

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

Date of hearing: 19 October 2016

11/11/2016

CASE NO: 68868/2012

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

S A P

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRENNER AJ

1. The material issue for determination before me was whether, and if so, to what extent, the plaintiff, S A P ("P"), enjoyed a claim against the defendant ("the RAF"), for past and future loss of income. At the hearing, I was informed by the parties that I was at liberty to examine and analyse all expert reports made available to the Court.
2. By agreement between the parties, P's claim to payment of the sum of R79 654.00 for past medical expenses was to be postponed sine die, this because of her failure to produce the supporting vouchers to justify the claim.

3. P, born on 2 April 1970, (39 years old at the time), was involved in a motor vehicle collision on 11 February 2010, when a car driven by her was hit by another car. The RAF conceded 100% negligence on the part of the driver of the other car.
4. The injuries sustained by her are described in the report of orthopaedic surgeon Dr Hans B Enslin ("Enslin"), dated 20 August 2014. Enslin could not recommend a claim for general damages, as these were not "serious injuries" and no complications had occurred or were likely to occur. Based on P's account, documents, his physical examination, and radiographic studies, Enslin could describe the injuries as
 - 4.1 an abrasion on her forehead;
 - 4.3 a soft tissue injury to her cervical spine;
 - 4.3 a soft tissue injury to her back.
5. P was treated at the Ermelo Medi Clinic on the same day, on an out patient basis. She was given an injection. Later on, she was prescribed pain medication for the pain in her right hip and buttock. In October 2010, she developed pain in her back, buttock, right hip and neck. She was absent from work for 3 days. She was later absent from work for 6 days in November 2010, for chest pains.
6. At the time, P was employed as a senior service agent by Liberty Life in Ermelo. She had started work there in 2007.
7. According to Enslin:

"Writer (Enslin) believes that this accident can have an effect on Ms P's ability to be promoted within her organisation, and although she is capable of working, her work speed will decrease at a faster rate, had she not been injured on 11 February 2010."
8. P filed the medico-legal reports from the following experts, namely, orthopaedic surgeon Enslin, occupational therapist, Wilma van der Walt ("Van der Walt"), clinical psychologist, Francien de Ridder ("de Ridder"), industrial psychologist, Dr Willie Pretorius ("Pretorius"), and actuary Johan Sauer ("Sauer"). The RAF filed medico-legal reports from occupational therapist, Success Moagi ("Moagi"), and orthopaedic surgeon Dr Solani Mukansi ("Mukansi"). The expert reports of P's clinical and industrial psychologists stood uncontroverted.

9. The whole person employment figure for P was rated by Enslin at 10% while it was rated at 13% by Mukansi. The joint minutes of the meeting on 8 October 2016, of the orthopaedic surgeons, Enslin, and Mukansi, are inciteful concerning P's injuries. They agreed as follows:

"1. Ms P sustained an abrasion on her forehead, and sustained an injury to her neck, and her lower back, in the motor vehicle accident that occurred on 11 February 2010. Dr Mukansi documented that she had a bruised right hip.

2. Ms P remains symptomatic in respect of her neck and back, and experienced headaches, (Ms P complained to Dr Mukansi on 29 May 2015 of sciatica).

3. Ms P does not qualify for the Narrative Test due to his (sic) musculoskeletal impairment. 11

10. On the subject of P's employment capacity, Dr Enslin had the following to say:

"Work aggravated her accident related symptoms, but, she feels better on weekends. Dr Enslin believes that this accident can have an effect on Ms P's ability to be promoted within her organisation, and although she is capable of working, her work speed may decrease at a faster rate, had she not been injured on 11 February 2010. Her Joss of earnings in future should be based on a possible decreased work performance, which could equate to 10% over the last two years of her working life. Her chances of remaining symptomatic over the last three years of her working life, are more than a 70% probability. "

11. Mukansi's view is diametrically opposed to that of Enslin:

"Or Mukansi has taken note that Mrs P works in the same capacity as prior to her being injured on 11 February 2010. He believes that her income generating capacity will not be affected by the accident that occurred on 11 February 2010. "

12. Conservative treatment for P was estimated by Mukansi at a cost of R50 000,00 and by Enslin at R30 000,00. Regarding surgery, Enslin believed that a surgical stabilisation of the cervical spine, and the lumbar spine may become indicated in future. Mukansi opined that surgery would not become indicated in the future.

13. It is trite that future medical treatment of P would be covered by the issue, by the RAF, of a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act,

14. A joint minute of the parties' occupational therapists, Messrs van der Walt, (for P), and Moagi (for the RAF), reveals consensus on the following matters. P had resumed her position at Liberty Life after the accident, and remained there. Her work was sedentary, and she met its strength requirements. Her neck and back pain would compromise her endurance of static postures such as sitting and prolonged standing. Pain management was indicated. They recommended ergonomic office furniture, and expected that her pain and problems with concentration and moods would improve with a successful treatment protocol.
15. The therapists agreed that P's performance level would fluctuate, depending on her symptoms and orthopaedic prognosis, to which her occupational prognosis was directly linked. They deferred to the orthopaedic surgeons on their prognosis. They shared the view that P's productivity at work could be affected by intermittent intrusive pain. Both agreed that P could work potentially to retirement age doing sedentary work in an ergonomic setting.
16. P was evaluated by industrial psychologist Dr Pretorius, on 27 January 2015. The RAF did not engage an industrial psychologist. Concerning her work capacity, Dr Pretorius, no relative of the plaintiff in casu, made the following observations, namely:
 - 16.1 P had difficulty concentrating due to her pain, and her work speed has reduced, affecting the achievement of work targets;
 - 16.2 her team leader at Liberty Life, Jennifer Mokothi, ("Mokothi") said that P was a "star performer" pre-accident, but post- accident, her work performance had deteriorated, owing to moodiness and high emotion;
 - 16.3 in Mokothi's view, the post-accident "restrictions", as well as P's diabetes diagnosis, directly affected her ability to achieve targets, which affected her income. There was a possibility of P receiving a warning if she became emotional and behaved inappropriately at work;
 - 16.4 due to P's restrictions and their impact, her performance rating may have been lower after the accident, than would have been the case had she not been involved in an accident. Therefore, *"her annual income from the time of the*

accident could have been higher, and it is therefore possible that she could have suffered an indirect past loss of earnings as a result of her involvement in the accident;

16.5 she may suffer loss of earnings owing to decreased competitiveness, productivity, emotional capacity, absence from work for treatment, and work vulnerability.

17. Clinical psychologist De Ridder came up with the following conclusions in her report:

"Mev P word na 'n Kliniese Sielkundige verwys vir langtermyn psigoterapie vir die behandeling van die psigologiese versteurings aanwesig en aanpassing voortspruitend uit die trauma van die ongeluk. In hierdie verband word 48 sessies by 'n Kliniese Sielkundige in die vooruitsig gestel "

Mev P behoort ook volgens die skryfster kompensasie te ontvang vir die pyn en lyding wat sy oor die afgelope jaar reeds verduur het en in die toekoms nog sal moet verduur, asook die moontlike verlies aan inkomste en lewenskwaliteit. "

18. I was presented with an updated actuarial report from Sauer, dated 13 October 2016. He made calculations for loss of income based on two scenarios. The first took into account inflationary increases only and, inclusive of contingency deductions, came to R185 664,00. The second scenario postulated P's potential for reaching a "Paterson B5 career ceiling", the figure being R460 020,00 after contingency deductions.

19. On a conspectus of the expert evidence at hand, I am not persuaded that the injuries in casu have prevented P from attaining a "Paterson B5 career ceiling." The injuries are such that they are largely manageable through medical intervention and treatment for which the RAF undertaking will suffice to a meaningful extent. P was treated on an outpatient basis on the day of the accident, and returned to work 3 days later, indicating an absence of severity in the injuries sustained.

20. The above notwithstanding, P's injuries have resulted in fairly chronic pain, which has in turn affected her earning capacity. This much is borne out by the expert reports of Enslin, van der Walt, De Ridder and Pretorius. I repeat that the expert reports of P's clinical and industrial psychologists stood uncontroverted, as no by expert evidence

from any counterparts were engaged by the RAF.

21. It is undisputed that P had suffered from diabetes and hypertension since 2013, according to Enslin's report. He stated that her diabetes and hypertension were not related to the accident, but that symptoms of anxiety and depression were "partially related" to the accident.
22. In determining that P's injuries have compromised her earning capacity, I have taken note of the ratio in the case of **Prinsloo v RAF 2015 (6) SA 91 WCC** in which a soft tissue injury resulted in Prinsloo developing chronic pain, causing her to battle to maintain her work functioning. I refer to paragraph 91 at page 112 of **Prinsloo**, in which cognisance was taken of the following, regarding the claimant:

"Her vulnerability stemmed from the weakening effect which her pre-existing psychological make-up and personality traits had on her ability to withstand trauma."

23. It is within the discretion of the Court to determine the applicable scenario for loss of income, which is taken conjunctively with loss of earning capacity. In my respectful view, the facts and expert evidence in casu support scenario 1, as postulated by Sauer.
24. I refer to the claim for past loss of earnings. P was absent from work for three days, from 11 to 13 February 2010, amounting to a claim of R715,00. A loss may only occur if she was not entitled to paid sick leave and there is no evidence to support this. The claim for sick leave from 1 to 6 November 2010 for R1 487,00 was for chest pains for which there was no evidence that they were attributable to her accident related injuries. The claim for R2 092,00 is unsustainable.
25. Sauer's calculations covered the two year period from 2 April 2033 to 2 April 2035, at R13 022,00. The contingency, which increased from 10% to 20% from 17 October 2016 to 2 April 2035, has dropped from 90% to 80%, arriving at a figure of R170 549,00.
26. Regarding future loss of income, for R183 572,00, Sauer made the following assumptions, namely:
 - a. That problems will only be experienced in the last two years of P's working life which will result in her earning 10% less than she would have received had

the accident not occurred;

- b. Her probability of earning income has decreased by 10% over the period from the date of calculation (17 October 2016) to date of retirement.

27. The figure of 10% has been taken for the reasons of, inter alia, factors such as increased unemployment vulnerability, labour incapacity, long periods of unemployment. There is no basis for a further general contingency deduction from this amount. In the result, a claim for future loss of income of R183 572,00 taking the RAF cap into account, is warranted.

28. The following order is granted, namely:

- a. The plaintiff's claim for past medical expenses is postponed sine die;
- b. the defendant is directed to pay to the plaintiff the sum of R183 572,00 for future loss of income;
- c. the defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay 100% of the costs for the future accommodation of the plaintiff in a hospital or nursing home or for the treatment of or the rendering of a service to her or the supply of goods to her arising from the injuries sustained by her in the motor vehicle collision on 11 February 2010, after such costs have been incurred and on proof thereof;
- d. the total amount in paragraph b above is payable on or before 30 November 2016 into the bank account of PAS Attorneys as follows: PAS Attorneys, FNB, Ermelo, account [...] branch code 270344, ref 1099A;
- e. the defendant will not be liable for any interest on the payment if it is made by 30 November 2016, failing which, interest shall accrue thereon at 10,25% per annum from the due date to date of final payment;
- f. the defendant shall pay the plaintiffs taxed or agreed party and party costs on the High Court scale on the premise that:

- i. failing agreement on costs, a Notice of Taxation may be served;
- ii. the plaintiff shall accord the defendant 14 court days within which to make payment of taxed or agreed costs;
- iii. such costs shall include the costs to the date of this order, the costs of the instructing and correspondent attorney, including travelling costs and expenses, attendance at Court, the pretrial conferences and pretrial minutes, attendances at pretrial conferences, attendances at any settlement meetings between the parties, costs previously reserved, if any, and further, the following, namely:
 - iv. the cost of all medico-legal, radiological, actuarial addendum and joint minutes, and consideration of all reports of the defendant;
 - v. travelling costs and expenses for the plaintiff to attend medico- legal appointments;
 - vi. travelling costs and expenses for the plaintiff to attend Court;
 - vii. the costs of preparing the trial bundles;
 - viii. the costs of the engagement of senior/junior Counsel, advocate MJ Kruger, including the day fee on 17 October 2016 and 19 October 2016;
 - ix. in the event of failure to pay the taxed or agreed costs, interest shall accrue thereon at 10,25% per annum from the due date to date of final payment.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

9 November 2016

Appearances

For the Plaintiff:

Instructed:

Advocate MJ Kruger

L J Breedt Attorneys

Counsel for Defendant:

Instructed by:

Adv L Shai

Pule Attorneys