

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 13024/06

In the matter between:

NAICKER RAVINDRAN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

SALDULKER, J :

A. INTRODUCTION

[1] The plaintiff has instituted a claim for damages arising out of the bodily injuries that he suffered in a motor vehicle collision on 5 March 2005.

[2] The defendant has conceded the negligence of the insured driver and has admitted liability for all of the plaintiff's proven damages.

[3] This court is required to adjudicate on the question of future loss of earnings in respect of the contingency deduction that the plaintiff is entitled to.

[4] The plaintiff has undergone two medico-legal examinations by Dr Geoffrey Read, an orthopaedic surgeon who has prepared two reports dated 20 April 2006 and 2 April 2007 respectively. In addition the plaintiff underwent a psycho-legal evaluation of his earning capacity by Mr Stephan Van Huyssteen, an industrial psychologist.

[5] At the outset the parties agreed that the reports of Dr Read and Mr Van Huyssteen be admitted and their reports were handed up to the court as evidence of the contents thereof.

[6] The parties have also reached agreement with regard to the following heads of damages:

6.1 Past hospital and medical expenses - R 6 388,21

6.2 Future medical expenses - Defendant shall furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act), for the plaintiff's future medical expenses and treatment in respect of the lumbar spine injuries.

6.3	General damages	-	R120 000,00
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[7] Both the plaintiff and the defendant employed actuaries, (Mr Ivan Kramer and Mr Gerard Jacobson) to calculate the value of the plaintiff's income. The parties agreed upon a median figure namely that the gross prospective value of plaintiff's income is the sum of R5 700 000,00. Both actuarial calculations applied a 15% contingency deduction to the value of the plaintiff's income but for the accident.

[8] The real question for determination is what additional contingency allowance should be applied to the value of the Plaintiff's future loss of income having regard to the injuries sustained in the collision. This quantification necessitates having regard to the reports that have been admitted which set out a conspectus of the plaintiff's experiences in the workplace in consequence of the *sequelae* of the injuries sustained in the collision.

B. DR READ'S MEDICO-LEGAL REPORT DATED 20 APRIL 2006

[9] From Dr Read's medico-legal report dated the 20 April 2006 the following appears:

9.1 The plaintiff suffered an injury to his lumbar spine. A bone scan

performed on the 30 March 2005 revealed stress fractures involving the L2 and L3 pars intra – articularis.

9.2 The plaintiff complains of severe, ongoing pains emanating from the lumbar spine which is constantly present. The pain was aggravated by exertion and periods of immobility. Associated with the pain was stiffness of the lumbar spine. There were also pains emanating from his left shoulder blade. He had radicular symptoms in the right lower limb with pain and sensations of pins and needles. The plaintiff's condition could not be considered to have stabilised at that stage.

9.3 He experiences considerable difficulty working because of the pains emanating from the lumbar spine. He cannot sit for long and gets up almost every hour to walk around and stretch his back. He estimates that he loses about an hour per day in this way.

9.4 He walks with a rigid back and has an obvious severe discomfort in his lumbar spine

C. DR READ'S MEDICO -LEGAL REPORT DATED 2 APRIL 2007

[10] From the above report the following appears:

- 10.1 The X-rays of the lumbar spine taken on 2 April 2007 are normal. However the plaintiff continues to experience severe ongoing symptoms of pain, muscle spasms and stiffness of the lumbar spine and these are deteriorating rather than improving with the passage of time. He also continues to experience symptoms suggestive of radiculopathy in the right lower limb.
- 10.2 Although two years have passed since the collision the plaintiff remains symptomatic and the plaintiff is likely to continue to experience chronic lumbar spine pain in the future. He remains markedly less productive as a result of the severity of his injuries.
- 10.3 The plaintiff will require ongoing conservative treatment for his symptoms and the treatment would consist of analgesics, anti-inflammatories and physiotherapy. In addition, the plaintiff would benefit at some stage from a course of in-hospital traction treatment.

10.4 There is a strong possibility that the plaintiff will require surgery to his lumbar spine. If he attends to the treatment recommended in the report, his symptoms should be considerably relieved. He will be required to take off four months to attend to the treatment.

D. EFFECT OF THE INJURIES ON THE EMPLOYMENT

[11] Mr. Van Huyssteen's report is based on the results of the interview with the plaintiff, the psychometric assessment, the medical reports available, the conditions prevailing in the labour market and the plaintiff's circumstances.

[12] From the report it appears that the plaintiff was an internal Sales representative with Radiant Lighting from 1998 until the date of the collision. He returned to this position after the collision in April 2005. In 2007 he was promoted to Internal Sales Manager at Radiant Lighting.

[13] Mr Sarakinsky, the plaintiff's manager informed the industrial psychologist that the plaintiff had been promoted to a managerial position due to his good work performance. Mr Sarakinsky rated Mr Naicker's work performance as a 3.5 on a 4 point rating scale , where 1 equals poor work

performance and 4 equals excellent work performance. He described the plaintiff in comparison to other sales personnel 'as a very good salesperson ', who had the ability to move to positions like key accounts manager or to middle management level positions in the future. In Mr Sarakinsky's opinion the plaintiff was better suited to 'pure' sales management positions rather than people management positions.

[14] According to Mr Van Huyssteen, pre-morbid, the plaintiff would probably have worked as a sales representative in the lighting industry for another 1 to 2 years earning similar to what he was earning at the time which equated to a Grade C4 on the Paterson job grading system. This was based on the plaintiff having worked as a sales representative in the lighting industry for 7 years. Thereafter, he would have been promoted to the position of sales manager which would probably have been his ceiling until retirement , at age 65. His remuneration would be equated to grade C5/D1 on the Paterson job grading system.

[15] According to Mr Van Huyssteen post morbid, the plaintiff is currently in a middle management position having been promoted to this position in 2007. This position is probably a semi-sedentary type position and the plaintiff will probably be suited to work in this position. Based on the plaintiff's qualification level (grade 12) as well as his manager's comments, a middle management level position will probably be the plaintiff's ceiling until

retirement. Mr Van Huyssteen is of the opinion that the plaintiff will probably be working in similar positions, probably equating to a grade C5/D1 on the Paterson job grading system.

[16] Further Mr Van Huyssteen states that to acquire higher level positions the plaintiff will probably have to obtain a tertiary education qualification like a diploma in sales and marketing. However he states that there was no indication from the plaintiff that he wished to increase his educational qualifications. In his opinion, however, any such ambition would be hampered by the plaintiff's below average clerical /commercial abilities which will hinder his progress to higher levels.

[17] According to Mr Van Huyssteen, the plaintiff did not suffer past loss of earnings and he will probably not suffer future loss of earnings. With regard to the contingency deduction, Mr Van Huyssteen states that because of what has been noted by Dr Read that 'he is likely to always have some lower lumbar spine pain and difficulty in sitting for prolonged periods or in any occupation that requires driving' and that 'even in an ideal occupation such as described above, the plaintiff is always likely to have some ongoing loss of productivity', a higher contingency deduction must be considered for him.

E. DISCUSSION

[18] Mr Zidel for the plaintiff has advanced the following arguments in respect of the additional contingency deduction:

18.1 He has submitted that insofar as it is reported by Dr Read that the plaintiff suffers a loss of at least 1 hour of productive work per day, this would constitute a loss of 12½% of productivity. On this basis, Mr Zidel argues that the appropriate additional contingency allowance which should be applied to the value of Plaintiff's future income is 12½%, thus being a contingency allowance of 27½% having regard to the collision. Applying 27½% contingency allowance to R5,700,000.00, (i.e. an additional 12½% allowance) totals the sum of R4,132,500.00 resulting in a net future loss of income in the sum of R712,500.00.

18.2 Alternatively to the above, he has argued that this court may consider a 10% differential contingency allowance more appropriate on the basis of the 15% deduction but 'for the accident' and a 25% deduction 'having regard to the accident' (as provided for in the actuarial calculation of plaintiff's actuary, Mr Ivan Kramer), and the loss of income based upon this additional contingency

allowance would be R570,000.00.(10% of R5,700 000.00)

[19] Furthermore, Mr Zidel has argued that Dr Read has recommended that the plaintiff will be required to take four months off work for the ongoing and extensive future medical treatment detailed in his report. In these circumstances, the plaintiff is entitled to be awarded an amount for the loss of income for this period. The plaintiff is employed as a sales manager earning an income of R28 943,20 per month. Thus the future loss of income for 4 months would amount to the sum of R115 772,80. The plaintiff has recommended that a 5% contingency allowance should be deducted from this amount, thus arriving at the figure of approximately R110 000,00 for future loss of income.

[20] However, Mr Thabede for the defendant, has submitted that the 10% split as suggested by Mr Zidel, between the 'but for accident' and 'having regard to the accident' is too high a split to be used unless there is a legal and / or a scientific basis for it. He contends that a reasonable split would be an amount of 2,5% , a differential on the basis of a 15% contingency deduction in respect of 'but for the accident' and a 17,5% deduction in respect of 'having regard to the accident'. This would allow for a split of 2, 5% having regard to the plaintiff's circumstances at the present time.

[21] Mr Thabede has advanced the following reasons for his contentions:

21.1 Despite the plaintiff having not as yet received the treatment recommended by Dr Read, he was promoted to a middle management position in 2007 without any reservations from the employer about his work performance.

21.2 The four months off work that the plaintiff will take to attend to the recommended treatment should form part of the contingency deduction to be allowed and there is no basis for it being calculated separately from the contingency deduction.

21.3 When Mr Van Huyssteen made the recommendation of a higher contingency deduction, he was aware of the four months off work that the plaintiff would require for the purposes of treatment, yet he did not specifically mention that it should be treated separately from the contingency deduction.

[22] Additionally, Mr Thabede has contended that the industrial psychologist has not advanced any cogent reason why , if the plaintiff will not suffer any future loss of earnings , a higher contingency deduction should be considered.

He has argued further that the plaintiff's claim that he loses 1 hour of productive work per day should be approached with caution. Furthermore he submits that if the plaintiff receives the treatment recommended in Dr Read's report, his condition should improve considerably and this would reduce the loss of 1 hour productive work per day.

[23] On Mr Thabede's Calculation, the plaintiff's loss of income would amount to R142 500 calculated as follows:

But for accident	:	R5 700 000,00 less 15%
	=	R4 845 000,00
Having regard to accident	:	R5 700 000,00 less 17,5%
	=	R4 702 500,00
		<hr/>
R4 845 000,00	—	R4 702 500,00
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Total Loss of Income		R142 500,00
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[24] According to Mr Thabede, these calculations have taken into account the four months that the plaintiff would be off work to receive medical treatment. Mr Thabede has further submitted that if this Court were to find that, over and above the amount of R142 500,00 that the Plaintiff is entitled to, he is also entitled to the four months salary that he will be off work, he submits that a 10 to 15% contingency deduction should be applied to the four months loss.

F. ASSESSMENT

[25] The question for determination is what additional contingency allowance should be applied to the value of the plaintiff's future income having regard to the injuries sustained in the collision. It is clear from Dr Read's report the plaintiff who suffered a severe injury to his lumbar spine will continue to suffer the *sequelae* from this injury for the remainder of his life.

[26] In my view there appears to be no reason to disbelieve the plaintiff when he estimates that he loses about one hour of productive work per day in view of Dr Read's physical examination of the plaintiff which revealed that the plaintiff has an obvious severe discomfort of his lumbar spine and walks with a rigid back. However, if the plaintiff attends to the treatment of his lumbar spine as recommended by Dr Read, his condition should be much improved.

[27] Dr Read records that the plaintiff is markedly tender on palpation of his lumbar spine with marked para-spinal spasm particularly on the right hand side. Dr Read furthermore records that the movement of the lumbar spine in the form of lateral flexion and rotation is restricted to 50% of normal range. The plaintiff has lost his normal lumbar lordosis.

[2 8] At the time of the collision the plaintiff was employed as a salesman. He was responsible for wholesale and public sales. The plaintiff returned to work more than a month after the collision. But this was not without experiencing difficulties because of the pains emanating from his lumbar spine. According to Dr Read the plaintiff informed him during April 2007 that his symptoms were worse a year later.

[29] The plaintiff was promoted 2 years after the collision to Internal Sales Manager due to his good work performance. It appears that even though customers have complained of his lack of efficiency and enthusiasm, his employers are satisfied with his performance. This work is generally of a semi-sedentary nature. Prior to the collision he visited clients but he no longer attempts to do so because the exertion aggravates the symptoms emanating from his lumbar spine.

[30] From Dr Read's report, it appears that the plaintiff took three weeks of sick leave in 2006 because of the symptoms emanating from the lumbar spine. At the time of the interview, this year 2007, the plaintiff had not taken any sick leave. According to Dr Read this was related more to work circumstances than to an improvement in his symptoms.

[31] Because of the severe injury to his lumbar spine the plaintiff will continue suffering symptoms for the remainder of his life. According to Dr

Read the plaintiff would be best suited to a semi-sedentary type of occupation in which he is given an opportunity to get up at regular intervals and stretch his back, as well as sit and rest. Even in this ideally described occupation the plaintiff is always likely to have some ongoing loss of productivity.

[32] In determining what additional contingency allowance should be applied, the plaintiff's ongoing symptoms of pain, muscle spasms and stiffness cannot be disregarded as this would ,in my view, impact on whether the plaintiff will be in a position to carry on at the same level of functionality in the future.

[33] An additional factor which has to be taken into account is the possibility of the plaintiff losing his present job for any reason, which would substantially reduce the plaintiff's prospects of securing alternative employment with his physical disabilities. He remains markedly less productive as a result of the severity of the lumbar spine pain. But for the injuries sustained in the collision, the plaintiff would have been able-bodied and in a position to work to his full potential and ability and thereby maximise his employment prospects.

[34] The history of the plaintiff's past, present and future difficulties has been set out in great detail by the experts. The plaintiff is likely to continue to experience chronic lumbar spine pain in the future. Even after attending to

the treatment of his lumbar spine as recommended by Dr Read , the plaintiff is likely to always have some lower lumbar spine pain and difficulty in both sitting for prolonged periods or in any occupation that requires driving.

[35] It appears that despite his deficiencies, the plaintiff has maintained a consistent employment record. But this has not been without experiencing ongoing pain and discomfort. The injuries that he has suffered have clearly disadvantaged him in the workplace and have negatively impacted upon his future productivity and employability. The plaintiff is always likely to have symptoms referable to his lumbar spine. In my view all of the above factors are important in determining the contingency allowance to be applied.

G. CONCLUSION

[36] Having considered all of the foregoing, in my view , a 10% differential contingency allowance appears to be an appropriate amount that should be applied to the value of the plaintiff's future income having regard to the injuries that the plaintiff suffered in the collision. The loss of income based upon this additional contingency allowance would in the circumstances be R570,000. The 2,5% additional contingency allowance as contended for by the defendant is not supported by the experts and is conservative in the circumstances of this case.

[37] Given the current severity of the plaintiff's symptoms and the detailed treatment that Dr Read has recommended and the prospect of further painful surgery that he has to look forward to in the future, which is not without considerable disability, pain and discomfort, it is just and equitable that the plaintiff be awarded an amount for the future loss of income for four months off work for undergoing the recommended treatment.

[38] In the result, I make the following order:

38.1 The defendant is ordered to pay to the plaintiff the following amounts:

- | | | | |
|----|--|---|--------------|
| 1. | Past hospital and medical expenses | - | R 6 ,388. 21 |
| 2. | Future loss of income for four months off work | - | R110 ,000.00 |
| 3. | 10% contingency differential for future loss of income | - | R570 ,000.00 |
| 4. | General Damages | - | R120, 000.00 |
| | TOTAL | | R806, 388.21 |

38.2 The defendant is ordered to furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 5 March 2005 in respect of the claim for Future Medical Expenses .

38.3 The defendant is ordered to pay the plaintiff's costs of suit, such costs to include the costs of senior counsel and the qualifying fees of plaintiffs' experts being Dr Read and Mr Van Huyssteen.

H SALDULKER
JUDGE OF THE HIGH COURT

Date of Judgment: 11 September 2007