

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 1615/2008
Date heard: 25 March 2010
Date delivered: 06 July 2010

In the matter between:

HEINRICH OTTO VAN ROOYEN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T O N Q U A N T U M

DAMBUZA, J:

[1] The plaintiff in this case claims damages against the defendant (“the Road Accident Fund” or “the Fund”) for injuries sustained by him in a motor vehicle collision in Uitenhage on 7 July 2005. The Fund has conceded liability for all the damages suffered by the plaintiff. The matter only came before me for determination of quantum.

[2] The plaintiff is a 42 year old man who was, at the time of the collision, employed by Telkom in Uitenhage as a technician. He had been employed by Telkom for 20 years, since he finished school. His duties involved installation and programming of telephone systems in big businesses and entailed carrying

heavy toolboxes, cables, batteries and other equipment. He often had to climb onto roofs of the buildings wherein he would be installing or programming the telephone systems.

[3] On the day of the accident he was driving a light delivery vehicle belonging to Eskom. Whilst stationary at a stop street, another vehicle (the insured vehicle) collided with his vehicle from the back and thereafter sped off.

[4] The plaintiff sustained a “musculo-ligamentous” sprain injury to his lower back. This injury eventually rendered him incapable of performing his duties at Telkom and he was medically boarded in December 2006. In February 2009 he again secured employment as a Sheriff in Uitenhage. In the summons he claims for damages suffered by him for past medical expenses, future medical expenses, loss of earnings (past and future) and general damages.

Past medical expenses

[5] When the matter came before me the parties had already agreed on past medical expenses of R3,318.17 which had already been paid by the Compensation Commissioner.

Future Medical expenses and treatment.

[6] The defendant gave an undertaking that it will furnish an Undertaking in terms of the Provisions of Section 17(4) of the Road Accident Fund Act, Act 56 of 1996 ("the Act").

Past loss of earnings

[7] At the time of the collision the plaintiff earned an income of R13,097.53 per month together with an annual bonus equivalent to one month's salary and a contribution of 7.5% of his basic salary towards a retirement fund. After he was medically boarded, he received a nett lump sum payment of R317,789.00 and from January 2007 he received pension payment of R4,195.62 per month which, by the time of the trial, had increased to R5,280.00 per month. Presently he earns an average monthly income of R4,732.70 from his employment at the office of the Sheriff.

[8] The position occupied by the plaintiff at Telkom at the time of the collision is/was known as level C-2 position. He was 37 years at the time of the collision. He testified that he had hoped that at about 42 years he would be promoted to a C-3 level job which would have meant that his duties would be more supervisory. His salary, once promoted, would have been about R295,000.00 per annum. He had, prior to the collision, acted as a supervisor for about seven to nine months. According to a Joint Minute prepared by Industrial Psychologists Drs Heinrich Otto Van Daalen and Richard Holmes and handed in by agreement, the promotion anticipated by the plaintiff would have been reasonable. The plaintiff started working for Telkom as a trainee. Thereafter he was promoted to B3

Grade, later to B5 Grade, then to C-1 Grade and lastly to the C-2 Grade position that he still occupied at the time of the collision.

[9] A medico-legal Report prepared by Dr Basil Mackenzie, an Orthopaedic Surgeon was also handed in by agreement. In his report Dr Mackenzie states that due to a pre-existing back injury, the plaintiff would, in any event, only have been able to able to work at Telkom until the age of 50 years. The plaintiff testified that he sustained the pre-existing back injury whilst playing rugby and that surgery had to be performed to treat the injury.

[10] The plaintiff's contention is that in view of the prospect of promotion to a more sedentiary (supervisory) position at Telkom, he would have been able to work until the age of 55 years. In his injured state however, he will not be able to perform the work he does as a sheriff beyond the age of 50 years.

[11] Although there is no evidence as to why the plaintiff was not promoted by Telkom, particularly when it became evident that he would have to be medically boarded and in view of the evidence by Dr Holmes on scarcity of persons with technical skills or qualifications in the country, I do agree that the assumption that the plaintiff would have, in due course, been promoted to the level of a supervisor, is not unreasonable, given the plaintiff's history with Telkom.

[12] An Actuarial calculation of the plaintiff's loss of income was handed in by agreement. The calculation is based on the above history. According to the

calculation the plaintiff, in his uninjured state, would have earned an amount of R716,524.00 from the date of the collision to the date of trial. But the salary he earned until he was medically boarded together with the lump sum payment and his earnings as a sheriff amount to R729,354.00. Consequently, he has earned R48,656.20 more in the injured state than he would have earned in his uninjured state.

[13] It was submitted and I agree that there ought not to be a contingency deduction to the income that the plaintiff has earned.

Future Loss of earnings.

[14] The plaintiff claims R3,585,718.00 as future loss of earnings and/or earning capacity. According to the Actuarial calculations the plaintiff's future pre-morbid earnings from Telkom (excluding future pension benefits of R1,217,114.00) would have been R2,368,604.00. The Industrial Psychologists recommended that a much higher contingency deduction of 35% should be applied to the plaintiff's income in his injured state (R1,266,987.00) than the 15% contingency recommended for the earnings in the uninjured state. I do agree. The plaintiff, in his injured state, is generally more vulnerable than in his uninjured state. No contingency deduction is applicable to his pension as this income is certain. The plaintiff's future earnings in the injured state is therefore R1,153,263.00.

[15] It was submitted on behalf of the plaintiff that because the claim is for a relatively short period of time (13 years, being the difference between his age of 42 years at the time of the trial and the retirement age of 55 years), a contingency deduction of 15% should be applied to the amount awarded as pre-morbid future loss of earnings. *Mr Paterson* who appeared on behalf of the defendant submitted that, in view of the lack of evidence on why the plaintiff was not promoted and/or on factors considered by Telkom as relevant for promotion, together with lack of evidence on deductions that would have been applicable to the plaintiff's salary as a supervisor, a higher contingency deduction of 25% (R896,429.50) should be applied to the plaintiff's future pre-morbid earnings. In my view the submission that a higher than the recommended contingency deduction is not justified. Firstly I can only assume, and there is no evidence that the Industrial Psychologists did not apply their mind to the relevant factors prior to making the recommendation. Further, it appears that promotion aspects are generally included in the normal contingencies applied in claims for loss of earnings. Robert Kock in *The Quantum Year Book (2010)* at 102 comments that:

“General contingencies cover a wide range of considerations which vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc.” (My emphasis)

According to the Actuarial calculation the plaintiff will receive future earnings of R1,266,987.00 from pension benefits (R942,063.00) and earnings as a sheriff (R324,924.00, calculated up to the age of 50 years).

[16] The difference between the plaintiff's future pre-morbid earning capacity (R3,585,718.00), less 15% contingency deduction (R537,858.00), and the injured future earning capacity (R1,153,262.00), less a 35% contingency deduction is the sum of R1,894,597.00. From this amount must be deducted the R48,656.20 surplus compensation. The balance is R1,845,941.00.

General Damages

[17] It is evident from the record that there are no realistic chances that surgical or any other treatment would improve the plaintiff's condition significantly and that in particular, his back will not attain its pre-accident state. It would seem that even the potential improvement of 1 to 2% which could, according to Dr Mackenzie, be achieved through rehabilitation would not translate into real improvement that would enable the plaintiff to fully resume his pre-morbid life. According to Dr Mackenzie's report the plaintiff suffered moderately severe pain which stabilized at moderate levels. When giving evidence the plaintiff described the pain on the lower back as constant, with varying degrees of intensity and worse in the mornings, with improvement as the day progresses. He testified that he experiences constant numbness of the hamstring and a painful left hip, with pain aggravated by mobility and inclement weather. He also experiences extreme pain in his feet for periods of about 15 minutes at about two week intervals. As a result of the injury, the plaintiff is unable to run or maintain one position for a considerable length of time and/or to climb stairs or walk on uneven

surfaces. The pain does respond to medication. Prior to the collision, the extent of the plaintiff's pre-existing lower back condition was assessed at 14% "whole person impairment". As a result of the collision there has been a further 3% deterioration, to impairment of 17%.

[18] The plaintiff experiences difficulty in maintaining balance, taking a bath, tying shoes, gardening and enjoying recreational activities which he used to enjoy, such as paintball, hunting, fishing and rubber ducking. Prior to the collision he was a relatively active person. He is now unable to share these activities with his children. However, Dr Mackenzie opines that he would have only been able to enjoy these activities up to the age of 50 years. The plaintiff has also suffered from depression, feelings of inadequacy, lack of motivation, irritability and anger outbursts. These feelings have improved since the plaintiff obtained employment as Sheriff. They, however, contributed to the breakdown of his marriage.

[19] Criticism has been levelled at the plaintiff for having complained to Ms Ansie Van Zyl, an Occupational Therapist, who also testified on his behalf, that he also experienced pain on his feet, spells of dizziness and intermittent discomfort on his neck, complaints which he had not expressed to Dr Mackenzie. It seems to me that even if one accepts that the plaintiff did not mention complaints to the other experts with whom he consulted, and even if one accepts that there is no evidence that these *sequelae* are related to the collision, these

complaints do not, either singularly or collectively, significantly contribute to the plaintiff's claim, to the extent that the quantum of his general damages would be affected by the exclusion thereof. On the whole I am satisfied that the plaintiff's present condition is largely attributable to the collision.

[20] Counsel for the parties referred me to a number of decisions in which damages were awarded for whiplash injuries.¹ Without necessarily setting out the facts and the comparative aspects in each of these cases in this judgment, I have considered them as guidelines in determining appropriate damages in this case. In my view an amount of R120,000.00 would be reasonable as general damages in this case.

[21] The award I shall make is calculated as follows:

Past Medical Expenses	R3,318.17
Loss of Earnings	R1,845,941.00
(Having deducted the surplus compensation of R48,656.20 from R1,894,597.00)	
General Damages	<u>R120,000.00</u>
	R1,969,259.17
Less	R3,981.38
(As the Compensation Commissioner made an award of R7,299.55, R3,318.17 of which went to Past Medical Expenses)	
	<u>R1,965,277.79</u>

[22] Consequently, my order is as follows:

¹ **Road Accident Fund v Maasdorp**; Corbett and Buchanan Vol V, C4-37, a decision of the Northern Cape Division handed down on 21 November 2003; **Mary Le Roux v The Road Accident Fund** C&H Vol V, at C4-88; **Nxele v President Insurance Company Limited**, a decision of the WLD Case No 8652/92, handed down on 1 July 2003; **Scull v Santam Limited** C&H, Vol V, C4-9, a decision of the Cape Provincial Division Case No 971/95, handed down on 12 November 1996.

- [20.1] That the defendant is to pay to plaintiff the sum of **R1,965,277.79**.
- [20.2] Interest is to accrue on the said amount at the legal rate of 15.5% per annum payable as from 14 days from the date of judgment to date of payment;
- [20.3] Defendant is to furnish plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, for payment of the cost of future accommodation of the plaintiff in a Hospital or Nursing Home or treatment of or rendering of a service or supplying of goods to him arising out of the collision in which he was involved on 7 July 2005, after such costs have been incurred and upon proof thereof;
- [20.4] Defendant is to pay plaintiff's cost of suit, as taxed or agreed, on the party and party scale. Such costs are to include:
- (i) The qualifying expenses, if any of the following:
 - (a) Dr Mackenzie;
 - (b) Dr Crafford;
 - (c) Ansie van Zyl;

(d) Dr Holmes;

(e) Arch Actural Consulting.

(ii) The costs of a pre-trial inspection *in loco* attended by plaintiff's attorney.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv. L A Schubart instructed by Heine Ungerer Attorneys of Port Elizabeth.

For the defendant: Adv. N M Paterson instructed by Ketse Nonkwelo Inc Attorneys of Port Elizabeth.