IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 15/56496

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

11/10/2019

In the matter between:

NDAMBO BONGANI — Plaintiff

and

ROAD ACCIDENT FUND — Defendant

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The plaintiff instituted an action against the defendant claiming compensation in respect of injuries that the plaintiff suffered as a result of a collision that occurred on 3 November 2012.

[2] When the matter was called before me, only the issues of loss of earnings and earning capacity called for a decision. The defendant conceded the merits 100% in favour of the plaintiff. The issue of general damages was referred to the Health Professions Council of South Africa.

[3] By agreement the parties would lead the evidence of the Industrial Psychologist and the Occupational Therapist instructed on behalf of the respective parties. Joint minutes between the respective Industrial Psychologists and Occupational Therapists are to be considered. However, the defendant only led the evidence of its Industrial Psychologist. The defendant found itself without an Occupational Therapist witness and despite a subpoena having been served on her and furthermore an undertaking that she would appear the following day, she did not appear at court on either of the two days on which the matter was heard.

[4] The handling of the respective cases of the parties left much to be desired. They, as well as counsel that appeared on behalf of the respective parties, were ill-prepared. I record this for what follows later in this judgment.

[5] The background to this claim can be summarised as follows:

(a) On 3 November 2012, the plaintiff, 26 years of age, was a passenger in a motor vehicle. That vehicle was involved in a collision with another vehicle and the plaintiff was injured;

(b) The injuries suffered by the plaintiff amounted to:

(i) an injury to the head with laceration of the right front scalp and laceration of the external ear;

(ii) a straining injury of the right wrist;

(iii) an impact injury to the right shoulder.

(c) It is common cause that at the time of the collision, the plaintiff was a warehouse assistant. His job required 80% heavy work to be done. He was earning within the lower quartile of semi-skilled category of Paterson levels.

(d) The plaintiff has a grade 12 qualification. This is also common cause.

(e) Furthermore, it is common cause that the injury to the right wrist has impacted upon the plaintiff's employability post-morbid.

[6] The Industrial Psychologists are agreed that as a result of the injury to the plaintiff's right wrist, the plaintiff has diminished earning capacity in the open market.

[7] The Occupational Therapists are agreed that the plaintiff has the dynamic strength for heavy work, but due to the condition to his right wrist, the plaintiff should be restricted to medium work.

[8] The plaintiff's neurosurgeon opined that the plaintiff sustained a Grade 1 concussion. However, that type of injury does not give rise to long terms sequelae, although a small percentage of patients may suffer from chronic headaches and memory problems that would require treatment.

[9] The employment history of the plaintiff reveals the following:

(a) After obtaining grade 12, the plaintiff received training as a Rope Access Technician;

(b) The plaintiff started working as an Assistant Manager at Steers and Fishaways and worked as such for a year;

(c) After that, the plaintiff was employed as a Data Capturer at Safe Mail Egoli. He was employed there for a year and a half;

(d) The plaintiff then joined Best Safety Glass as a Warehouse Assistant. He was so employed for two years when the collision occurred in 2012. His duties entailed windscreen fitting, plumbing and welding. 80% of his work required heavy work such as lifting steel, carrying heavy pipes and pulling windscreens from vehicles. His work required working in standing, crouching, kneeling and bending positions;

(e) After the collision, the plaintiff obtained light work such as data capturing which required him to sit, write and type. He coped with the job until he left for greener pastures and obtained employment with Safe Mail Egoli from which he was retrenched after two years;

(f) The plaintiff is currently employed by Sky Riders as a Rope Access Technician. The present job, although it requires rigging of steel pipes, the process is automated and he is required to "push a button" in this regard. It is common cause that the present employment is not a heavy job and he is allowed to rest in between "when fatigued".

[10] Dr Malaka, the Industrial Psychologist for the plaintiff, opined in the joint minutes, that while the plaintiff at the time of the collision was remunerated at the first quartile of semi-skilled workers in the non-corporative sector, he would have after ten years, with in-house and personal training, earned at Paterson B3/B4 level. Dr Malaka further opined that at the age of 45, the plaintiff could have earned at Paterson

B5/C1 level and his ceiling would have been at Paterson C2/C3 level at the age of 50.

[11] Ms Ntsieni, the Industrial Psychologist for the defendant, opined in the joint minutes that at the time of the collision, the plaintiff was remunerated at the lower quartile for semi-skilled workers in the non-corporative sector. She opined further, that considering that at the date of the collision, the plaintiff was 25 years of age, he would have managed to grow his earnings, reaching a ceiling between the median to the upper level of semi-skilled workers in the non-corporate sector at the age of 45.

[12] In my view, it does not matter whether the retirement age is 65, as contended for by Dr Malaka, or 60-65, as contended for by Ms Ntsieni. Both Actuaries calculated at the age of 65.

[13] As recorded earlier, both Occupational Therapists are agreed that post-morbid, the plaintiff is capable of employment of medium demand.

[14] Ms Ntsieni opines that the plaintiff enjoyed work of light demand throughout his employment career, as well as at the time of the collision. That statement is not correct. Both Industrial Psychologists are agreed that at the time of the collision, the plaintiff had employment with heavy demand. Consequently, having regard to the agreed fact of diminished earning capacity as a direct result of the injury to the right wrist, the plaintiff is restricted to work with medium demand which is common cause between the experts.

[15] No particular fact has been recorded by any of the experts that the plaintiff could only enjoy light demand employment. His present employment to that effect is self-induced. The plaintiff did not lead evidence in that regard. There is no evidence that the present employment of the plaintiff is "sympathetic". The plaintiff did not lead such evidence, neither was the plaintiff's employer called to testify in

that regard. As a rule of thumb, counsel in matters such as the present, more often than not, submit without any factual premises, that the "current employment of the plaintiff is sympathetic".

[16] It follows that the post-morbid earning capacity of the plaintiff is to be adjudicated at employment of medium demand and nothing less and nothing more.

[17] The different approaches adopted by the Industrial Psychologists are unsound and meritless. There are no premises for the defendant's Industrial Psychologist to infer and opine towards a light demand employment as well as for the plaintiff's Industrial Psychologist to infer and opine on a further increase to a Paterson C2/C3 level. No facts have been put forward for the latter instance.

[18] Unfortunately, both Actuaries calculated on the imprecise and erroneous opinion of the respective Industrial Psychologists. Their calculations are thus flawed in that regard. The one is hopelessly too low and the other exorbitantly too high.

[19] No evidence was produced that the plaintiff would have obtained any further qualification other than grade 12. Furthermore, no evidence was led that the plaintiff had foreseen that he would obtain further qualifications. The opinion by Dr Malaka, that the plaintiff would have progressed to a level beyond semi-skilled employment through in-house training and experience, is mere speculation and without foundation. The plaintiff had not indicated such a desire, either in evidence, or otherwise.

[20] The aforementioned conclusions were put to the respective counsel appearing on behalf of the parties. I directed that suitable calculations on the premise of medium demand employment be obtained and presented to me with appropriate submissions thereon. In particular it is to be calculated with reference to the fact that the plaintiff enjoyed

semi-skilled labour with no positive indication that he would have been in a position to go beyond the upper quartile of semi-skilled labour in the non-corporate sector. Despite having the opportunity to address the issues, the "revised" calculations, from both sides, were of limited assistance.

[21] The revised calculations by the defendant's Actuary did not indicate any calculation in respect of possible contingencies. Although the issue of contingency is the prerogative of the court, it is often suggested to the actuary what the possible scenario in that regard could be. The Actuary on the part of the plaintiff has indicated, by way of illustration, a contingency of pre-morbid as 17% and post-morbid as 37%. In the heads of argument submitted on behalf of the defendant, contingencies of 25% and 30% are proposed. However, the bases therefor are not explained. In my view the proposed 25% is far too high, and the 30% too low. The proposed contingencies of 17% and 37% are more to the point.

[22] The defendant's Actuary calculated the average between the first scenario sketched by the plaintiff's Actuary. i.e. taking into account a Paterson C2/C3 level, and the scenario of the defendant's Actuary, i.e. where the plaintiff is in the same position as when he started out, ignoring the agreed medium demand position and more particular ignoring the fact that the plaintiff was at the time of the collision, employed in a heavy demand position. The calculation on behalf of the defendant is thus of no assistance. It is premised upon incorrect facts and probable scenarios as recorded earlier. Furthermore, contingencies need to be determined without any indication on how that should be approached.

[23] In coming to some meaningful conclusion on the issue of loss of future earnings, the only scenario that could probably apply, is that of the plaintiff's Actuary. In this regard, the plaintiff's Actuary calculated on two premises. In the first scenario, the calculations were made with

reference to the difference between the uninjured ceiling at the Paterson C2/C3 level and the injured ceiling at upper quartile semi-skilled worker non-corporate sector and applying contingencies of 17% pre-morbid and 37% post-morbid. The second scenario is premised upon an upper quartile of semi-skilled work in the non-corporate sector where the pre-morbid and the post-morbid employment remains the same. A contingency is again proposed at 17% pre-morbid and 27% post-morbid. The plaintiff's Actuary then determines the average between the two scenarios and arrives at a nett loss of R1 729, 485.

[24] In my view, the latter calculation appears to be the more acceptable manner that is a reasonable and fair calculation in arriving at the plaintiff's probable loss of future earnings.

I grant the following order:

a. The defendant is to pay the plaintiff the amount of R1 729 485 (one million seven hundred and twenty-nine thousand and four hundred and eighty-five rand) in respect of future loss of earnings;

b. The defendant is to pay interest at the rate of 9,0% calculated from 14 days from the date of this judgment to the date of payment;

c. The defendant is to deliver an undertaking to the plaintive in terms of section17(4)(a) of the Act;

d. The defendant is liable for the costs.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	Ms N Mabena
Instructed by:	Nkosi Nkosana Inc
On behalf of Respondent:	Ms M P Ramela
Instructed by:	Marivate Attorneys