

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

Case Number: 10597/2015

17/7/2019

In the matter between:

ANTONIO GABRIEL WATE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

DU PREEZ, AJ:

INTRODUCTION:

1. The plaintiff, Mr. Antonio Gabriel Wate, and the defendant, the Road Accident Fund, both duly presented by attorneys and counsel, agreed that this *quantum* trial¹ should proceed on the evidence contained in the discovered documentation and the expert reports, without adducing oral evidence.
2. The parties' respective counsel referred the court to the relevant excerpts

¹ The merits having been settled as per draft order dated 21 November 2016.

from these documentation and reports and presented argument In respect thereof.

BACKGROUND:

3. On 29 November 2012 and on the R30 Road between Klerksdorp and Bothaville, the plaintiff, who was a passenger in a motor vehicle with registration letters and number [...] ("*the tax*") driven by Mr J Bomdzela, was injured when the taxi collided with a motor vehicle with registration letters and number [...].²
4. In the plea,³ the defendant denied that the plaintiff suffered the following injuries during the collision:⁴
 - 4.1 Fractured ribs and contused chest on the right side with pulmonary contusion;
 - 4.2 Right femur fracture;
 - 4.3 Aneamia due to blood loss;
 - 4.4 Deep laceration of lower lip;
 - 4.5 Knee injury.
5. Eventually, the only dispute in this regard was whether the plaintiff had in fact sustained the knee injury as alleged and whether the plaintiff had suffered a loss of earnings as a result thereof
6. The matter was enrolled for trial on 30 April 2019, but postponed to 3 July 2019 and the cost were reserved.
7. The parties differ as to the reasons why the matter was postponed, which aspect is addressed more fully *infra*.

THE ASPECTS THAT THE COURT HAS TO ADJUDICATE UPON:

² Particulars of Claim, paras 3 & 4.

³ Plea, para 5.

⁴ Particulars of Claim, para 6.

8. The aspects that the Court has to adjudicate upon, are the following:
 - 8.1 Whether the plaintiff had indeed sustained the knee injury;
 - 8.2 If the plaintiff had sustained the knee injury, whether he had suffered a loss of earnings as a result thereof;
 - 8.3 If the plaintiff had suffered damages as a result of the knee injury, the *quantum* of such loss of earnings; and Who has to 'pay the costs of suit, including the costs occasioned by the postponement on 30 April 2019?

DID THE PLAINTIFF SUSTAIN A KNEE INJURY AS ALLEGED?

9. The defendant's counsel relied on the following evidence in support of the defendant's denial that the plaintiff had sustained a knee injury:
 - 9.1 The operational notes of the surgeon, Dr Redelinghuys, who operated on the plaintiff after the accident and which refer to the femur fracture, but not to any knee injury.
 - 9.2 The report of Or OF Malherbe, a diagnostic radiologist at Drs Verster & Partners Inc, dated 12 June 2012, which mentions the femur injury, but not any knee injury. In fact, the report describes the knee as within normal parameters.
 - 9.3 The medico legal report by the defendant's expert orthopaedic surgeon, Dr BE Ramasuvha, which was compiled after an examination the plaintiff on 27 May 2016. This report states that the plaintiff had sustained injuries to the right distal femur and chest. Although there is an entry under the heading "PRESENT COMPLAINTS" that the plaintiff experiences pain in the right knee when "waking up from bed", there is no diagnosis of any knee injury as such.
 - 9.4 The report of the defendant's diagnostic radiologist, Dr F Ismael of Drs Mkhabele & Indunah Diagnostic Radiologists Inc, who examined the plaintiff on 27 May 2016, and according to which the right knee x-

rays show no fractures and that the medial and lateral compartments of the knee joint are normal.

- 9.5 A clinical neuropsychological report of a clinical psychologist, Dr HJ Swanepoel, dated 9 November 2016, that does not mention any knee injury;
 - 9.6 The report of the orthopaedic surgeon, Dr JF Ziervogel, dated 12 June 2014, which states that the x-rays of the right knee, do not show any clear indication of an injury;
 - 9.7 The report of a specialist Physician, Dr G. Promnitz, dated 14 July 2016, who opined that the accident would not have interfered with the plaintiff's ability to perform his occupation, as evidenced by his subsequent return to work in the same line of employment.
10. The defendant's denial that the plaintiff had suffered a knee injury, is refuted by the following uncontested evidence:
- 10.1 Dr. Promnitz's report which;
 - 10.1.1 Pertinently states that the plaintiff had sustained a fracture to his right femur and injured his right knee;
 - 10.1.2 Opines that as a result of the knee injury, the plaintiff will be prone to the development of osteoarthritis in the knee;
 - 10.1.3 Defers the above to that of an orthopaedic surgeon.
 - 10.2 The diagnosis by an orthopaedic surgeon, Dr JF Ziervogel, in his said report that until proven otherwise, the plaintiff suffers from an injury to the meniscus (which diagnosis has not been disproved);
 - 10.3 The diagnostic outcome that the flexion of the plaintiff's right knee is significantly restrained, as it appears from, among others, the reports of Drs JF Ziervogel and BE Ramasuvha.
11. The Court therefore finds that the plaintiff did sustain an injury to his right

knee.

DID THE PLAINTIFF SUSTAIN A LOSS OF EARNINGS AS A RESULT OF THE KNEE INJURY?

12. The defendant contended that even if the plaintiff's right knee was injured in the accident, it did not cause the plaintiff's incapacity to do certain work, because the plaintiff had previous injuries, to wit a fracture of his left forearm in 2001 and a back injury (L1 - 2 fractures) during 2008, which caused his inability, among others, to lift heavy objects.
13. Although the plaintiff's occupational therapist was aware of these previous injuries,⁵ she still concluded that:⁶
 - 13.1 The accident caused a reduction in the plaintiff's physical capacity;
 - 13.2 The plaintiff Should be advised to limit tasks which put strain on his knee and not to be crawling on such a frequent basis as he is currently doing in the mine;
 - 13.3 The plaintiff is at **risk** of losing his job due to the pathology in the knee;
 - 13.4 Following the proposed knee--replacement, the plaintiff will no longer be suitable for any work in the mine and that he will most probably not pass his medical examination to obtain his red ticket to work on the mine;
 - 13.5 The plaintiff is best suited for work of a light physical nature which does not require the handling of medium or heavy weights or high mobility demands;
 - 13.6 It appears as if the accident had ended his mining career prematurely;
 - 13.7 It is unlikely that the plaintiff will be accommodated in a surface job, as he does not have the necessary skills;

⁵ Gail Vlok's Medico-Legal Report of 21 June 2019, paras 19 20, p 412.

⁶ Id, paras 117 - 120, p 436.

- 13.8 The plaintiff will most likely need to retire early;
- 13.9 The plaintiff has become an unequal participant in the open labour market compared to his uninjured peers.
14. The defendant's occupational therapist's report indicated that the plaintiff had no previous fractures, which information was obtained from the plaintiff, but deferred the full and comprehensive information regarding the plaintiff's medical history, to the relevant experts.⁷
15. This expert further deduced, among others, that:⁸
- 15.1 The plaintiff *"has a decreased weight bearing tolerance on his right knee"* (own emphasis);
- 15.2 The plaintiff is a compromised employee as an underground miner;
- 15.3 The pain in the plaintiff's *"right lower limb is a barrier with regards to efficiency, effectiveness and job enjoyment* (own emphasis).
16. It follows that the knee injury that the plaintiff sustained, decreased his capacity to work and he suffered damage as a result thereof.

THE QUANTUM OF THE PLAINTIFF'S LOSS OF EARNINGS:

17. It is unnecessary to cite to the relevant case law and legal principles pertaining to the quantification of the plaintiff's claim, save to state that:
- 17.1 In computing general damage, a number of factors play a role, among others, the extent of the harm (which is usually a function of the nature, intensity and duration of the harm), the specific purpose of the award, general considerations of equity and parity with previous awards.⁹

⁷ NE Thembo's report, para 4, p 255.

⁸ Id, para 12, p 262.

⁹ Du Bois (et al), *Wille's Principles of South African Law*, 9th Ed, p 1164; Neethling (et al), *Delict*, 5th Ed, pp 230 - 232.

- 17.2 Whether contingencies should be applied, and in what percentage, is directly linked with the amount the Court considers just in respect of compensation.¹⁰
- 17.3 The amount to be awarded as compensation, can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case.¹¹
- 17.4 The Court has a large discretion to award what the Court considers right.¹²
- 17.5 The rate of the discount cannot be assessed on any logical basis and is largely arbitrary and depends upon the trial judge's impression of the case.¹³
18. The plaintiff's actuaries calculated the capital value of the plaintiffs loss of earnings (without any contingencies having been applied) as R2,160,100.00, comprised as follows:

	<u>Uninjured</u>	<u>Injured</u>	<u>Loss of</u>
	<u>Earnings:</u>	<u>Earnings:</u>	<u>Earnings:</u>
Past (until 28/2/2014)	R 223,500	R210,300	= R 13,200
Future	R2,146,900	R	= R2,146,900
		TOTAL:	R2,160,100

19. The plaintiff's counsel proposed that the following contingencies should be applied:

19.1 5% in respect of the past loss of earnings;

19.2 7,5% in respect of the future uninjured earnings;

¹⁰ *Van Ghent v Road Accident Fund* [2017 ZAFSHC 187

¹¹ *Sandler v Wholesale Goal Suppliers Ltd* 1941 AD 194 199 .

¹² *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) 614F

- 19.3 60% in respect of the future injured earnings.
20. The plaintiffs counsel motivated the 60% contingency in respect of the future injured earnings, among others, as follows:
21. The plaintiff is already not suited for his current position and should only do light **work**;
22. He will most probably have to retire prematurely;
23. He is unable to earn any other income;
24. He is effectively unemployed;
25. He is still working, whilst he does not have the capacity to do so.
26. The defendant's counsel did not make any submissions regarding contingencies.
27. After having read the papers, listened to the submissions of both parties' counsel, considered the relevant facts of the case (such as the plaintiffs age, his qualifications, employment history, the injuries sustained and the prognosis in respect thereof, his past and future earning capacity and the opinions of the expert witnesses) and the applicable legal principles and case law, this Court opines that:
- 27.1 The plaintiffs actuaries' undisputed calculation of the capital value of the plaintiff's loss of earnings (without contingencies having been applied) in the amount of R2,160,100 should be accepted as the basis of the plaintiffs loss in this regard;
- 27.2 The contingencies proposed by the plaintiff's counsel of 5% and 7,5% in respect of past loss and uninjured income respectively, seem reasonable;
- 27.3 A contingency of 60% in respect of the future injured earnings is, however, too high, especially having regard to the fact that the plaintiffs own occupational therapist reported that the plaintiff

¹³ *Van der Plaats v SA Mutual Fire & General Assurance Co Ltd* 1980 (3) SA 105 (A) 114 - 115.

displayed self-limiting behaviour (which means that the plaintiff stopped the task before a maximum effort was reached) during testing.

27.4 Under the circumstances, a contingency of 50% in respect of future injured earnings, is more appropriate;

27.5 Such a contingency takes into account the fact that the plaintiff is still employed and may remain in that position, but also allows for the possibility that he may be rendered unemployable if he should lose his employment.¹⁴

28. If these contingencies are applied, the plaintiff has suffered a total loss of earnings in the amount of R924,972.50, comprised as follows:

Past loss of earnings:	R 13,200- 0,5%= R 12,540.00
Plus: Future uninjured loss of earnings:	R2,146,900- 7,5% = R1,985,882.50
Less: Future injured loss of earnings:	R2,146,900 - 50% = R1,073,450.00
TOTAL	= R 924,972.50

COSTS:

29. The reserved costs of the previous set down on 15 May 2019 remain in dispute.

30. The parties' legal representatives have two irreconcilable versions as to what transpired and what caused the postponement and each party submitted that the other party had to pay such costs.

31. The Court has a wide discretion as to costs, and having considered all relevant factors, it is just that the costs occasioned by the said

¹⁴ *Advocates Syaed N.O. (Curator ad litem of RR Rigney) v RAF*[2016] ZAGPPHC 1112 [16].

postponement, should follow the event.

ORDER:

32. The Court consequently grants an order in terms of the draft order (as amended to include the said damage amount of R924,972.50) marked "X".

DB DU PREEZ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

12 JULY2019

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