

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

Case No: 80828/2014

14/7/2017

In the matter between:

SIYANDA TEDDY ZWANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

- [1] The plaintiff, Mr Zwane, claims damages from the defendant, the Road Accident Fund, for personal injuries sustained as a result of a motor vehicle collision that occurred on 17 July 2010 ("the collision"). The plaintiff sustained an injury to his lumbar spine.
- [2] The parties have previously settled the issue of liability.(a 50/50 apportionment was agreed) and future medical and related hospital expenses have been disposed of in terms of the court order dated 1 July 2016.

- [3] Counsel for the parties informed the court at the beginning of the trial that the only remaining issues to be determined are the quantum of past medical and related hospital expenses (the amount claimed R 72 658,22) and the question of any loss of earnings. Counsel further agreed that the case can be argued on the medico-legal reports ("the reports") filed by the plaintiff in view thereof that the defendant did not file any such reports. Mr Badenhorst, counsel on behalf of the defendant confirmed that the defendant admits the contents of the plaintiffs reports.
- [4] The issue regarding the quantum of the past medical and related hospital expenses was resolved during the tea interval and agreed that the amount payable towards the plaintiff in this regard was R 29 510,00 after the applicable apportionment was applied.
- [5] The defendant has furthermore undertaken, in terms of section 17(4) of the Act, to furnish the plaintiff with an undertaking of 50% of future accommodation of the plaintiff in a hospital or nursing home as well as the treatment of or rendering of a service to him or supplying of goods due to injuries sustained by him in the collision and the sequelae thereof.
- [6] The only task of the court is now to quantify the issue of loss of earnings allegedly suffered by the plaintiff.
- [7] A bundle containing all the expert reports filed by the plaintiff was handed in as exhibit "A". The following expert reports were in the bundle:
- Dr Theo Enslin (medical practitioner wrt the RAF 4 Assessment);
Dr H B Enslin (orthopaedic surgeon);
Ms A Ndabandi (occupational therapist);
Dr K Truter (clinical psychologist);
Kobus Prinsloo (industrial psychologist); and
Kobus Pretorius (actuary).
- [8] Mr Du Plessis, counsel for the plaintiff informed me at the beginning of the trial that the plaintiff would not persist with his claim for general damages in view of the experts held that the plaintiff does not qualify as serious

injured as envisaged in terms of the Road Accident Fund Act and Regulations thereto in this regard. The highest total impairment of the whole person (WPI) was by Dr Theo Enslin and he listed his finding as 11% WPI whilst Dr Hans Enslin listed the WPI at 2 %. See Bundle "A" p 13 and 25 respectively. It is therefore clear that the plaintiff does not qualify for general damages under the latest dispensation.

- [9] The plaintiff's situation with regard to his employment is the only relevant aspect to the decision of quantum to be made by the court and I will summarize it below.
- [10] The plaintiff was employed by MTM as a demand planner since August 2011 and earned approximately R 27 000,00 per month. The plaintiff left his employment at MTM for a better working opportunity at Nestle SA. See a summary of his career path in the report by the Occupational Therapist, Angel Ndabambi p 44-45 of bundle "A". Ndabambi further states on p 45 that the plaintiff was promoted twice since 2011 at Nestle and now earns R 30 000,00 p/m to date at Nestle. His financial position improved since joining Nestle.
- [11] Ndabambi further states that the plaintiff resumed his then employment at MTM after the collision until he secured another job offer at Nestle. He currently presents with pain over the lumbar spine, this injury remaining symptomatic since the collision. She concludes on p 51 that the accident had a negative influence on the plaintiff's amenities. This loss is normally addressed in the award for general damages. The plaintiff however elected to abandoned any claim for general damages.
- [12] Dr H Enslin remarked that the plaintiff is likely to remain able to work in his present capacity until normal age of retirement. See Enslin p 25 in Bundle "A". Enslin gave the plaintiff a 2% WPI. See p 25. On p 26 Enslin remarks that the plaintiff has not developed serious complications following transverse process fractures of his lumbar spine nor did the plaintiff sustain serious injuries with long-term sequelae.
- [13] The Occupational Therapist, Angl Ndabambi, reports the following:

- (a) On p 37 under **Post-accident functioning** she state that the plaintiff continued to participate in his administrative work tasks with no reported limitations.
- (b) On p 38 she states that although his mood changed, no change occurred in his social skills on interpersonal relationships.
- (c) On p 46 she states that the plaintiff indicated that the accident did not affect his promotional prospects and that he would continue working and aspires to open his own construction business.
- (d) On p 54 she states that the plaintiff is suited for his job. She ponders on certain aspects of pain the plaintiff suffers from time to time, but it seems that she is of the opinion that this may improve.

[14] The only reasonable inference from Ndabambi's report in this instance is that the plaintiff's employment situation improved since the accident. She defers to the opinion of an industrial psychologist as to a possible loss of future earnings.

[15] Dr K Truter, the clinical psychologist, comes to the conclusion that the plaintiff has predominantly physical complaints. Truter made the following remarks on p 64 " ... *according to him- the plaintiff- his work performance is above standard..*" and on p 67 "*This however has not yet influenced his productivity at work*". Truter advises that the plaintiff be treated and such future treatment will fall under the auspices of the undertaking. On Truter's report the plaintiff did not suffer any loss of earning or loss of earning capacity. In this regard the judgment in **Deyssel v Road Accident Fund (unreported case no 2283/2009 GJ** on 15 June 2011 by Bizoz AJ, is applicable as to the difference between loss of earning capacity and loss of income. See par [14] & further in **Deyssel**.

[16] The Industrial Psychologist, JJ Prinsloo, in his report on p104 under the heading **Post -Morbidity Assessment of impact on Career Prospects and Earning Capacity**, he concludes that the plaintiff did not suffer any direct loss in earnings- see table in this regard. Prinsloo concludes that the plaintiff will continue to work until the age of 65 and postulates that the issue of

the damages be addressed by means of:

- (a) Compensating for General Damages by applying the narrative test - this notion rejected by the defendant and abandoned by the plaintiff;

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and

- (b) Applying a contingency that is *slightly* higher than the pre-morbid contingency on his post-morbid occupational functioning.

- [17] Prinsloo is of the opinion that the plaintiff will continue to function as a Supply Planner with successful progression to Supply Chain Manager I & II until normal retirement. Without detracting from the rest of Prinsloo's report, and also all the other reports, it is clear that the plaintiff will not suffer any future loss of income or loss of income capacity. The experts are all ad idem that the plaintiff suffered certain bodily and psychological injuries but that his ability to work is not impaired to such an extent that he will suffer a future loss of income.
- [18] Prinsloo had a conversation with Ms Cheryl Moodley, the plaintiff's line manager at MTN. Moodley regarded the plaintiff's work performance as "*high performance*" pre-morbid. See p 88 & 89. During the same conversation Moodley's rating of the plaintiff post-morbid remained at *high performance*" and that there was no decline in the plaintiff's work performance after the accident. See p 95 & 96.
- [19] Prinsloo mentions that the plaintiff may possibly undergo future medical treatment that this will result in "***increased sick leave/absence from work due to accident sequelae***". See p 99. This is in my view an unfounded general statement. The only future sick leave envisaged is for surgical stabilization of the lumbar spine. It cannot be taken that it will result in ***increased*** sick leave. It will in all likelihood be a once off sick leave and cannot in my view be labelled as ***increased sick leave***.
- [20] If all the expert reports are taken into account and compared with one another, it becomes clear that the plaintiff suffered certain injuries that probably influences his physical attributes without having any significant

effect on his working performance. I cannot agree with Prinsloo's finding that the plaintiff is compromised as to his competitiveness in the open labour market. His employment has improved after the accident since moving to Nestle SA. He obtained two promotions since moving to Nestle and still had to potential according to Moodley (on p 96) to a Demand Planning Manager or Operational Manager position within MTN had he remained at M1N.

- [21] I differ from Prinsloo that the plaintiff will be any foreseeable risk during his career with regard to his occupational functioning. His employment has improved since the accident and since voluntary leaving MTN to join Nestle.
- [22] This raises the question of what to do if an actual patrimonial loss cannot be proven. I have referred to the judgment in **Deysel** above. In this matter the aspect of loss of income and loss of earning capacity was dealt with see [14] and on. Bizoz AJ came to the conclusion that *"loss of earnings and loss of income are part and parcel of the same concept and are vital for each other's existence"*. See [29] in **Deysel**.
- [23] Having regard to all the reports of the experts to the effect that the plaintiff has suffered some physical impairment of his person, I am not convinced that this has led to any loss of earning capacity on the facts. I am further of the view, particularly based on what Ddamandi (the Occupational Therapist) and Prinsloo (the Industrial Psychologist) concluded that the plaintiff in fact did not suffer any loss of income nor is any future loss of income projected. The experts all conclude that no early retirement is foreseen and it is clear that the plaintiff in fact is better off at Nestle than what he was at MTN. Even after the accident when he returned to MTN, his supervisor, Me Moodley indicated that his work performance was still "high" and his work behavior remained at "excellent". See pages 88-89 (pre-morbid) when compared with page 95 (post-morbid.)
- [24] The plaintiff has failed to prove any future loss of income despite the proven impact-related injuries and sequelae which is clearly of a physical nature. I accept that the plaintiff has suffered an actual impairment to his

whole person and that it will require that he will put in extra effort to continue his current "excellent" work performance, but this in its self does not prove a future loss of income. There is further no indication that he will be compromised in future nor will his promotional prospects be affected. See Ndabambi' s report on p 46.

- [25] I am of the view that this manifests instead as non-patrimonial damage in the form of pain and suffering and could have formed part of the quantum of general damages to be considered. The medical WPI ratings of the plaintiff was however so low that none of the practitioners regarded his injuries are of a serious nature with long term sequelae. See Enslin p27. The plaintiff does not qualify for general damages and elected not to persist with any claim for general damages. There is therefore no room for the court, like in the **Deysel matter**, to even consider to add any amount to a claim for general damages.
- [26] I am of the view that the plaintiffs claim for loss of earnings has no merit and is therefore dismissed.
- [27] Mr Du Plessis handed a draft order to court, providing for the amount to be awarded and other related aspects regarding reserved costs of the 24th of May 2017 and the costs of the experts listed and interest. As indicated above, the only other outstanding issue was the quantum of the past medical expenses. The amount was settled during the trial in the amount of R 29 510,00 (after applying the appropriate apportionment of damages).
- [28] The annexed draft order as completed by the court as to the amount (the settled past medical expenses) of R 29 510,00 together with paragraphs 2 to 5, as initialed and marked "XYZ" and annexed hereto, is made an order of court.

J HOLLAND-MUTER A/J
GAUTENG DIVISION,
PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

On the 20th of June 2017

Before his Honourable Acting Judge Holland-Muter

Case No: 80828/2014

In the matter between:

SIYANDA TEDDY ZWANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

After having heard counsel, the court orders as follows:

1.

**PLAINTIFF'S CAPITAL FOR LOSS OF EARNINGS AND PAST HOSPITAL/
MEDICAL EXPENSES:**

The Defendant is order to pay to Plaintiff he amount of **R29 510.00 [Twenty Nine**

Thousand, Five Hundred and Ten Rand] in delictual damages for injuries Plaintiff sustained in a motor vehicle accident which occurred on 17 July 2010, which amount is payable by Defendant to Plaintiff on/or before 28 July 2017 by depositing same into Plaintiff's attorneys of record's trust account, the details of which are as follows:

ACCOUNT HOLDER	:	MACROBERT INC
BANK	:	STANDARD BANK
TYPE OF ACCOUNT	:	TRUST
ACCOUNT NUMBER	:	[....]
BRANCH	:	PRETORIA
BRANCH CODE	:	01-00-45
REFERENCE	:	G DREYER/1017707

2.

INTEREST:

- 2.1 The Defendant will not be liable for interest on the outstanding amount;
- 2.2 Should the Defendant fail to make payment of the capital amount on/or before 28 July 2017, Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10.5% per annum as from the date of this order to date of final payment.

3.

COSTS:

The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court Scale for 24 May 2017 and 20 June 2017, which costs will

include, but will not be limited to, the following:

3.1 The costs of all expert reports, medico-legal reports, addendum medico-legal reports, and combined joint reports, RAF4 Serious Injury Assessment Report(s) and radiology reports of all experts of whom notice has been given and/or whose reports have been furnished to the Defendant and/or its attorneys and/or whose reports have come to the knowledge of the Defendant and/or its attorneys as well as all reports in their possession and/or contained in the Plaintiff's bundle of documents. This shall include, but not be limited to, the following experts of whom notice has been given, namely:

31.1 Dr HB Enslin, Orthopaedic Surgeon;

31.2 Dr TJ Enslin, General Practitioner;

31.3 A Ndabambi, Occupational Therapist;

31.4 K Prinsloo, Industrial Psychologist;

31.5 Dr K Truter, Clinical Psychologist;

31.6 K Pretorius, Actuary;

3.2 The full fees of Plaintiff's counsel in respect of preparation, consultations, pre-trial conferences, including a day fee for 24 May 2017 and 20 June 2017;

3.3 The reasonable travelling, subsistence and transportation costs including e-toll fees incurred by and on behalf of the Plaintiff for attending the medico-legal examinations;

3.4 The costs of holding all pre-trial conferences, as well as roundtable meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;

3.5 The costs of and consequent to compiling all minutes in respect of pre-trial conferences;

3.6 The costs of and consequent to the holding of all expert meetings

between the medico-legal experts appointed by the Plaintiff;

- 3.7 The reasonable taxable costs of one consultation with the client in order to consider the offer of the Defendant, the costs to accept it, have it made an order of court and to procure performance by the Defendant of its obligations in terms hereof;
- 3.8 The cost incurred in obtaining payment and/or execution of the capital amount mentioned in paragraph 1 above;
- 3.9 All costs relating to the preparation and copying of the trial bundles, consisting of 5 (five) copies.

TAXATION:

- 4.1 Plaintiff is ordered to serve the Notice of Taxation of Plaintiff's party and party bill of costs on Defendant's attorneys of record;
- 4.2 The Defendant is ordered to pay the Plaintiff's taxed and/or agreed party and party costs within **14 (FOURTEEN)** days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;
- 4.3 The Defendant's claims handler is ordered to request payment of the taxed or agreed party and party costs within a period of **7 (SEVEN)** days from the date upon which the accounts have been served on Defendant and/or Defendant's claims handler and to provide Plaintiff's attorney with written confirmation that payment has been requested;
- 4.4 Should the Defendant fail to make payment of the party and party costs within **14 (FOURTEEN)** days after service of the taxed accounts on the Defendant's attorneys of record, Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10.5% per annum as from the date of taxation to date of final payment.

CONTINGENCY FEE AGREEMENTS:

The Plaintiff and the Plaintiffs attorneys of record did not enter into any contingency fee agreement.

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REGISTRAR

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