the Plaintiff, it is reported that he will be confined to light duty for the rest of his life with retirement age recommended at the age of 60. The parties have also agreed that, given the accident, the Plaintiff will retire at the age of 60.

Background

[4] As a result of the aforementioned motor vehicle collision, the Plaintiff sustained a right tibial plateau fracture of the medial proximal aspect, which was treated surgically with internal fixation. There is also severe medial compartment post-traumatic osteo-arthritis present. Furthermore he sustained left shoulder dislocation with a fracture of one of the bones and a fracture of the right tibial plateau. He reported reduced mobility at the left patella. He will require total knee replacement in the near future and has clinically developed post-traumatic Osteoarthritis. The knee injury is considered a serious injury.

[5] At the time of the accident he was 43 years old, working as an Electrical sales representative for Circuit Breaker Industries (CBI), a company which is a national supplier of circuit breakers. He qualified as an electrician and registered as such in 2008 and completed his trade test. In his evidence, the Plaintiff provided a history of working in the oil and gas industry, having worked in the oil rigs of South African Coast and abroad. During 2008 he worked on a contractual basis as an Electrician for HSC Recruitment Agency doing electrical maintenance. He also worked, amongst others, in Dubai and Namibian waters. He had the benefit of working for 28 days on the rig and 28 days not working on a monthly basis.

[6] From March 2010 to December 2011 the Plaintiff was employed as an Electrical Foreman for Dietsman International. He was subcontracted for maintenance on the Total oil rig, called Pazflor. He worked in France, Korea and Angola. During this period he also worked on a 28 days' rotation on a monthly basis. Whilst he was employed on the Pazflor oil rig, he was requested to amend the existing health and safety and environmental protocol policies and procedures for Total and thereafter to explain and demonstrate various aspects thereof to higher management of Total. The policies and procedures focussed on the safety in transition between the various trades when taking over on a job. Later he was approached by Total for a future employment as an HSE (Health, Safety and Environmental) Supervisor, through Mr Vinod Singh, Head of Operational Safety and Methods Department. They continued to discuss the possibility of the Plaintiff being employed in the HSE in the future and this discussion continued beyond his employment at Dietsman.

[7]. For the period June 2012 up to July 2012 he took up an offer to work at Petro SA as an offshore Electrician in Mossel Bay. At the time of the accident, the Plaintiff was working for CBI Electric as Technical sales representative. He testified that although he accepted the position at CBI, it was not his intention to remain and work in South Africa permanently, that when he came to South Africa in December 2011, after his contract had expired, he was already in discussions with Mr Singh about the possible job opportunity as HSE Supervisor. The Plaintiff produced email correspondence from Mr Singh, inviting him to advise if he was still interested in the position at Total and further email correspondence from Mr Singh to Mr Jean- Marc Pecquois, the Process Facilities Manager of Total in Korea recommending the

Plaintiff in response to a query by Mr Pecquois concerning senior HSE advisors. He submitted his CV and confirmed his availability to take the job.

[8] The Plaintiff testified furthermore that during his discussions with Mr Singh he was advised that the HSE supervisory post would be attached to a new oil rig, named Clov, which was under construction and fabrication in Korea. It was destined for utilization and deployment in Angola. According to the planning the manufacturing of the vessel would have been completed during July/August 2013, wherein after the vessel would remain in Korea for approximately 1 year during which it would be fully commissioned for operation and would thereafter be moved to Angola for production purposes. He testified that he would become an HSE supervisor on Clov as soon as it entered the commissioning phase. It is the Plaintiff's case that after December 2011, the Plaintiff made an effort to be better qualified for the position of HSE. He registered for the National Examination Board in Occupational Safety and Health (hereinafter referred to as NEBOSH), for which he personally paid for.

Expert evidence

[9]. Mr Ben Moodie, the Plaintiff's Industrial Psychologist, provided a background to the Plaintiff's tertiary/educational history. He confirmed the Plaintiff's earnings at Dietsman at an amount of US\$450.00 per day plus benefits. The Plaintiff reported to him that had he taken up the position at Total he would have earned in the region of €10 000.00 to €15 000.00 per month as well as accommodation, food and medical aid benefit. In his position as Electrical foreman at SFG Engineering, he was earning €350.00 per day, which amounts to €9 800.00 per month. Mr Moodie therefore concluded that pre-accident the Plaintiff's earnings would have been at an average of €12 500.00 per month plus accommodation, food, medical aid and tax benefit. It is accepted that he would have reached his career ceiling and thereafter his income would have increased in line with inflations.

[10] He testified that given the email correspondence between Mr Singh and the Plaintiff, he did not see any reason why the Plaintiff would not have been appointed in the HSE position; that the Plaintiff would probably have worked until the age of 70. Further that after the age of 65 years he could have returned to South Africa and earned on a level commensurate with that offered by Total or earned a similar

income to overseas until the age of 70. He referred to the joint minute signed by him and Ms Tjale (Defendant's Industrial Psychologist), wherein he concluded that, but for the accident, the Plaintiff would in all probability have opted to pursue employment offshore, as an HSE supervisor at Total. Mr Moodie confirmed that he had perused the latest actuarial report and observed that the income figures contained therein correctly coincided with those contained in his reports. Mr Moodie, with reference to the latest international earnings surveys, concluded that electrical foremen in the oil and gas industry would currently be earning approximately €8 700 per month.

[11]. For the Defendant, Ms Tjale, Industrial Psychologist was called as the witness. She testified that the Plaintiff consulted with Psychometrics from her office and conceded that she did not consult or speak to the Plaintiff, prior to compiling her report. She relied on the information obtained by her psychometrics. In addition to the information obtained by her office, she also deferred to the information as reported by Dr Whitehead, the 1st Plaintiff's Industrial Psychologist. Ms Tjale conceded that from 2008 the Plaintiff ventured into a new career, by completing his trade test and qualified as an Electrician. This made it possible for him to gain employment in the oil and gas industry. He obtained certificates from NEBOSH as well as the medical certificate, which could be accepted as part of getting ready for the job in the Health Safety environment in the Oil industry. She confirmed the Plaintiff's work history and educational progression as well as the alleged income by the Plaintiff and Mr Ben Moodie.

[12]. She further confirmed the Plaintiff's current employment at Circuit Breaker Industry, in Johannesburg, working from George from August 2012, where he was still employed at that position at the time of the accident. In that position he was earning in the region of R29 800 per month with benefits. Post-accident his earnings remained unaltered. Ms Tjale testified that despite the background of the Plaintiff's job history in the oil and gas industry from 2008 to 2011 she could not consider the possibility of the Plaintiff returning to work in the rig industry. Ms Tjale testified that he spoke to Mr Singh who advised her that as the Project Manager it is his job to search for resources on the Total database and find close matches. It is his responsibility to identify and approach the resource and the selection process continues until the best resource is appointed. He confirmed that in this case the

best resource was Mr Kinnes, the Plaintiff. He further indicated that the position was a contract position and would have been completed in August 2015. Ms Tjale submitted that the fact that Mr Singh could not produce a job offer that was offered to the Plaintiff, she therefore could not consider that he could have been offered a position at Total.

[13]. She totally disregarded the possibility of the Plaintiff being selected for the HSE supervisory position as such she did not make any provision for the Plaintiff ever returning to work in the Rig. She acknowledged the clear career path that was altered and the preferred path that was followed by the Plaintiff. She further acknowledged that the Plaintiff sufficiently equipped himself for the altered path in his career in the Oil Rigs for a period of approximately five years. Further that he was approached by Mr Singh, whom he had worked with on the Total project.

[14] It is the Defendant's case that the Plaintiff's permanent position at CBI, (South Africa), should be accepted as the position that the Plaintiff had settled for pre-morbid and furthermore that his current income should be used as the basis of calculation in determining the loss of income, pre and post-accident. Ms Tjale based her scenario of the Plaintiff's loss on the fact that the Plaintiff opted to remain in his current job pre-accident on the basis that the Plaintiff did not take up job opportunities presented to him.

Issues

[15] The issues in dispute with regard to the loss of income which the court has to deal with are,

Firstly, the Plaintiff's probable future career path had the accident not taken place;

Secondly at what age would the Plaintiff have retired disregarding the accident.

The Law

[16] In determining the loss of income the Plaintiff bears the onus to prove that he would have earned such income had it not been for the accident. It remains the duty

of the Plaintiff to proof beyond reasonable doubt that prior to the accident he had the ability to earn the alleged income.¹

In *Southern Insurance Association Ltd v Bailey* NO² it was stated that:

'an inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches: One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative. It is manifest that each approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt *a non possumus* and make no award'.

Analysis

[17] The court accepts that from the information presented, as well as the evidence by both parties, that there is no definite indication that would affirm that the Plaintiff received an offer to work for Total as HSE supervisor. It is however an unavoidable fact that the Plaintiff had the intention to work in the oil Rigs. Even after returning to SA we still find correspondence indicating an interest to return in the oil industry. This is a fact that the Defendant chose to overlook. The plaintiff presented its case on the Plaintiff's career pre-accident, given the career built up, the qualification, the fact that the Plaintiff identified that there is an opportunity for better earning in the oil and gas industry.

[18] Accepting that the Plaintiff had an interest to work in the oil rigs, further that there was a probability that he might not have necessarily received an offer from

¹ The law of third party compensation, HB Klopper, 178

² 1984 (1) SA 98 (A) at 113f-114A,

Total, there is high probability that the Plaintiff would have continued to look for opportunities in the oil industry. He would have accepted such employment, mainly because it pays better comparing to his current income with his present employment. In his response to Mr Singh when ask if was available for the HSE position he replied that,

'I have never been more ready for this position and would appreciate it if it could be done as soon as possible. Thank you for this opportunity; I will give it my 100%'

[19] The Plaintiff displayed to the court that indeed there was an engagement between him and Mr Singh regarding this anticipated job as indicated in the emails. The court accepts that despite the evidence presented by Defendant that the Plaintiff took up a permanent position at CBI, which they contend it would have been his career path had the accident not occur, there was clear intention by the Plaintiff to pursue a career in the oil Rigs.

[20] The question as to when would such probability have eventuated would remain a matter of speculation which should be addressed by way of contingencies. The Plaintiff has proven on a balance of probabilities that he had the intention to further a career in the oil industry pre-accident. Taking into account his Educational history, further qualification i.e. NEBOSH certificates, as well as the medical certificate, this reaffirms a profile of upward movement. The Plaintiff displayed that he had the skills and expertise to work in the Rigs and was driven by earning a better income.

[21] The court finds no reason to disbelieve the evidence of the Plaintiff. He remained consistent throughout the trial and there is no reason to doubt his evidence. His intention to pursue a career in the oil industry is not challenged. In fact it is acknowledged by the Defendant. The Defendant conceded that the Plaintiff is a driven employee who seizes any opportunity to achieve the best. He showed in his work history that he worked himself up the ladder, striving for better work and income. Ms Tjale reported that the Plaintiff was not intending to return overseas and this she based on the fact that he accepted permanent position in South Africa and that he indicated during his interview that he returned to South Africa to be with his family. The Plaintiff testified as to the circumstances that resulted in him accepting the position in South Africa. He testified that he opted to accept the position at CBI, whilst waiting for the HSE position to materialise.

[22] The Court notes that despite the concession by Ms Tjale that she did not have a single meeting with the Plaintiff, let alone a telephone discussion, she prepared the report purely from the collateral information collected by her employees. The fact that the Plaintiff had indicated his intentions to return to overseas, this should have been the reason enough for the Industrial Psychologist to want to meet with the Plaintiff, investigate this probability and consult with all the relevant individuals. The Defendant's Industrial Psychologist in this regard relied on the standard collateral information collected by her staff.

[23] In evaluating the opinions of both industrial Psychologist, in view of the case of *Abdo NO v Senator Insurance Co Ltd and another*³, wherein the court preferred direct evidence and that if it is unacceptable, the court must decide on what opinion is preferable and base its decision on it. In this regard the court accepts the evidence of Mr Ben Moodie in postulating the Plaintiff's career path, pre-morbid, including the projected income.

[24] In conclusion the court considers two aspects:

a) Disregarding the accident, what career path would the Plaintiff have followed. It is the Plaintiff's case that the Plaintiff had the intention to return to work in the rig. That after the expiry of his contract at Dietsman he returned to SA, accepted a position at CBI whilst waiting for the Total offer. The insinuation by the Defendant that the Plaintiff intended to remain in South Africa because he accepted a permanent position at CBI, cannot hold, except to note that the Plaintiff would have had the option to terminate such contract when he received the offer. Further that it would have been practically possible and easier to terminate a permanent (indefinite) employment contract as opposed to a shorter (definite) contract which is project based. The Plaintiff was aware as to more or less the period that the Total contract was to be available as the vessel was being constructed and would have been commissioned in 2013.

(b). The second aspect to deal with is that given, the career path as outlined by the Plaintiff, in particular by Mr Ben Moodie, in the oil rig, be it in a permanent position or contract position, at what age would the Plaintiff have retired. The

Defendant based its argument on the report by Dr Whitehead, who reported that it is probable that the Plaintiff would have continued working in the oil rigs until he reached, the age of between 50 and 60 years. He indicated that upon reaching the age between 50 and 60 , many international oil rigs will no longer employ individuals as they are regarded to be “too old” for the type of work performed. On the other hand Mr Moodie concluded that the Plaintiff would have retired at the age of 70. He reported that the Plaintiff would have continued working internationally up to the age of 65, after which he would have been able to secure contractual employment after returning to South Africa. He would have continued similar work on contractual basis, earning similar salary to what he would have earned at Total. He justified the retirement age of 70 on the basis that there is a serious scarcity of resources with the skill and experience in the oil industry. This basis is dismissed by the Defendant and relied on the submissions by Dr Whitehead. Ms Tjale reported that retirement age in the rig industry is 65 years.

31. Therefore it is accepted that the career path for the Plaintiff is as indicated by Mr Ben Moodie that of working in the oil rigs overseas. The Plaintiff's retirement age should be taken at 65.

32. It is therefore concluded that the Plaintiff premorbid would have probably secured employment in the oil rigs. It is assumed that had the Total position materialised the plaintiff would have commenced working there from January 2014. There is another probability that should the Plaintiff not have received the position with Total he would then looked for other positions in the same industry earning more or less the same salary per month as he would have earned at Total. To cater for unforeseen probabilities as to whether or not the Plaintiff would have definitely secured work internationally it should be addressed by contingencies.

33. The court accepts that there was a higher possibility that the Plaintiff would have secured alike positions in the oil and gas industry. He would have continued to work abroad until the age of 60 thereafter returning to SA, and secure consultancy work until age 65.

34. The actuarial calculations by Mr Loots are based on the scenario as discussed by Mr Ben Moodie. It is assumed that the Plaintiff would have started working in the rig in July or August 2013. His monthly income is taken at €8000,

increasing with inflations at 3.5% per annum. The calculation below is acceptable with the exception of the retirement age 70, which should be at the age of 65 years. Post-accident earnings are taken as calculated by Mr Loots. It is however accepted that the loss of income as calculated and capped at an amount of R5700 128.00 should be taken as the loss of income.

	Past	Future	Total	
Earnings had accident not occurred	8,139,848	23,477,120	31,616,968	
Less Contingencies (5%/15%)	406,992	3,521,568	3,928,560	
Subtotal	7,732,856	19,955,552	27,688,408	
Earnings having regard to accident	1,411,158	3,442,704	4,853,862	
Less Contingencies (5%/35%)	70,558	1,204,946	1,275,504	
subtotal	1,340,600	2,237,758	3,578,358	
Loss of Earnings	6,392,256	17,717,794	24,110,050	
Loss of Earnings (Capped)			5,700,128	

[35] I therefore make the following order

(a) The defendant shall pay to the Plaintiff the amount of R5 700 128.00 for future loss of income.

(b) The defendant shall pay the Plaintiff's taxed or agreed party and party costs.

B. RANGATA, AJ

ACTING JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Heard on 06 November 2017

Date of Judgement: 14 December 2017

Counsel for the Plaintiff: Advocate GW Alberts SC

Counsel for the Defendant: Advocate. NJ Potgieter