

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

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO :11326/16

20/9/2018

In the matter between:

N.K MKHABELA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

RANCHOD J:

[1] The plaintiff claims compensation from the defendant for injuries he sustained in a motor vehicle accident on 25 June 2013 at Church Road, Hamilton involving a motor vehicle with registration letters and numbers [...] driven by on P.B Sealome (the insured driver) and motor vehicle bearing registration letters and numbers [...] driven by B.A Mosiba (the second insured driver . The plaintiff was injured in the collision whilst he was a passenger in the bac of a bakkie.

[2] On 1 July 201 this Court ordered separation of the issue of liability from that of quantum of damages and granted judgment by default in respect of the former as to 11 0% in favour of the plaintiff for the plaintiffs proven or agreed damages.

[3] The defendant thereafter made an offer of R250 000.00 for general damages and agreed to give an undertaking in terms of s17(4) of the Road Accident Fund Act 5j of 1996 (the Act) in respect of future medical, hospital and related expenses. The plaintiff has accepted these offers and all that remains to be determined is the quantum of past and future loss of income.

[4] It appears that the matter could not be settled between the parties and plaintiffs attorneys set the matter down for hearing on 19 June 2017 for judgment by default against the defendant in respect of the loss of income and for an undertaking in terms of s17(4) of the Act. It was also sought that the issue of general damages be separated from the other issues. As I said, subsequently, general damages and provision of an undertaking have been settled. The matter was removed from the roll on 19 June 2017 and eventually re-enrolled for 23 March 2018 on the unopposed roll when it lay before me and reserved judgment. I requested plaintiffs counsel to furnish me with heads of argument setting out the salient facts from the various expert reports for determining quantum.

[5] The plaintiff has filed medico-legal reports and an actuarial report from the following experts:-

- 4.1 A report by Dr Hans B Enslin (orthopaedic surgeon);
- 4.2 A report by Dr JH Kruger (neurosurgeon);
- 4.3 A report by Dr D Velthuisen (occupational therapist);
- 4.4 A report¹ by Ben Moodie (industrial psychologist) and
- 4.5 An actuarial report by Johan Sauer (actuary).

[6] The defendant¹ did not appoint any experts.

[7] According to Dr Enslin (orthopaedic surgeon) the plaintiff sustained the following injuries in the accident: -

- 7.1 A fracture of C7;
- 7.2 A fracture of C6 lamina and spinous process;
- 7.3 A fracture/subluxation of C6/C7.

[8] The plaintiff was taken to the Pelonomi Hospital where a multiple level

fusion of the cervical spine was performed on 28 June 2013 and he was discharged on 7 July 2013. He was re-admitted on 4 August 2013 for the 'redo' of a screw that had pulled out. He was discharged on 8 August 2013. He still complains of pain and discomfort in his neck.

[9] Dr Enslin notes that the plaintiff was a fulltime student and worked for Haw and Ingles Civil Engineering over weekends. He was absent from work 14 weeks following the accident on 25 June 2013 and received 67.5% of his normal salary for this period of absence. Dr Enslin opines that:-

'Mr Mkhabela has been left with serious long term musculoskeletal impairment, due to the multiple level fusion of the cervical spine and the pseudoarthrosis at a single level of his cervical spine. His claim will warrant an award for general damages.'

He says further:-

'Mr Mkhabela is twenty four years old and is busy studying Civil Engineering. He will be limited in his administrative and his extra-mural assignments as a qualified engineer. He will tire more easily. Driving will place strain on his cervical spine and climbing onto ladders and scaffolding may aggravate his accident related symptoms. As he grows older his working output and performance could be affected by his accident related pathology.

Writer believes that it would be appropriate to allow for a 10% loss of earnings from the age of 45 to 55 and then from the age of 55 to 65 to allow for a 20% loss of earning capacity.'

[10] Dr J.H Kruger .a neurosurgeon states as follows in his medico-legal report dated 27 September 2016:-

'From a neurosurgery perspective, the accident the patient was involved

in, has severely negatively influenced his ability to work in the open labour market, as well as his retirement age.'

[11] The occupational therapist, Ms Debbie Velthuisen of Rita van Biljon Occupational Therapists states in the medico-legal report dated 5 September 2016 that the plaintiff is currently best suited for sedentary to light work. She goes on to say:-

'13.7 With the recommended medical and therapeutic intervention, this includes the recommended surgical intervention, psychological support, physiotherapy, Occupational Therapy and the implementation of ergonomic adaptations and assistive devices, the plaintiff's productivity in the work place could be maintained in the sedentary to light areas however he will likely remain restricted and less likely to secure employment where further weight handling or mobility is required. Furthermore, with aging/surgical intervention/worsening of symptoms he may endure further physical limitations which would not only have a negative impact on the possibility of promotion in the work place but on his ability to work productivity (*sic*) until normal retirement age. I defer to the Orthopaedic Surgeon in this regard.'

[12] The industrial psychologist Mr Ben Moodie considered the various medico-legal reports and states, *inter alia*:-

'In the uninjured state writer postulate (*sic*) a career ceiling of Paterson Level D5 at the age of 45 whereas in the post-accident scenario it would in all probability take him up to age 50-55 to reach Paterson Level D4.'

He states further:-

'One also has to accept that any individual with an impairment and disability will be disadvantaged in the open labour market as these individuals will necessarily be less competitive than their uninjured counterparts, will be less effective and productive in the work place and

will have to be selective with regard to choice of employer, type of employment and work environment. It should also be noted that treatment and recuperation would not necessarily imply that these individuals would recover fully and be able to function on par with the pre-morbid level of functioning.

It is unsure how the client's pain will either become worse or whether the client would be recuperate from any pain related complaints. If the client's condition becomes worse either by means of any future job duties of alternatively to re-injure himself in any way, then the client might not be able to carry on working as what he would have done but for the accident. In this case it is only if his pain is of such a nature that it influences his day to day functioning that this might have an impact on his progress and ultimate capability to work until normal retirement age.'

[13] The actuary, Mr J.J.C Sauer has calculated the plaintiff s past loss of income as R227 899 after applying a general contingency deduction of 5%. think it to be appropriate.

[14] As far as future loss of income is concerned the actuary applied a contingency of 10% for the pre-accident scenario and 28% post-accident. In my view, a general contingency deduction of 15% should be applied to the pre-accident scenario. Post-accident, I taken into account what the various experts have said and am of the view that a deduction of 20% would be appropriate.

[15] The loss of income may therefore be calculated as follow:-

<u>FUTURE LOSS</u>		
Pre-accident-as per actuary		R14,951,271
Less 15% contingency deduction		2,242,690
		<hr/>
		R12,708,581
Post-accident-as per actuary	R11,187,133	
Less 20% contingency deduction	<u>2,237,427</u>	<u>R8,949,709</u>
		R3,758,875

Add past loss	227 899
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	R3,986,774
Add general damages	<hr/>
	R250 000
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TOTAL	R4,236 774

[16] Accordingly, the defendant is ordered to compensate the plaintiff as follows:

1. Payment of R4,236,774 (Four Million Two Hundred and Thirty Six Thousand Seven Hundred and Seventy Four Rands).
2. Interest on the aforesaid amount at the applicable rate from 14 days after this judgment is served on the defendant to date of payment.
3. Payment as aforesaid is to be made into the plaintiff's attorney's trust account, as follows:

Account Holder: VZLR INC. Trust Account
Branch: ABSA VAN DER WALT STREET
Branch Code: 323345
Type of Account: TRUST ACCOUNT
Account number: [....]

4. The defendant shall furnish the plaintiff with an unlimited Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, in respect of future accommodation of the plaintiff in a hospital/nursing home, for the treatment of/ rendering of services/supply of goods to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained by the plaintiff in the accident which occurred on 25 June 2013;

5. The defendant is to pay the plaintiff's taxed or agreed party and party costs, into the aforementioned account, for the instructing- and correspondent attorneys, which costs shall include, but not be limited to the following:
 - 5.1 All reserved cost to be unreserved, if any;
 - 5.2 The cost of obtaining all expert medico-legal, actuarial, and any other reports of an expert nature;
 - 5.3 The reasonable taxable qualifying, preparation and reservation fees of all experts, including the costs of consultation fees with the legal teams, if any;
 - 5.4 The reasonable travelling- and accommodation costs, if any, incurred in transporting the plaintiff to all medico- legal appointments.
6. There is a contingency fee agreement.

N. RANCHOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff : Adv. W.R Du Preez

Instructed by :Van Zyl Le Roux Inc.

Counsel on behalf of Defendant : No appearance

Date heard : 28 March 2018

Date delivered : 20 September 2018