

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- | | |
|-----|---------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED: YES / NO |

CASE NO:40767/2020

In the matter between:

PULE DIUTLWILENG

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

WRITTEN REASONS

Mazibuko AJ

Introduction

1. This is an action for damages arising from a motor vehicle collision on 15 September 2018, where the plaintiff was a pedestrian.

2. The matter came before me on quantum only, as the merits were previously settled at 80/20 in favour of the plaintiff.
3. At the commencement of the trial, the court granted the application in terms of rule 38(2), which was brought by consent between the parties' legal representatives, respectively.
4. The issues for determination were future medical expenses, general damages, past and future loss of earnings or earning capacity.

Future medical expenses

5. The defendant undertook, in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, to reimburse 80% of the plaintiff's costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by him in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.

General damages

6. The defendant had not elected a position regarding the general damages. The issues relating to general damages will accordingly be postponed *sine die*.

Past loss of earnings

7. Concerning actuarial calculations, the actuarial expert's report indicated as follows:
"Paragraph 2.2.1. Determination of past loss of income: "The following is noted from paragraph 6.3.2.6 of Ms Noble's first report: "Past loss in earnings He reportedly was paid in full during his period of recuperation. He may, however, have suffered a loss from incentives during the months that he was not working..." The following is noted from paragraph 3.3.2.5 of Ms Noble's addendum report: "... With a payslip available for December 2018, indicating him having received full

payment, and based on him informing the writer that he was booked off for a month post-PVA and that he RTW while still mobilizing on crutches, it is accepted that he RTW around mid-October 2018. He needs to provide payslips for September to November 2018 to prove otherwise, which is of academic interest only, as he reported was paid in full during his period of recuperation." In the absence of further information, we are unable to determine a past loss of income during Mr Diutlwileng's period of recuperation."

8. With regard to past loss of earnings, the plaintiff did not suffer any loss since he was paid during his recuperation until he returned to work.

Future loss of earnings

9. The plaintiff adduced evidence by way of affidavits subsequent to granting the rule 38(2) application. Through his counsel, he made submissions, and so did counsel on behalf of the defendant. I granted an order awarding the plaintiff future loss of earnings in the amount of R628 991.50. The reasons for that award follow.

Issue

10. The issue for determination was whether the plaintiff had made a case for loss of earnings.

Discussion

11. There must be proof that the disability gives rise to a patrimonial loss, this is dependent on the occupation or nature of the work which the plaintiff did before the accident or would probably have done if he had not been disabled.¹
12. It is trite that the plaintiff must prove the extent of his loss and damages on a balance of probabilities. Regarding loss of income, the plaintiff must adduce evidence of his income to enable the court to assess his loss of past and future

¹ Union and National Insurance Co Limited v Coetzee 1970(1) SA295 (A) AT 300A

earnings and the amount of income he will reasonably lose in the future as a result of the injury.

13. To determine the claim for future loss of income or earning capacity, it is necessary to compare what the plaintiff would have earned 'but for' the incident with what he would likely have earned after the incident. The future loss represents the difference between the pre-morbid and post-morbid figures after applying the appropriate contingencies.
14. In the matter of *Southern Insurance Association Ltd v Bailey NO*,² it was said: "*Any enquiry into damages for loss of earning capacity is to its nature speculative because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers 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 a loss*".
15. The evidence is that the plaintiff was 29 years old at the time of the accident. He had been employed at Unilever as a qualified field marketer/merchandiser since January 2017. His duties fell within the medium category of work, with high demands of general mobility and non-static standing endurance. After the accident, he returned to work some six months later, still mobilizing with crutches. After that, he had two months of light duty.
16. His former supervisor stated that the plaintiff worked as a sales marketer /merchandiser before and after the accident. He was responsible for stocking all Unilever shelves and display areas. Shelves are situated from low level to eye level. After the accident, the plaintiff raised complaints of ongoing left lower limb pain. As a result of his complaint, he was transferred from a larger store to a smaller store in February 2021 to accommodate his situation. The actual work remained primarily similar.
17. He had been employed part-time and full-time with different employers since 2005 as a machine operator, SHE assistant, and merchandiser. He had been with

² 1984(1) SA 98 AD

Unilever since 2012 as a merchandiser. After the accident, he was frequently off-sick. In 2021, he was terminated from his employment as he would be absent and not produce a sick note justifying the entire period of his absence.

18. He was in a car accident before, though he had never lodged a claim with the defendant. In 2016, he was injured on his arm whilst on duty at his then-workplace, DM Engineering.
19. He was still unemployed at the time of assessment. He had applied for positions such as call centre agent and had not been invited for interviews. He was receiving the R350 Government grant.
20. It is not in dispute that the plaintiff sustained injuries in the accident relevant to this matter and still suffers from the sequelae of those injuries. On his return to work, he resumed his duties and later on transferred to a smaller store to accommodate his condition resulting from the pain due to the accident. The duties at the smaller store were still similar. He continued to earn the same salary and enjoyed all his pre-accident remuneration benefits. His injuries limited his physical ability to perform all the work-related tasks required of him. He took off from work more often. He was still hampered by his injuries but continued to perform his duties as required.
21. The defendant conceded the plaintiff is compromised post-morbid. It is accepted that the plaintiff's life has changed physically due to the accident. He was absent from work quite frequently as a result of the pain. The evidence is that he did not follow the necessary protocols when taking sick leave and just stayed at home and would provide them with a doctor's note once back at work. An official enquiry was launched against him as a result of his frequent absenteeism and his poor following of protocol pertaining to reporting his absenteeism. He was later dismissed.
22. No cogent evidence was adduced before the court as to why the plaintiff would not report his absence and present his employer with a sick note only on his return. To

the experts, he never said that he would bring the clinic note by the nursing sister or nurse, and the employer would refuse to accept same as an official sick note or medical certificate. The evidence was that he would be booked off and would stay more days than he was granted, not report his absence, and, on his return, would just submit the medical/sick note. There is no evidence he would have still lost his employment had he followed his employer's reporting protocol. In fact, he went back to the duties he performed before the accident. His employer sent him to a smaller store to accommodate his post-morbid condition. He still earned the same salary. He was found still employable and not recommended for early retirement.

23. According to the occupational therapist, the plaintiff's dismissal was due to poor attendance directly ascribable to the sequelae of the accident and the left ankle injury he sustained. He will struggle to obtain work in any of his previous positions until the internal fixation is removed, and he will then be able to resume his career.
24. The Industrial psychologist opined that the plaintiff would be delayed in reaching his career ceiling whilst awaiting the removal of the internal fixation. His loss of work capacity would slowly start worsening. It would be around 10%, resulting in him being best suited to the occupation of a sedentary to light work category with accommodations and ergonomic adaptations. Though he will not have to retire early, he will not be deemed on par with his able-bodied colleagues.
25. *The determination of the general contingency deduction to be made falls squarely within the discretion of the court, which must decide what is fair and reasonable.*³ When the court considers an order for future losses, it is expected to use contingency deductions to provide for any future circumstances that may occur but cannot be predicted with precision. It is accepted that the extent of the period over which a plaintiff's income has to be established directly influences the extent to which contingencies must be accounted for. With the unforeseen contingencies, the longer the period can influence the accuracy of the amount deemed to be the

³ *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), at paragraphs [95] to [96]; and *Nationwide Airlines (Pty) Ltd*

(in liquidation) v SA Airways (Pty) Ltd [2016] 4 All SA 153 (GJ), at paragraph [147].

probable income of the plaintiff, the higher the contingencies must be applied. The actuarial calculations are helpful, though not binding, as the court has wide discretion to award what it considers fair and reasonable compensation.

26. A contingency deduction is made so that any possible and relevant future event which might otherwise have caused or influenced the extent of the damages sustained by the plaintiff is considered⁴. Contingencies have been described as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement, and other unforeseen factors'⁵. The courts have recognized, however, that the fortunes of life are not always adverse; they may be favourable⁶.
27. As they stand, the actuarial calculations are based on a scenario that the plaintiff will be employable and earn the income he would have earned pre-morbid. The court has considered the plaintiff's circumstances, which must influence the assessment of the general contingencies to be applied and the content of the expert reports, as agreed by the parties. It is of the view that a 15% contingency deduction on the pre-morbid and 25% on the post-morbid of the plaintiff's future uninjured earnings is fair and reasonable.
28. In relation to costs, the plaintiff has been successful, and there is no reason why he should not be entitled thereto.
29. Consequently, the following order is granted.

Order:

⁴ Erdmann v Santam Insurance Co Ltd [1985] 4 All SA 120 (C); Ncubu v National Employers General Insurance Co Ltd [1988] 1 All SA 415 (N); and Burns v National Employers General Insurance Co Ltd [1988] 3 All SA 476 (C).

⁵ Road Accident Fund v Guedes 2006 (5) SA 583 (SCA), at paragraph 3.

⁶ Southern Insurance Association v Bailey NO, at paragraph 117B.

1. The draft order handed up to the court by consent between the parties on 29 February 2024 is hereby made an order of court.

N. Mazibuko

Acting Judge of the Gauteng Division, Pretoria

This judgment was handed down electronically by circulation to the parties' representatives by email.

Representation:

Counsel for the plaintiff:

Adv L. Haskins

Attorneys for the plaintiff:

Adams and Adams Attorneys

Counsel for the defendant:

Adv T. Gaokgwathe

Attorneys for the defendant:

State Attorney (Pretoria)

Heard:

29 February 2024

Date of Judgment:

6 May 2024