REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 29295/08

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

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DATE SIGNATURE

In the matter between:

D K FERREIRA Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

J U D G M E N T

MEYER, J:

[1] The plaintiff, who is 60 years of age at present, claims the payment of compensation for his damages as a result of bodily injuries sustained by him due to a collision that occurred on 18 February 2006. An unidentified four

wheel motorcycle (quad bike) collided with the plaintiff in the parking terrain of the Stonehaven-on-Vaal Restaurant where he was on duty as a car guard.

[2] The issue of liability has been settled. The plaintiff will be entitled to 100% of his proven or agreed damages. The parties also reached agreement in respect of most matters relating to the quantum of damages. It was agreed that the defendant is to pay to the plaintiff the amount of R170,000.00 in respect of his general damages and to also provide him with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay for his future medical treatment in respect of the injuries sustained by him in the collision. Only the plaintiff's claims for his past loss of earnings and for his future loss of earnings or reduced earning capacity remain in issue.

[3] The plaintiff testified. Each party called an occupational therapist – Ms E Kruger for the plaintiff (exhibit A.15-70) and Ms I H Shibambo for the defendant (exhibit A.71-83), and an industrial psychologist – Dr A C Strydom for the plaintiff (exhibit A.86-110) and Ms C du Toit for the defendant (exhibit A.111-117c). Each expert witness prepared a medico-legal report following their assessments of the plaintiff. He was also assessed by orthopaedic surgeons – Dr D Heyns for the plaintiff and Prof A Schepers for the defendant. They were not called as witnesses, but the parties agreed that the minutes of their pre-trial meeting (exhibit A.56-57) be received in evidence. Joint minutes were also prepared and referred to by the occupational therapists (exhibit A.84-85) and by the industrial psychologists (exhibit A.118-119).

[4] The plaintiff was born on 12 January 1950. At secondary school he obtained the equivalent of a Grade 10 certificate in 1968. He was employed by Iscor from 1974 until 1994. He obtained a tertiary technical qualification and he *inter alia* worked for Iscor in the capacities of millwright and electrician. The plaintiff was declared medically unfit for employment at Iscor during 1994, and has since then been receiving a disability pension from the Iscor and now Mittal Steel South Africa Pension Fund. About ten months after his discharge from Iscor, the plaintiff took up employment as a general assistant and domestic servant for six months, a teacher's assistant for four years, and he has been working as a car guard since 2002 in order to supplement his disability pension. On 16 January 2004, the plaintiff successfully completed the Grade E security officer course (exhibit A.159) and on 31 October 2007, the Grade D one (exhibit A.155). He is registered as a security service provider as contemplated in s 21 of the Private Security Industry Regulation Act 56 of 2001.

[5] The plaintiff performed duties as a car guard for Ronêl Security from 2002 until the collision on 18 February 2006 at the parking terrain of the Stonehaven-on-Vaal Restaurant evenings from 06:00 pm until the last vehicle left the premises; for Fleischmann Security from May 2007 until June 2009 at the parking terrain of the Vaal Mall, which is a regional shopping centre in Vanderbijlpark, daily from 08:00 am until the last vehicle left the premises at about 07:30 pm; and again for Ronêl Security from June 2009 until the evening before the commencement of this trial at the parking terrain of the Riverside Boulevard Complex for patrons of The Dros Restaurant during

evenings, except Mondays and Tuesdays, from 04:30 pm until the last patron left the premises. The plaintiff testified that the Dros Restaurant closed down and that Ronêl Security would place him as a car guard at the parking terrain of another restaurant, Villa Verdi, which is about 2½ kilometres from his home in Vanderbijlpark.

[6] The plaintiff testified that his duties as a car guard entail directing vehicles to parking areas, attending at the vehicles in order to greet the drivers and to seek their permission to look after their vehicles, ensuring the safety of such parked vehicles, and attending at the vehicles when the drivers return in order to accept any monetary value that is given to him. It seems on the evidence presented that the services of a car guard in the position of the plaintiff are engaged or the car guard is given permission to guard cars at venues, such as restaurants and shopping centres, by security services provider undertakings, in this instance Ronêl Security and Fleischmann Security. The plaintiff receives no remuneration or other financial benefit from the security services provider undertaking. The plaintiff's sole source of income for his services as a car guard is in the form of tips or monetary donations given to him by members of the public whose vehicles he looks after. A car guard's income is affected by the location and how busy it is. This is also the opinion of the industrial psychologist, Dr. Strydom. The plaintiff, in turn, is obliged to pay a fixed daily *'sub-contractor's fee'* to the security services provider in consideration for the permission to perform the duties of a car guard at the particular venue. He testified that he paid Ronêl Security between R30,00 to R50,00 per day depending on the day or evening

in question and irrespective of what he had received in tips on the particular day in question.

[7] It is common cause that the reason why the plaintiff was declared medically unfit and why he went on early retirement from his employment at Iscor during 1994, is because, following a diagnosis of cancer, he had an abdominal tumour surgically removed. The orthopaedic surgeons agreed that the surgery in 1994 left the plaintiff '*with a certain amount of weakness in the left leg*' and that he '*is suffering from neurofibromatosis*'. The occupational therapists also noted in the minutes of their pre-trial meeting that the plaintiff suffers from pre-existing left leg weakness following the abdominal cancer surgery which included the removal of part of the left sciatic nerve.

[8] It is common cause that as a result of the collision on 18 February 2006, the plaintiff sustained a fracture of the left distal third of the femur. He was admitted to the Sebokeng Hospital after the collision. His fractured femur was surgically fixed with an internal fixation, a medullary nail. The orthopaedic surgeons are *ad idem* that the plaintiff's left femur has shortened by 2,8 centimetres during the healing process when '*the locking screw at the distal end of the femur fractured'*. They are also *ad idem* that the intra-medullary nail is protruding into the intercondular notch of the femur. It is common cause that there is a broken drill point present in the proximal area of the left femur. The plaintiff was discharged from hospital on 24 February 2006.

[9] The orthopaedic surgeons are *ad idem* that the plaintiff '*will need removal of the internal fixation as soon as possible*', that he '*will probably develop osteoarthritis of his left knee in another ten to fifteen years' time which might need a total knee replacement*', that he '*for the meantime will need a raised build-up shoe which will have to be renewed twice a year for the rest of his life*', and that '*he will benefit from conservative treatment as far as his left knee is concerned to keep his knee mobile and strength in his muscles in the meantime*'. The orthopaedic surgeons are furthermore *ad idem* that the plaintiff will have to be off duty for one month after the removal of the internal fixation, apart from which his '*earning capacity for the rest of his life should not be affected as a result of the injury*'. The knee replacement will be well past the plaintiff's retirement age.

[10] The plaintiff testified that the pre-existing paralysis of his left leg requires him to be careful where and how he walks. He tries to avoid uneven surfaces and not to walk too fast. He needed to take medication for pain before the collision. Although it was not *'absolutely necessary'* to rest when he was on duty before the collision, he *'took a rest'* at quiet times. The plaintiff testified that as a result of his collision-related orthopaedic injury he currently suffers from *'slight ache'* in the area of his left knee, which is aggravated when he stands or walks a lot. Stiffness of his left leg occurs when he is on his feet for lengthy periods. The shortening of his left leg does not, according to the plaintiff, affect his ability to walk other than that he walks with *'a slight limp.'*

[11] The occupational therapists are *ad idem* that the plaintiff's functional abilities were impaired by his pre-existing nerve lesion and the *sequelae* thereof, and that they were further impaired by his collision-related orthopaedic injury and the *sequelae* thereof. The former *inter alia* left him with limited paralyses of his left leg that causes him to walk slower. The latter left him with a shortened leg, which causes him to walk with an uneven gait as well as the other *sequelae*. The occupational therapists are also *ad idem* that the plaintiff's pre- and post-collision work as a car guard is *'light to sedentary'*.

[12] The opinions of the occupational therapists, however, differ on the issue of whether or not the plaintiff is likely to suffer future loss of earnings or earning capacity. The plaintiff's occupational therapist, Ms Kruger, is of the opinion that the plaintiff is post-collision suitable for *'sedentary work with occasional walking'*, as opposed to *'light to sedentary'* work, and defers to the industrial psychologist for recommendation of suitable employment. The defendant's occupational therapist, Ms Shibambo, is of the opinion that the plaintiff's physical capacity exceeds his work demands, that the plaintiff has the physical capacity for occasional moderate work, but that his work should not require extensive standing and walking. She is of the opinion that the plaintiff should be able to continue working as a car guard after the recommended treatment.

[13] Ms Kruger mentioned that the plaintiff takes very little pain relief and she conceded that he will have less pain once the internal fixation is removed. She expressed the opinion that the plaintiff's shortened leg causes him to

walk with an imbalance of his muscle structure, which, she conceded, will improve once he wears an adjusted shoe and has undergone further rehabilitation. She is nevertheless of the view that from a functional point of view the plaintiff remains only able to perform work of a sedentary nature. Ms Kruger expressed the opinion in her evidence that although the plaintiff might be coping in his position as a car guard, such position is not suitable for him as a result of the collision-related orthopaedic injury and *sequelae*. The likelihood of osteoarthritis developing, in her opinion, increases should he remain in his present position. The accepted consensual medical opinion of the orthopaedic surgeons, however, is that the plaintiff '*will probably develop osteoarthritis of his left knee in another ten to fifteen years' time*'. The orthopaedic surgeons, I accept, were well aware of the plaintiff's position as a car guard, and nevertheless agreed that the onset of osteoarthritis of the plaintiff's left knee will occur in another ten to fifteen years' time. Ms. Kruger, correctly in my view, conceded that the issue of osteoarthritis falls within the expertise of orthopaedic surgeons and that she could only comment on what happens to patients generally.

[14] I consider the opinion of Ms. Shibambo to be logically supported and consistent with the proven facts and the plaintiff's work history before and after the collision in question. See *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA), paras [34]-[40]. It is an over-simplification and generalisation to say that the position of car guard requires extensive standing and walking. The plaintiff's evidence is that he did not cope as a car guard at the regional shopping centre, because of the

long hours during the day when extensive standing and walking was required. He, however, coped as a security guard at the parking areas at the restaurants where he was working. What emerges from the plaintiff's evidence is that the position of a car guard in a parking terrain of a restaurant, such as Stonehaven-on-Vaal and The Dros Restaurant at the Riverside Boulevard Complex, requires less standing and walking than that of a car guard outside the parking area of a regional shopping centre. The plaintiff did not work as a car guard at a shopping centre before the collision and it is a matter of mere speculation how he would have coped given his pre-existing limitations.

[15] The opinion of Ms Shibambo is *inter alia* founded on the information which the plaintiff communicated to her, which was that he '*…does not have problems at work and plans to continue working as a car guard'*. She also recorded the information which the plaintiff conveyed to her, which is that when he was stationed at the Stonehaven-on-Vaal Restaurant '*he stood and walked earlier on after arrival* [of the vehicles]*, sat most of the time during the night and stood/walked to direct cars off the parking occasionally*'. It is recorded in the minutes of the pre-trial meeting of the occupational therapists that the *'... plaintiff reported that he stands and walks early on upon arrival and walks to direct cars off the car-park occasionally.'* The plaintiff's industrial psychologist, Dr Strydom, recorded in her medico-legal report that the plaintiff informed her '*… that he is able to perform his work as a security guard. He can now sit and rest when watching cars. He will not be able to stand the whole shift*'.

[16] The plaintiff testified that he suffers from *'slight pain'* in his leg when he returns home from his employment, *'but most of the time it is bearable.'* He did not suggest that he was unable to cope in the performance of his duties as a car guard at the parking terrains of the restaurants where he worked. He takes little pain relief. The plaintiff testified that when he worked as a car guard at the Vaal Mall he experienced a lot of pain in his injured leg. Onset of pain occurred about an hour after he had commenced working, and increased thereafter. I do not consider the plaintiff's evidence in chief that his duties as a car guard at the Stonehaven-on-Vaal Restaurant and The Dros Restaurant required him to be predominantly or primarily on his feet to be reliable. It is inconsistent with his statements to *inter alia* his own occupational therapist and industrial psychologist and the difference in symptoms which he experienced when on duty as a car guard at the Vaal Mall, where he was predominantly on his feet, and at the parking terrains of restaurants.

[17] The plaintiff's industrial psychologist, Dr Strydom, postulated that *but for* the collision the plaintiff *'... would have been employed in any of his pre-morbid positions until the normal retirement age.* The plaintiff's claim for future loss of earnings or of reduced earning capacity is also founded thereon that *but for* the collision he would have retired at age 68. Dr Strydom is of the opinion that the plaintiff, as a self-employed person, is highly likely to have worked beyond the normal retirement age *but for* the collision. Dr Strydom accepted that the plaintiff's employability has been curtailed by the collision in question based on the opinion of Ms. Kruger that the plaintiff *'... will be able to*

work in a sedentary position with occasional walking.' Post-morbidly, Dr Strydom concludes as follows: *'Mr Ferreira is declared medically unfit for work and still receives a pension from ISCOR. Thus his work as a Car Guard is additional to his pension. He does not receive a constant amount per month and his income depends on the tips given by the clients. Because he claims to be able to perform in his current position, the writer is of the opinion that he should remain in his position for as long as he possibly can. Should he no longer be able to perform this type of work, he will probably suffer periods of unemployment if not totally unemployed given his age and limited employment opportunities. Mr Ferreira is however willing and motivated to work albeit with pain and discomfort. The writer suggests an increase in his post-morbid contingency deduction to compensate him for the potential future loss of income and likely earnings; loss of employability and suffering periods of unemployment should he lose his current position for any reason.'*

[18] The plaintiff testified that he is able to obtain and to perform duties as a security guard of a more sedentary nature, such as a guard at a gate. Such position, according to the plaintiff, is not as lucrative as that of a car guard at a restaurant and he therefore prefers to be the latter. It is accepted that alternative sedentary positions that are available in the market-place for a person with the plaintiff's limitations, qualifications, and experience were not investigated and explored by Dr Strydom, because of the plaintiff's stated preference and intention to remain a car guard and his stated ability to perform the duties of one.

[19] The defendant's industrial psychologist, Ms. Du Toit, correctly, in my view, accepted that the plaintiff was compromised by his pre-existing condition and also by the injuries that he sustained in the collision and the *sequelae* thereof. But, accepting the opinions of the orthopaedic surgeons, she expressed the opinion that the plaintiff should be able to continue working in a relatively similar way as before the accident. There has, in my view, not been any acceptable evidence presented at this trial to conclude otherwise. The plaintiff is able to perform duties as a car guard provided that extensive standing and walking is not required. I am unable to conclude that his limited employment opportunities were any different before the collision. The contrary opinion of Dr Strydom is based on the opinion of Ms. Kruger, whose opinion I am unable to accept.

[20] Ms du Toit expressed the opinion, which is accepted by the occupational and industrial psychologists for both parties, that it is more probable than not that the plaintiff, for his part, will attempt to be employed. He is driven and committed to work. His pain is relieved by mind over matter. With reference to his work history it seems probable that his 'employer' is satisfied with his performance and the undertaking of car guard duties by people of age is not uncommon. Ms du Toit is in my view correct in saying that the plaintiff's position is somewhat different than that of a self-employed person in the usual sense. She also differs with the opinion of Dr Strydom that the plaintiff, as a self-employed person, is highly likely to have worked beyond the normal retirement age *but for* the collision. The plaintiff, in her view, is 'self-employed' insofar as he generates his own income, but he

requires permission to do so, both before and after the collision. He is getting older and must compete with younger persons and he may not get the required permission. The plaintiff's prospects to work beyond the normal retirement age accordingly remain as speculative as they were before the collision.

[21] I am unable to find that the evidence and the acceptable expert opinions establish that the plaintiff is likely to suffer future loss of earnings or of earning capacity as a result of the collision, apart from the one month off duty that the orthopaedic surgeons agreed upon following the surgical removal of the internal fixation, which the plaintiff, in their opinion, requires *'as soon as possible'*. This loss, I understood counsel not to differ, translates into the sum of R4, 751.00.

[22] Finally, I turn to the plaintiff's past loss of earnings. It is undisputed that the plaintiff did not work as a car guard from the date of the collision on 18 February 2006 until 17 April 2007. The plaintiff testified that he was able to go back to work and to perform duties as a car guard from October 2006. He did not look for a job, because he was in a state of depression and did not feel like working. Ms Kruger notes in her medico-legal report that the plaintiff reported feelings of depression since the onset of his cancer and the results of the '*Beck Depression Inventory*' administered in her opinion '*can be regarded as indicative of possible borderline clinical depression*'. His state of depression which prevented him from working can therefore not be attributed to his collision-related injuries and *sequelae*, but rater to his pre-existing

condition. I am of the view that the plaintiff should be awarded compensation for his past loss of earnings for a period of eight months. The plaintiff testified that he earned on average R3, 800.00 per month at the time of the collision. His past loss of earnings, on a simple calculation, accordingly amounts to R30,400.00.

[23] In the result the following order is made:

1. The defendant is ordered to pay to the plaintiff the amount of R205, 151.00 within 14 days from the date of this order, failing which interest will start accruing on the aforesaid sum at the rate of 15,5% per annum until date of final payment.

2. The defendant is ordered to provide to the plaintiff an undertaking as envisaged in section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the plaintiff's future accommodation in a hospital or nursing home or medical treatment of the plaintiff or the rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the collision which occurred on 18 February 2006, after the costs have been incurred and on proof thereof.

3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs of the action, which costs shall include the qualifying fees in respect of the plaintiff's experts, namely Dr

Daneel Heyns (orthopaedic surgeon), Ms E Kruger (occupational therapist), Dr AC Strydom (industrial psychologist), and Mr G W van der Linde (Scientia Actuaries and Consultants).

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P.A. MEYER
JUDGE OF THE HIGH COURT

23 September 2010