IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 5617/2016

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

29-March-2018
.....
DATE

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SIGNATURE

In the matter between:

MINNIE: STEFANUS JOHANNES Plaintiff

and

ROAD ACCIDENT FUND Defendant

REASONS FOR JUDGMENT

MANAMELA, AJ

Introduction

[1] This matter concerns injuries sustained and loss suffered by the plaintiff due to an accident involving his motorcycle and motor vehicle driven by an insured driver of the defendant on or about 27 January 2013, along Molen Road in Rustenburg, North-West Province. The plaintiff sustained injuries to his left hand and left knee and, consequently, suffered loss or damages due to the injuries from the accident. He caused summons to be issued against the defendant seeking compensation for the damages due to the injuries and their *sequelae*.

[2] The plaintiff alleged that the defendant's insured driver was the sole cause of the accident, due to his negligent driving and, therefore, the defendant bears liability as envisaged by the provisions of the Road Accident Fund Act 56 of 1996 (the RAF Act) for the resultant damages suffered by the plaintiff. It was claimed that the plaintiff suffered damages in respect of past and future loss of income; past and future medical expenses, and general damages for pain and suffering, discomfort, disability and temporary loss of amenities of life. The defendant denied liability and asserted that the plaintiff's negligence in the driving of his motorcycle either solely caused the accident or partly contributed thereto, and prayed, in the event of a finding on the latter, for apportionment of damages to be awarded to the plaintiff in terms of the Apportionment of Damages Act 34 1956.

[3] The matter came before me on trial on 16 November 2017, when Mr PA Venter appeared on behalf of the plaintiff and Ms N Soviti-Zwedala appeared on behalf of the defendant. No oral evidence was adduced at the hearing and after listening to oral submissions by counsel, I reserved judgment overnight and, the next day, on 17 November 2017, I made an

order in terms whereof the defendant was, in the main, directed to pay to the plaintiff an amount of R1 824 414.82 representing 70% of his proven damages. Further, the order made included an agreement between the parties that the defendant will furnish the plaintiff with an undertaking to pay 70% of his costs of future accommodation in a hospital or nursing home, or his treatment or for services rendered or goods supplied to him arising out of injuries sustained in the accident and their *sequelae*. The aspect of the general damages was separated from the rest and postponed *sine die*. I was also advised that there was no dispute in respect of an amount of R30 298.89 for past medical expenses. I included this amount in the calculation of the award made. Although, brief reasons were given at the hearing and at the time, I nevertheless mentioned at the time of granting the order that full reasons for the order would be provided in due course. This was in consideration of the fact that the amount awarded was a recalculation from the actuarial report.

Brief relevant background

[4] As stated above, by the time the hearing in this matter began, the parties had agreed that the defendant would be liable to compensate the plaintiff for 70% of the plaintiff's proven and/or agreed damages. That being the case, issues relating to merits were no longer required to be determined, as the aforementioned agreement was made an order of this Court. Therefore, the background issues of this matter will only be stated, to the extent that they had a bearing on the determination of the material issues relating to *quantum*.

[5] The plaintiff was born on 26 April 1975 and therefore was about 38 years old at the time of the accident in January 2013, and about 42 years old on the date of trial. He completed

his matric in 1993 at a technical high school and was awarded a certificate in boilermaking and hydraulics (N3). He did his apprenticeship, wrote tests and qualified at the end of 1996, as a boilermaker. He was employed by Xstrata/Glencore, as a junior foreman/co-ordinator in palletizing, at the time of the accident. He had worked for Xstrata/Glencore since 2006 or 2008. He resigned from Xstrata/Glencore at the end of 2013, reportedly due to his limitations or difficulties relating to the left knee and hand. At some stage, thereafter, he was again employed as a boilermaker by Gears Mining. He had worked in boilermaking for 20 years.

[6] In 2004, he was also in another motor vehicle accident wherein he sustained a so-called "a T12 compression fracture", for which he underwent a fusion surgery, which resulted in him presenting with bilateral drop foot, sensory fallouts in both legs and poor balance.

[7] It is also reported by one of the occupational therapists that the plaintiff had mentioned that he was busy furthering his studies in information technology, which studies were to be completed by the end of 2016 and February 2017.

Plaintiff's injuries and damages (expert opinions)

[8] Plaintiff's injuries were common cause between the parties. However, the parties are not particularly in agreement with regard to the effect of the injuries on the plaintiff's loss of income. Consequently, I will deal with the views or opinions of the experts employed by the parties to assist the Court in this regard. I pay particular attention to the views and opinions as contained in the joint minutes of the respective experts.

Orthopaedic surgeons

[9] The orthopaedic surgeons agreed on the nature of the injuries sustained by the plaintiff in the motorcycle accident: fracture dislocations of the bases of the left index, middle and ring metacarpals and carpometacarpal joints, as well as, a strain of the lateral collateral ligament of the left knee. They also agreed that the plaintiff has full ranges of pain-free motion of all the joints of the affected hand and full ranges of pain-free motion of the lower limb joints bilaterally. Further, the surgeons agree that the MRI scan performed in May 2017, on the left knee showed degenerative changes of the knee only, which they agree may require arthroscopic treatment of the knee and that there is a small chance of the plaintiff eventually requiring a total knee replacement. The plaintiff requires the removal of the left-hand internal fixation, the surgeons agreed. However, they differed on his employability, with Dr MJ Tladi, retained by the defendant, opining the plaintiff's employability has not been affected by the accident, whereas Dr CE Barlin, employed by the plaintiff, saying that he will probably be fit for sedentary duties only from the age of 60, although they both defer to the opinions of occupational and industrial psychologists, in this regard.

Occupational therapists

[10] The occupational therapists were employed in this matter were Ms C-M du Toit and Ms S Moagi. The occupational therapists produced a joint minute in October/November 2017 in terms of which the following is, among others, recorded.

> "7.1. We agree that Mr Minnie has a grade 12 level of education. thereafter [sic] he studied to become a boilermaker.
>
> 7.2. We note that he is currently busy furthering his studies in Information Technology. He indicated to Ms du Toit that he is due to complete the course and the end of 2016 [sic] and the other in February 2017. This was not reported to Ms. Moagi

7.3. **We agree** that he his [sic] work history is limited to that of a Boilermaker has worked as a Boilermaker for 20 years.

7.4. **We agree** that he worked as a Boilermaker at Glencoe Xstrata at the time of the accident.

7.5. **We agree** that this position can be classified as heavy demand.

7.6. He reported to **Ms du Toit** that he experienced balancing difficulties and often fell at work due to his bilateral drop foot, which is *unrelated* to the accident. He also has had difficulty with balance in a crouched and kneeled position and therefore adapted the manner in which he executed certain tasks.

...

7.8. **We note** that he was realigned to 'light duty' for about 2-3 months in a sedentary position.

7.9. **We note** that upon his return to full capacity, he experienced various difficulties related to his left knee and hand. He eventually resigned end of 2013 due to these limitations.

7.10. At the time of **Ms du Toit's** assessment he was employed as a boilermaker at Gears Mining. This position can be classified as light demand with rare aspects of low medium load handling.

7.11. At the time of **Ms Moagi's** assessment, he was unemployed.

7.12. He reported to **Both therapists** to continue to experience difficulty with his left wrist when tightening screws as well as his left knee particularly when walking on uneven terrain."[1]

[11] Based significantly on the above-mentioned assessments, the occupational therapists arrived at, among others, the following findings, that:

"...

- **We agree** that he is not deemed to be suited to perform work as a boilermaker as in the position that he was doing at the time of the accident. Although his agility limitations are not solemnly due to the accident, it is noted that he was able to continue to work as a boilermaker prior to the accident in discussion, despite his unrelated physical limitations, albeit using modified techniques.

...

[1] See the pre-trial joint minute compiled by occupational therapists at par 7 on indexed pp 7-8.

- **We agree** that given the orthopaedic prognosis, significant improvement in his residual physical capacity is not expected, particularly given the degenerative changes in the left knee. We agree that he would in all likelihood be best suited to sedentary with aspects of light load handling only in the long term as general mobility would be even further reduced.
- **We agree** that provision should be made for reasonable accommodations and assistive devices to facilitate optimal work performance and reduce discomfort.
- **Therapists of** the opinion that taking into account his educational background and work history, it is likely that but for the accident he would have continued to work as a boilermaker. Mr Minnie does not have the capacity to comply with the typical demands of a boilermaker which according to the dictionary of occupational titles (and according to his position that he was employed in at the time of the accident) is medium to heavy demand in nature…
- **We agree** that his vocational prospects have been negatively affected by the accident, and will continue to remain limited into the future"[2]

Industrial psychologists

[12] The parties also acquired the services of industrial psychologists, as expert witnesses, in this matter. Ms Samantha Behrmann (SB) was employed by the plaintiff and Nicolene Kotze (NK) was employed by the defendant. They compiled joint minutes, based on their respective reports and opinions, which, with regard to the loss suffered by the plaintiff, read as follows in the material part:

> "1. **SB opines** that the claimant has suffered the following losses:
>
> a) the difference between what Mr. Minnie would have continued earning at Xstrata/Glencor until being appointed in January 2014 (for calculation purposes) as a senior technical co-ordinator… and what he has earned and will earn until his retirement. Deference to the actuary for the calculation,

[2] See the pre-trial joint minute compiled by occupational therapists after par 7 on indexed pp 8-9.

b) Please defer to the factual regarding Mr. Minnie's past loss of income during his convalescence, taking into account overtime he would have earned

c) To cater for uncertainties and highly probable protracted periods of unemployment as an IT Technician (funds for exams permitting) in future as well as for Mr Minnie being fit only for sedentary work from age 60, a much bigger contingency should be applied. Deference is given to the court and legal teams in this respect.

2. **NK**: a) any substantiated past loss of income, as well as loss of income until such time that he completes his studies and secure suitable employment, from which time onwards is expected to continue to earn more or less on par with the postulated pre-accident salaries.

b) his job choices are curtailed, he could face in periods of unemployment during the remainder of his working career whilst seeking suitable employment, he may not be able to perform optimally compared to his uninjured counterparts and therefore he would likely remain a vulnerable individual, reliant on a sympathetic employer to some extent. These factors could continue to impact negatively on future earnings. Deference is however given to medical opinion for apportionment of the injuries sustained in the accident.

c) the above aspects, only if deemed related to the *sequelae* of the accident, be addressed by means of a higher post-morbid contingency deduction.

d) If the experts are in agreement that he will not be able to return to his pre-morbid job, then it would be advisable that he be assisted to complete the current IT studies as soon as possible and any further studies he may require to qualify as network security engineer, as this would enable him to earn more or less on par with the anticipated pre-accident income. Deference is given to the occupational therapist for comment on his ability to cope with such a job.

e) As per Dr Barlin, Mr Minnie is likely to be fit for sedentary duties only after age 60. Deference is however given to consensus medical opinion with regards to early retirement and whether early retirement would be applicable should he secure suitable employment. If all the experts agree that early retirement is indeed indicated, provision should be made for a total loss of income during such indicated period of earlier retirement.

3. **We acknowledge** that contingencies remain the prerogative of the court or to be negotiated between the legal parties."[3]

Actuarial report

[13] On the basis of the joint minutes of experts, Gerard Jacobson Consulting Actuaries compiled and delivered an actuarial report dated 14 November 2017. I will not deal with each and every aspect of the report, but with what formed part of the submissions at the hearing. I have considered the report in its entirety, but I will particularly deal with the summary of the loss of income. What ought to be always borne in mind is the principle that reports by experts like actuaries, although based on expertise and being of immense benefit to the Court, are only a guide and ought to be evaluated as part of all evidence before the Court.[4]

[14] The actuary, in the main, relied on the joint minutes by the industrial psychologists and summarised the essential parts into three bases. Basis I, which is opinion expressed by Ms Behrmann is to the effect that the plaintiff would have been promoted into the role of senior technical co-ordinator in January 2014, which would have enabled him to reach his career ceiling at his mid-40s with earnings in line with the C5 Paterson upper quartile package of between R45 000.00 and R48 000.00 per month in 2014 monetary terms, until his retirement at the age of 65. In terms of Basis II opined by Ms Kotze, the plaintiff would have remained in his pre-morbid position, until his retirement at the age of 60 to 65, whilst benefiting from annual inflationary increases. And in terms of Basis III, which is also a view of Ms Kotze, it is postulated that the plaintiff may have been promoted to senior technical co-ordinator and with

[3] See the pre-trial joint minute compiled by industrial psychologists at part E on indexed pp 21-22.
[4] See Potgieter *et al Visser & Potgieter Law of Damages* 3rd ed (Juta Cape Town 2012) at p 467; See Klopper HB *Law of Third-Party Compensation* 3rd ed (LexisNexis Durban 2012) at p 177..

earnings in line with the C5 Paterson level (median to upper quartile package) from July 2014 until his retirement at the age of 60 to 65, with inflationary increases along the way. The reasoning behind the three Bases are fully explained in the report, including the basis of calculations.

[15] Further, the actuary stated that he or she was instructed to apply contingency deductions at 5% for past loss in respect of both pre-morbid and post-morbid scenarios of all three Bases. The instruction was presumably from the plaintiff or his attorneys, but nothing, in my view, ought to turn on this. For reasons that will become clearer herein below I deal with the calculations in terms of Basis II. After applying the aforementioned contingencies (i.e. 5% both ways), the plaintiff is said to have suffered past loss of income in an amount of R1 431 256.00 and, after effecting the statutory cap or limit in terms of the provisions of the amended RAF Act amounted to R966 754.00.

[16] With regard to future loss of income, contingency deductions of 15% pre-morbid and 25% post-morbid are suggested for Basis I; 10% pre-morbid and 40% post-morbid for Basis II, and 15% pre-morbid and 35% post-morbid for Basis III.

Submissions on behalf of the parties (legal argument)

Submissions on behalf of the plaintiff

[17] As indicated above, Mr PA Venter, appeared as counsel for the plaintiff and Ms N Soviti-Zwedala appeared as counsel for the defendant. None of the parties adduced oral evidence and therefore only oral submissions, based on expert reports mainly as truncated

through the joint minutes of the experts and the actuarial report, were advanced by counsel. Mr Venter also handed up written heads of argument and I take this opportunity to express my gratitude in this regard.

[18] From his written and oral submissions, Mr Venter advanced, among others, the following argument. The Court ought to consider that the entire work history of the plaintiff has been in boilermaking spanning a period of 20 years and not in a haphazard way. The plaintiff resigned his job as a boilermaking due to limitations relating to his hand at the end of 2013. The experts agreed that the plaintiff has residual capacity, but only suited for work of a sedentary nature and, therefore, no longer suited to work as a boilermaker. He would have continued to work as a boilermaker, but for the accident he can no longer meet the demands of boilermaking and as such his vocational prospects have been negatively affected. Mr Venter argued for, among others, the above-mentioned reasons, that Basis II with the pre-morbid contingency of 10% and post-morbid contingency of 40%, was the most appropriate under the circumstances. Notably, this basis applied the highest post-morbid contingency deduction of the three bases.

Submissions on behalf of the Defendant

[19] Ms N Soviti-Zwedala appearing for the defendant made oral submissions which included the following. She argued for a 5% pre-morbid contingency deduction and 10% post-morbid contingency deduction in respect of past loss of income. Therefore, the defendant's view is at variance with the 5% deduction across-the-board contained in the actuarial report albeit on instruction from the plaintiff or his attorneys.

[20] Regarding future loss of income Ms Soviti-Zwedala's submissions were to the effect that some of the plaintiff's current problems and complaints, like the required fusion surgery and back surgery already undergone, had nothing to do with the accident of 27 January 2013 that the previous accident in 2004. Further, that the plaintiff was unlikely to be retrenched and Dr Barlin stated he would be fit for sedentary duties only from the age of 60 onwards and, therefore, he would be close to his retirement, justifying a lower post-morbid contingency deduction, like up to 10%. In sum, counsel for the defendant appeared to favour Basis II only if the premorbid 15% contingency deduction was upped to 20%.

Damages to be awarded (a discussion)

[21] The crisp issue to be determined here was whether the plaintiff was able to continue as a boilermaker in the same way he did prior to the material accident. It was submitted that the plaintiff's injuries sustained from the recent and material accident created limitations or problems for the plaintiff in the performance of his duties and that he would otherwise have not managed, without the sympathy of his employer. The submission was further expanded that the plaintiff qualified only to perform duties of a sedentary nature. On the other hand, the defendant's counsel submitted that the current complaints of the plaintiff are due to causes relating to the previous accident or that the injuries from that accident has a significant bearing on the complaints.

[22] I fully considered submissions by counsel, as well as, the opinions of the relevant expert witnesses as contained in the reports and joint minutes. In my view, the plaintiff was clearly able to perform boilermaking duties after the material accident, although he, at times, experienced some problems arising from his injuries. However, it should be remembered that

the joint view of the orthopaedic surgeons is that the plaintiff has full ranges of pain-free motion of all the joints of the affected hand and full ranges of pain-free motion of the lower limb joints bilaterally. They also agreed that there is only "a small chance" of the plaintiff eventually requiring a total knee replacement. The plaintiff returned to his employer at the time of the accident after a break whilst receiving treatment and was employed as a boilermaker at the time of the trial. No evidence was led to suggest that the employment of the plaintiff post-morbid was sympathetic on the part of the employers. In my view, the problems arising out of the injuries sustained from the recent accident will have some bearing on the plaintiff's ability to perform his duties and, therefore, also his prospects in this regard, but plaintiff will not be precluded from continuing in his pre-morbid position as a boilermaker. I will return to this when dealing with the applicable contingency deductions, below.

Conclusion

[23] With regard to the appropriate award for future loss of income, as indicated above, counsel suggested application of different contingencies based on particularly Basis II suggested by the industrial psychologist and fully explained in the actuarial report.

[24] I agree that the most appropriate basis is Basis II, which is to the effect that the plaintiff would have remained in his pre-morbid position until his retirement. However, due to what is stated above, I therefore, applied 30% contingency deduction instead of the suggested 40% contingency deduction. The following calculation which is significantly adopted from the format in the actuarial report will explain the basis for the award made:

future loss

the value of income, but for accident	R	7 454 832.00
less 10% contingency deduction	R	745 483.00
net value of income, but for accident	R	6709349.00

value of income having		
regard to accident	R	7285850.00
less 30% contingency deduction	R	2 185 755.00
net value of income having regard to accident	R	5 100 095.00

net future loss: **R 1 609 254.00**

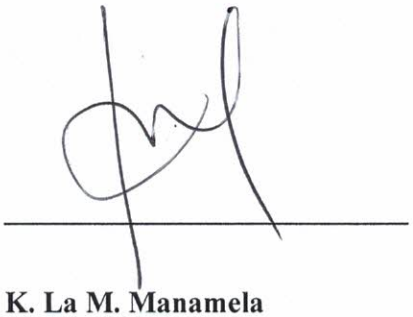
[25] The amount of R1 609 254.00 net future loss was added to the capped net amount of R966 754.00 in respect of past loss of income, amounting to a total net loss of income in an amount ofR2576 00.00. I accepted the basis for calculation of the past loss of income and the contingencies applied. I was mindful of the fact that the recalculated amount in respect of future loss of income (i.e. R1 609 254.00) did not reflect the same limitations to losses in terms of the amended RAF Act applied in respect of the net past loss of earnings, but considering that a 30% contingency deduction wasapplied, I considered the recalculated amount to be reasonable and appropriate under the circumstances. The amount of R30298.89 in respect of past medical expenses was added to the total net loss of income in an amount of R2 576 00.00 ending up with a total of R2 606 306.89. Therefore, after deducting an amount

equivalent to 30% from the aforementioned total, representing the 70%/30% apportionment on merits, the ultimate amount was R1824414.82. As stated above, an awardin this amount was made in favour of the plaintiff in terms of the order made on 17 November 2017.

[26] The order made also included that the defendant would furnish an undertaking in terms of section 17(4)(a) of the RAF Act, for payment of 70% of the costs of future accommodation of the plaintiff in a hospital or nursing home, or his treatment or for services rendered or goods supplied to him arising out of injuries sustained in the accident and their *sequelae*. Payment of these costs will be made once incurred and proven to or agreed by the defendant. The defendant was further ordered to pay the taxed or agreed party and party costs of the plaintiff, which would include those relating to obtainment of expert medico-legal and actuarial reports and other specified fees of those experts, if any, and legal fees.

Order

[27] For the abovementioned reasons, I made an order as indicated above, substantially finding that the defendant is liable to pay to the plaintiff an amount of R1824414. 82 representing 70% of the plaintiff's damages, save for general damages [determination of which was separated from the rest of the damages and postponed *sine die*]; the defendant is to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the RAF Act, and for payment of the plaintiff's costs, as specified.



K. La M. Manamela

Acting Judge of the High Court

29 March 2018

Appearances:

For the Plaintiff	:	Adv PA Venter
Instructed by	:	Faber & Allin Inc. Attorneys, Parktown, JHB
		c/o Adams & Adams, Lynwood Manor, PTA
For the Defendant	:	Adv N Soviti-Zwedala
Instructed by	:	Maluleke Msimang & Associates, PTA