

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 29290/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 29 July 2022 E van der
Schvff

In the matter between:

MBANJWA IN

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Van der Schvff J

Introduction

[1] The plaintiff approached the court for judgment by default. Summons was issued and served but the defendant did not file a notice of intention to defend. The plaintiff approached the court for default judgment. I was of the view that evidence

needed to be provided for the basis on which the plaintiff sought the court to quantify his claim for loss of earnings.

- [2] The accident occurred on 16 September 2018. As for the merits and the extent of the defendant's liability, it is trite that a plaintiff needs to prove only 1% negligence to succeed with a claim against the Fund. Since no case was made out by the defendant for contributory negligence, and based on the facts of the matter, the defendant is to be liable for all the plaintiff's proven or agreed to damages.
- [3] The plaintiff suffered a number of injuries as a result of the accident. Dr. Ntimbani, a neurosurgeon, stated in a report dated 6 February 2020, that he was informed by the plaintiff that he was unconscious for four days after the accident. He was treated for a head injury, chest injury, and right femur and leg fracture. He was discharged from the hospital after approximately 6 weeks. It is recorded on the RAF 1 form that the plaintiff suffered a brain-subarachnoid haemorrhage and subdural hematoma, left pneumothorax, a pelvic fracture, right femur fracture, and right tib-fib fractures. The plaintiff's Glasgow Coma Scale as recorded in the hospital records, on both 16 and 17 September 2018 was 15/15.

Summary of expert reports

- [4] Dr. Ntimbani recorded that the plaintiff's abstract thought general knowledge mathematical ability, and concentration were good, his language ability was normal and fluent and his short, medium, and long-term memory was tested he recalled 1/5 objects after 5 minutes. Dr. Ntimbani reported that the accident resulted in the plaintiff suffering significant residual neurocognitive deficits and suffers from headaches. The brain injury with its neurocognitive sequelae impacts negatively on the plaintiff's learning and will affect his employment.
- [5] Dr. Mafeelane, the orthopaedic surgeon's report, is dated 6 February 2020. Dr. Mafeelane reports that the plaintiff's right leg is 2cm shorter as a result of the accident. The wound on the right leg was also an open wound oozing pus. He diagnosed the plaintiff with chronic osteomyelitis. Chronic osteomyelitis is a bone

infection that does not go away with treatment. Dr. Mafeelane noted several scars on the plaintiff's right hip and thigh and on both legs. The plaintiff has not been pain-free since the accident. The accident impacted his ability to carry and lift heavy objects and the plaintiff suffers great difficulty with prolonged standing and walking. Dr. Mafeelane opined that it is unlikely that the plaintiff would return to his pre-accident level of activity. In his view, the plaintiff is only suited for sedentary employment.

- [6] The medical orthotic practitioner, Uwe Wiele, reported on the orthotic requirements following the injury to the plaintiff's right leg which resulted in a leg length discrepancy. The orthotist, amongst others, opined that the plaintiff will benefit from an ankle brace for his right ankle, as the ankle brace should enable him to walk a further distance with less discomfort and pain. The leg length discrepancy can be addressed by inserting foot orthotics and building up the heel and shoe of his right shoes. An aluminium walking stick may assist with his mobility.
- [7] The occupational therapist's report confirms that the plaintiff's mobility is compromised. He experienced pain when lifting weights from floor level, when carrying it, and when crouching. He is unable to bend his knee and ankle. I do not consider the OT's opinion of Mr. Mbanjwa's educational prospects as authoritative. The OT likewise overstepped the boundaries of his expertise by attempting to fulfill the role of an industrial psychologist. I do accept the expert view that Mr. Mbanjwa potentially qualifies to do work within the sedentary work category
- [8] The clinical psychologist (CP) assessed the plaintiff almost three years after the accident. The plaintiff reported to the clinical psychologist that he stopped attending classes due to the injuries sustained in the accident and that he went back to complete the remainder of his modules in the following year. He reported that he passed but that his performance had deteriorated and that he did not obtain the results that he had anticipated prior to the accident. It is reflected in the report that Mr. Mbanjwa suffers from emotional, social and cognitive difficulties as a result of the accident. The CP opined that Mr. Mbanjwa would benefit from psychotherapy.

- [9] The educational psychologist (EP) assessed the plaintiff in June 2021. He concurred with other expert witnesses who found that it is unlikely that Mr. Mbanjwa will return to his pre-accident level of activity as a result of the residual symptoms he experiences. He deferred to the recommendation of appropriate experts for career guidance and counselling and also proposed that Mr. Mbanjwa attend psychotherapy.
- [10] Two reports were filed by the industrial psychologist (IP). In the first, the court is informed that although Mr. Mbanjwa was able to complete the two outstanding modules to qualify for his BSc degree in 2019, post-accident he may not be able to study further as his ability to concentrate and complete further studies have been negatively impacted by the extensive physical, psychological and emotional sequelae of the accident under discussion. He also now qualifies for work of a sedentary nature. Without substantiating her view, she opines that '[h]e may not be able to secure any form of formal employment as employers would not consider him for employment, having to compete with many more able bodied candidates for work of sedentary nature', '[h]e does not qualify for work of any other nature', and '[a] total future loss of income should thus be considered for this claimant'. In an addendum report, the IP merely accepts that Mr. Mbanjwa would have been able to obtain a Master's degree. She, however, does not explain how his pre-accident academic achievement supports such an assumption.

Discussion

- [11] It must be stated from the onset that the evidence indicates that Mr. Mbanjwa's life was irrevocably affected by the accident, the injuries he sustained, and the sequelae thereof. I am, however, not convinced that a case was made out for holding that Mr. Mbanjwa does not qualify for work of any other nature, and that a total future loss of income should be considered for him. I am likewise not convinced that the facts placed before the court support a finding that Mr. Mbanjwa's academic progression before the accident was sufficient to guarantee entry into any post-graduate studies. Although I also accept that his concentration was adversely affected by the accident, the fact that Mr. Mbanjwa was able to

complete his two outstanding modules after the accident belies the contention that he is not able to study at all, *albeit* with more effort.

- [12] Because the court was approached on a default basis, I requested Mr. Mbanjwa's legal team to provide evidence that he would, on the probabilities, have been accepted for Honour's studies. No further evidence was submitted except for an excerpt of what is supposedly the academic criteria for postgraduate studies being uploaded to the case line's file. In fact, counsel proposed that Mr. Mbanjwa's claim for loss of earning be quantified using the 'degree qualification' scenario instead of the honour's or master's degree scenario. On this basis, counsel submitted, Mr. Mbanjwa's loss of earnings amounts to R7 386 803.00.
- [13] Mr. Mbanjwa's academic record does not indicate that the accident impacted his academic performance. No deterioration in marks is reflected in his academic record after the accident. He reportedly stated that he intended to further his studies prior to the accident. It should be noted however that Mr. Mbanjwa enrolled for a three-year qualification in 2013, and that he was not able to complete the degree in three years. Mr. Mbanjwa cited his involvement in the Student Representative Council and the Fees-Must-Fall event as reasons for him not completing his studies within three years.
- [14] The evidence before the court does not indicate what Mr. Mbanjwa's possible career path entails having regard to the accident. For purposes of quantifying Mr. Mbanjwa's claim, the actuary used three scenarios to calculate the present value of Mr. Mbanjwa's future income. The first two scenarios provide for further studies. In the third scenario, the calculation is based on him having obtained a Bachelor's degree. Although the IP stated that Mr. Mbanjwa would need to further his studies before he would be able to pursue his preferred career path, the actuary merely accepted that Mr. Mbanjwa could be employed as a result of having a bachelor's degree, and securing income employment earning at the median quartile of Patterson B2 level.
- [15] I accept that his academic performance prior to the accident was influenced by his involvement in political and student organisations. Unfortunately, this resulted in

his inherent potential not being reflected in his academic performance, and for him to have progressed on his preferred career path. It would most likely have necessitated additional studies to improve his existing marks, and impacted on his ability to secure funding for any proposed further studies. This fact needs to be taken into consideration when the applicable contingencies are determined. I also have to consider that although several experts indicated that Mr. Mbanjwa would benefit from counselling, career guidance, and psychotherapy, there is no evidence that he commenced with the proposed interventions, or that active measures were taken to address the chronic osteomyelitis. Mr. Mbanjwa retained an earning capacity that will be greatly enhanced if he engages in the proposed interventions.

[16] Since Mr. Mbanjwa was unemployed and busy with his studies when he was injured in the accident, his claim for loss of future income is in essence a claim for loss of earning capacity. It is trite that courts employ two different approaches when assessing damages based on loss of earning capacity:¹

- i. The court establishes a reasonable and fair amount based on the proven facts and the prevailing circumstances;² and
- ii. The court establishes an amount with reference to mathematical calculations made on the proven facts of the case using the mathematical calculation as basis for its award.³

[17] I have considered the actuary's calculation but because the calculation is based on the premise that Mr. Mbanjwa will not be able to earn any income in the future the actuary's calculation can only be used as a guideline indicating the present value of Mr. Mbanjwa's future income if the accident did not occur. Taking into account the fact that the accident undeniably impacted on Mr. Mbanjwa's preferred career path, that he has evinced strong leadership qualities prior to the accident, that he engaged actively in activities for which he had a passion, that he is still able to

¹ HB Klopper *The Law of Third-Party Compensation*, 2012, JUTA, 176.

² *Griffiths v Mutual and Federal* 1994 (1) SA 535 (A).

³ *Southern Insurance v Bailey* 1984 (1) SA 98 (A).

study *albeit* with more effort, that his emotional and psychological post-accident scars can to a certain extent be addressed by psychotherapy and other interventions but that it will take time to heal even if he takes the bold step to engage in the proposed therapy, that the chronic osteomyelitis will affect his physical functionality and that his mobility was irreversibly affected which will impact on future employment I am of the view that it is reasonable and fair in the circumstances to quantify Mr. Mbanjwa's claim for loss of earning capacity in the amount of R 3 000 000.00

ORDER

In the result, the following order is granted:

1. The draft order marked 'X' dated and signed by me, is made an order of court.

E van der Schyff
Judge of the High Court

Counsel for the plaintiff:

Adv. M. I. Thabede

Instructed by:

Nkwane Inc.

On Default Judgment Roll

11 March 2022, 20 July 2022

Date of judgment:

29 July 2022