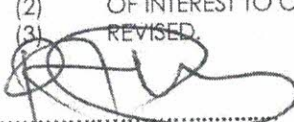


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 77603/17

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
	17/07/2020
SIGNATURE	DATE

In the matter between:

LESETJA WILSON MABOYA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MALUNGANA AJ

[1] On 14 July 2016, the plaintiff, a male of just about 49 years of age, was involved in an accident when the motor vehicle which he was driving

collided with the insured vehicle along the N1 Freeway, Midrand. He sustained physical injuries and was hospitalized at Tembisa Hospital from 14 July 2016 until the 18th of July 2016. He recuperated further at home.

[2] As a result of the accident, the plaintiff instituted an action for damages arising of the injuries which he sustained. Merits were conceded and the trial proceeded only on quantum, while the issue of general damages has been referred to the Road Accident Fund Appeal Tribunal for assessment of the seriousness thereof. In respect of the plaintiff's claim for hospital and medical expenses the defendant tendered an undertaking in terms of section 17 of the Road Accident Fund Act ('the Act'). I am therefore required to determine the issue of loss of earnings.

[3] The parties also agreed that there would be no need to lead oral evidence, and they would argue their cases based on the experts reports that were filed, all of which were admitted as evidence before this court. The parties also filed joint minutes by their corresponding experts which I was asked to consider as part of the admitted evidence.

[4] As appears from the medico-legal reports, the upshot of the plaintiff's injuries are the following: a head injury (subarachnoid haemorrhage) with loss of consciousness and cervical spine soft tissue injury. X rays revealed a 25% compression fracture of T5 and 20% a compression fracture of T6, and degenerative changes in the right hip joint. There was also a narrowing of the medial and inferior joint spaces of the left hip, with osteophyte formation of the femoral head.

[5] The plaintiff is also reported to have suffered a head injury in an accident in which he was involved in 1992. He sustained a loss of consciousness for about 30 minutes. His claim was settled after it was lodged with the defendant.

[6] At the time of accident the plaintiff worked as a milk delivery driver. He delivered milk at various delivery points. He worked without an

assistant and had to carry the crates independently. He received a monthly income of about R5 600. The accident in question occurred whilst he was on duty, and no information is available to indicate whether his claim was submitted to the Workman Compensation Fund. He returned to work after a period of four months, and still works nightshifts. He currently earns about R 5200 due to the company's downsizing.

[7] In the joint minutes dated 27 March 2018, compiled after a meeting between the parties' occupational therapists, Ms Gretchen Basson and Ms Zethu Nkosi, the following observations were noted:

"Paragraph 46 After the accident he returned to his job but he experienced aggravated pain with loading of the milk crates, carrying milk crates up steps and he needed to take frequent rest breaks to manage his fatigue and pain.

Paragraph 47 He further indicated to Ms Basson that at times he would have milk left over at the end of his deliveries, but he would not be able to recall which client's milk he forgot to deliver. Mr Maboya reported physical as well as cognitive difficulties after the accident.

...Paragraph 50 We agree that Mr Maboya's current job tasks requires the handling of heavy crates (25 kg) which aggravates the pain in his neck and thoracic area.

Paragraph 51 We agree that he will need to apply neck and back hygiene to manage his pain but given his inherent job description he is not able to manage his pain. Therefore, physically he would be best suited to perform a job where he can change postures often and limit weight handling to light weights.

Paragraph 52 Ms Basson is of the opinion that from a physical perspective, Mr Maboya will not be able to continue with the weight handling demands of his job for unlimited period of time.

Paragraph 53 Mis Nkosi is of the opinion that given Mr. Maboya's test scores and clinical observations, he retains physical capacity that meets the demands of his occupational duties. It is however noted that he reported fatigue at work when executing his duties. He takes breaks when tired as he works late at night and thus his work environment is not pressurised. The reported fatigue, reduced thought processing speed and reduced psychomotor speed is most likely related to the mild head injury sustained during the accident. It is therefore expected that should he lose his current job; he would not be able to execute similar duties with another employer."

[8] According to Mrs M E Botha, the industrial psychologist appointed by the plaintiff, she was informed by the plaintiff's employer that the plaintiff's remuneration differs from month to month, depending on the days worked. However, his pre-accident earnings of R5 540.00 per month is a correct figure in respect of his June 2016 salary.

[9] Consequent upon the meeting held between the parties' industrial psychologists, Mrs M.E Botha and Dr. W Coetzer, a joint minutes of their meeting was compiled on the 20 February 2020. The relevant portions of the joint minutes read:

"2.2.1 WE AGREE:

2.2.1.1 Given the available information, it is postulated that had the accident not occurred, the plaintiff would probably have continued working as a Driver, earning as indicated:

-Earnings pre-accident: R 5 640.00 (as per June 2016 pay slip)

-Earnings post-accident: R6 900.00(as per March 2019 pay slip)

- Earnings varied from month to month, depending on number of days worked."

[10] Importantly, the industrial psychologists agree that the plaintiff has been placed at an a disadvantage in the workplace owing to the sequelae of the injuries sustained in the accident. Should he lose his current employment he would be a vulnerable employee competing against his uninjured peers and is at risk of experiencing extensive periods of unemployment. Accordingly he is limited to work of an unskilled nature.

[11] However, the industrial psychologists disagree in terms of how to go about quantifying the plaintiff's prospective loss of income. It is postulated that given his limited scholastic education and type of previous work, and considering his age of 48 years, he will secure unskilled type of employment within a year, earning at a national minimum wage of 20.00 per hour and would receive an annual increase CPI increases until retirement age at 65 years.

[12] Mrs Botha opines that according to the collateral information which she obtained from the employer, there was no opportunity for the plaintiff to be promoted given the size of the business. Both experts postulate that the plaintiff had reached the pinnacle of his career. They further postulate that given the fact that the plaintiff did not work a full, it is unlikely that he would have secured additional employment to make out a full work week. He had pre-existing difficulties with chronic right shoulder pain, presbyopia, bilateral hip osteoarthritis from the previous accident in 1992, which further impacted his pre -accident career prospects.

[13] The plaintiff's counsel argued that the plaintiff employment capacity has been affected by the sequelae of the injuries he sustained in the accident current accident. He will struggle to find a job in an open labour market should he lose the current job, taking into account that he was doing a similar job for years.

[14] The defendant's counsel on the other hand argued that the plaintiff did not suffer any actual loss, there was no prospect of promotion pre accident. He submitted further that regard must be had to the fact that

he is currently 49 years and had been confined to the same job for almost 16 years.

[15] Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. See *Herman v Shapiro & Co* 1926 TPD 367 at 379.

[16] In the present case the relevant experts are in agreement that the plaintiff's earning capacity has been markedly affected by the injuries sustained in the accident, and it is unlikely that he will be successfully in obtaining a job in the open labour market should he lose the current job.¹ The *Herman* dictum fits perfectly in the case under consideration. Mrs E Botha managed to obtain collateral information from the plaintiff's employer pertaining to his accurate earnings. Mr Shapiro, the employer, further informed Mrs Botha that there was no prospect of the plaintiff being promoted due to the small size of his business. Dr Coetzer postulates that the plaintiff was likely to have continued to receive inflationary increases until he reached his retirement age.

[17] In *Esso Standards SA (Pty) Ltd v Katz* 1981 (1) SA 964 A at 970 D-H the court held that 'where the best available evidence to the plaintiff has been produced, though it is not entirely of a conclusive character and does not permit a mathematical calculation of the damages suffered still, if it is the best evidence available the court must use it and arrive at a conclusion based on it. The industrial psychologists opines that, although the plaintiff retains some physical capacity to meet the demands of his occupational duties, he remains a vulnerable employee who would be greatly limited in competing against his uninjured peers in the open labour market. Having considered all the medical evidence available to

¹ Paragraph 58 of the joint minutes between Ms Nkosi and Ms Basson

me, I agree with the latter proposition. With that said I proceed to consider the *quantum* which is appropriate for the plaintiff's loss of earnings. The approach is usually to have regard to the difference between what he would have earned but for the accident, and the post-accident career progression as postulated by the relevant experts.

[18] According to the actuarial report prepared by BNS actuary based on the joint minutes between the industrial psychologists, Mrs Botha and Dr W Coetzer dated the 20th February 2019, the plaintiff's loss of earnings can be calculated as follows:

PAST LOSS OF EARNINGS PRE-MORBID	R278,859
Less 5%:	13 942.95
Net past :	264 916.05
FUTURE LOSS OF EARNINGS	R1 068,246
Less 20%	R213 649.20
Sub-total	R854 596.80
Total Pre-morbid	R1,119,512.85
POST MORBID EARNINGS	
Past loss of earnings:	278,577.00
Less 5% contingency	264 648.15
Future Loss of Earnings	613,073.00
Less 25%	153 268.25
Sub total	R459,804.75
Total	R724 452.90
Total Loss of earnings	R395 059.10

[19] The above loss is based on the first scenario postulated by M.E Botha which is supported by the collateral information obtained from the plaintiff's employer, and which I find to be more probable in the quantification of the plaintiff's loss of earnings.

[20] I immediately interpose to point out that during the trial, the plaintiff moved for an order to amend his particulars of claim. After considering the matter and submissions granted the plaintiff leave to amend his particulars of claim.

[21] In the circumstances the defendant is liable to compensate the plaintiff the sum of R395 059.10. The costs should follow the results.

[22] Accordingly I grant judgment against the defendant as follows:

1. The defendant is ordered to pay the plaintiff the sum of R395 059.10
2. The defendant is to pay interest on the aforesaid amount of R395 059.10 *tempore morae* at the rate of 10.25%, from date 14 days after this judgment to date of final payment;
3. In addition, the defendant shall pay the costs of the action.



P H Malungana

Acting Judge of the High Court

Gauteng Division, Pretoria

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