REPORTABLE/NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Case no: 3515/2009
Date heard: 31/08/2012, 12/09/2012
Date delivered:

In the matter between

FRENCH SNYMAN **Plaintiff**

vs

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

PICKERING J:

This is an action instituted by plaintiff for damages arising out of a collision on 9 January 2006 between a motor vehicle being driven at the time by one Van Heerden and a fire engine in which plaintiff was a passenger. The defendant has conceded the merits of plaintiff's claim and the matter therefore proceeded before me on the issue of quantum only.

The defendant has admitted plaintiff's past medical expenses in the sum of R289 823,29 as well as his past loss of basic income in the sum of R65 878,60. Those amounts, however, have been paid by plaintiff's employer, the Nelson Mandela Bay Municipality, in terms of the Compensation for Occupational Injuries and Diseases Act 103 of 1993. It is therefore not necessary to have any further regard thereto. Defendant has also agreed to provide plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 in respect of future medical, hospital and various other expenses.

The only outstanding issues for decision are therefore the quantum of plaintiff's claim for general damages in respect of which plaintiff claims R300 000,00 and for future loss of earning capacity in respect of which he

claims R1 787 800,00.

A number of medico-legal reports compiled by various experts as well as a joint report compiled by plaintiff's and defendant's respective industrial psychologists have been admitted in evidence by consent. Apart from these plaintiff himself testified.

Plaintiff, a married man with two children, was born on 24 February 1967. He attended a Technical School at Brits where he obtained a grade 11 qualification. In 1989 he commenced employment with the then Uitenhage Municipality as a junior firefighter. In 1991 he was promoted to the position of a firefighter. During 1993 he was promoted to the position of leading firefighter at the Port Elizabeth Municipality. The Port Elizabeth and Uitenhage Municipalities have since been combined to form the Nelson Mandela Bay Metropole. In June 1998 he obtained the National Diploma in Fire Technology at the Port Elizabeth Technicon.

At the time of the collision he was an acting shift commander. As such he was responsible for supervising the operations of the entire shift, organising personnel and resources on the shift, and attending to accidents, fires and rescue operations. In his capacity as acting shift commander he was the officer in charge of a fire engine on the way to the scene of an incident when the collision occurred. At the time he was a passenger in the left front seat of the fire engine. In consequence of the collision he was thrown against the left door pillar of the fire engine and thereby sustained soft tissue injuries to his left shoulder and neck as well as a soft tissue injury to his lower back. He experienced immediate pain in his lower back. He was stabilised at the scene and transported by ambulance to St. George's Hospital where he was hospitalised for two days. He was treated conservatively after the accident but his pain did not improve.

After his discharge from hospital he was treated by his general practitioner with anti-inflammatories but his pain increased. In August 2008 he was hospitalised for four days. He was then referred to an orthopaedic surgeon,

Dr. Burger. After receiving various treatments including injections from Dr. Burger as well as undergoing physiotherapy, he was referred to another orthopaedic surgeon, Dr. De Jong, as well as to a neurosurgeon, Dr. Van Aarde in December 2009. Surgical intervention was recommended by Dr. Van Aarde. A rhizotomy was performed during January 2010, a rhizotomy being the surgical division of a sensory nerve root in order to relieve pain. In consequence of this operation plaintiff experienced significant pain relief but, during July 2010, the pain had returned. A second rhizotomy was performed on 7 January 2011, after which plaintiff was on sick leave for a few days. The pain then again returned. In March 2011 plaintiff was put off work for two days as a result of the pain.

Further consultations with Dr. Van Aarde followed. According to Dr. Van Aarde plaintiff presented with mechanical backache which was associated with radicular pain involving his left leg. X-rays demonstrated the presence of osteophytes in the lower lumbar region as well as the lower thoracic region. Disc narrowing was present at the level of L5 and S1.

A MRI investigation of plaintiff's lower back was performed, followed by a discogram. On the basis of these findings Dr. Van Aarde decided to perform a posterior lumbar fusion. Plaintiff accordingly underwent a decompression at the level of L4/5 and L5/S1. The posterior spinal fusion was performed on 4 May 2011, the fusion being augmented with interbody cages and pendicular screws. There were no complications following upon this operation. Thereafter plaintiff's backache and the radicular pain in his left leg improved to some extent.

According to the report of Dr. Olivier dated 1 June 2012, the plaintiff was asymptomatic prior to the collision. The presence of annular tears at the L4/L5 and L5/S1 levels were suggestive of a traumatic event and it can therefore be accepted that the lower back injury sustained in the collision was the cause of plaintiff's lower back problems. Dr. Olivier stated further that the accident resulted in plaintiff suffering a moderate to severe degree of pain and discomfort for a period of approximately six months thereafter. Following

upon the decompression and lumbar fusion plaintiff would have experienced a severe degree of pain and discomfort for a period of sixteen weeks. A moderate degree of intermittent discomfort is expected in the future. As a result of his injuries plaintiff cannot perform any strenuous physical activities. He cannot climb ladders, carry heavy objects, perform manual labour, work with his arms in an overhead position for a long period of time or perform any other physical activities which will aggravate his lower backache. He will be able to perform only sedentary and semi-sedentary duties until the age of retirement.

According to the admitted report of Ms. Strauss, an occupational therapist, plaintiff suffers daily pain and discomfort in his lower back, left hip and knee. His physical impairments and the resultant impairment of his functional capacity have occasioned him considerable frustration. He has experienced impairments in his ability to partake in his pre-accident leisure time pursuits such as exercising and fishing and has become less socially active since the accident. This reduction in his constructive leisure time and his meaningful social activities has had an indirect adverse influence upon other aspects of his life including his emotional well-being. He is teased at work by colleagues who call him "*the bitch*" because he can no longer perform heavy duties. He experiences high stress levels with a concomitant inability to cope therewith. He suffers from severe depression.

In his testimony plaintiff confirmed what is set out above in the various medico-legal reports. He stated that prior to the first rhizotomy his lower back pain was of so severe a nature that he was obliged to take extremely strong painkillers eight times a day. The first rhizotomy, which was a day procedure performed under general anaesthetic, relieved his pain for approximately two months. The pain then returned with a vengeance in consequence whereof the second rhizotomy was performed. This relieved the pain for a period of only one month.

After the lumbar fusion in May 2011 plaintiff was hospitalised for a period of twelve days. He then spent six months at home recuperating. He stated that he no longer has constant pain but suffers from hip pain from time to time as

his hip joints become inflamed. He has to exercise care when sitting, standing or even when lying down in case he aggravates the injuries. He can no longer enter a motor vehicle with his legs first but has first to sit and then pull his legs in after him. He was a keen gardener which he can no longer do.

He stated that prior to the accident he was extremely fit. He obtained Springbok colours in tug-of-war in 1987. He participated in gym work and road running. He stated that he was required to be operationally fit as a fireman. One of the training exercises entailed running up six flights of stairs carrying fifty kilogram in weights. Since the accident he can no longer do any gym work nor can he run. He is no longer able to partake in rock fishing from the beach as he cannot walk on sand. If he walks long distances he experience pain. He used to enjoy camping but can no longer pitch a tent by himself.

He stated that his injuries have had a devastating emotional effect upon him and his family. He was an extremely competent handyman who performed any requisite tasks around the house. He is no longer able to do so. He has become short tempered, aggressive and stressed. He stated that at times the pain was so severe that he did not want to live. He experienced feelings of bitterness and revenge in consequence of the collision and stated that he hated the person who had caused the accident. In consequence of this he was referred to a psychologist in Uitenhage during June 2012. At present he is on daily medication for stress. He stated that he had been involved in church activities as a deacon but for the last two to three years had stopped attending church because he had found himself unable to forgive the person who had caused the accident.

With regard to his work he stated that fire fighting was his life. His plan for the future was to become a station commander after five years as a shift commander. There are at present three station commander posts vacant. From station commander he could be promoted to Divisional Officer in control of a number of stations. He testified that there are seven Divisional Officers positions in Port Elizabeth. On 1 August 2006, despite his injuries, he was

promoted to shift commander. He stated that as a shift commander he was entitled to shift allowances and overtime. As a station commander he would have been entitled to a standby allowance. The station commander was only entitled to overtime on being called out whereas a shift commander had many opportunities for overtime.

As a consequence of his back injury, however, he could no longer cope with operational duties. He was accordingly moved to the control room where he worked twelve hour shifts as an operator. Because he was overqualified for that level of post his employer sympathetically created a post for him as an administration clerk at the training centre at Markman. In this position he will no longer receive shift allowances and overtime as he did prior to his classification as an administrative employee.

Plaintiff testified further that his father ran a tracing and debt collection agency and that he assisted his father in this business on a part-time basis. He stated that his earnings per month varied to a considerable extent. He estimated these earnings as being between R1 500,00 to R3 000,00 per month but in good months he could earn as much as R8 000,00.

Loss of earning capacity

In Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE) Chetty J, with reference to the cases of Santam Versekerings Maatskappy Bpk v Beyleveldt 1973 (2) SA 146 (A) at 150 B – D and Dippenaar v Shield Insurance Co Ltd 1979 (20 SA 904 (A) 917 B – D, set out the general principles applicable to a claim such as the present as follows:

> "*A person's all-round capacity to earn money consists, inter alia, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance,* in casu, *considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date of which he/she sustained the injury.* In casu,

the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss... At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil.

It is not in dispute in the present matter that plaintiff has indeed suffered a substantial loss of earning capacity in consequence of his injuries. This is detailed in the joint report compiled by the parties' respective industrial psychologists namely Mr. Benade and Mr. Whitehead where the following is stated:

"*With regard to his pre-morbid career scenario we agree on the following:*

- *Mr. Snyman was employed as Shift Commander on Task level 11 in the Fire Services at the time of the accident.*
- *He would have continued working in the Fire Services until retirement age of 65.*
- *But for the accident, he would have received a promotion to Divisional Head (Station Commander) at the age of 55. This position is on the TASK level 13.*
- *His career would have plateaued on TASK level 13, where he would have remained until retirement age.*
- *On task level 11 Mr. Snyman was eligible for a monthly salary, a shift allowance of 6%, a night shift allowance of 3%, a professional allowance (R161,00 per month), as well as employer contributions to his Provident Fund (18%) and Medical Aid (60%), as well as a thirteenth cheque as bonus annually.*

- *Mr. Snyman was also working part-time in a tracing business, where he earned between R1500,00 and R3000,00 per month.*
- *He would have continued with this business for a maximum period of 10 years from the end of 2009.*

With regards to his post-morbid career scenario, we agree on the following:

- *Mr. Snyman has been transferred to the position of Administrative Officer from 1 August 2012.*
- *This position is on a TASK level 11. The position was created for him by his employer to accommodate him in his current medical condition.*
- *In this position he does not qualify for shift allowance or night shift allowance, as he now works normal office hours.*
- *It is not foreseen that he will receive any further promotion until retirement age.*
- *It is unlikely that he will continue with his part-time temporary business into the future given his medical condition.*
- *Mr. Snyman's current salary is indicated in the report of Johan Benade, as per his payslip dated 25/08/2012.*

With regards to loss of income we agree as follows:

- *Mr. Snyman has suffered no loss of income until the end of July 2012.*
- *He will lose his shift allowance (6% of basic salary) and his nightshift allowance (3% of basic salary) from now until the age of 55. He will also lose overtime of between 12 and 20 hours per month at R109,00 per hour.*
- *From the age of 55 he will lose the difference between his current salary on the TAK level 11 and TASK level 13 Salaries (we suggest to use an average R274 836) of the scale 2011/2012), as well as a Motor Vehicle Allowance of R3 500,00 and a Standby Allowance of R1 200,00 per month. Other*

benefits will remain the same (for details in this regard please refer to the original report of Johan Benade).

- *He will also lose an amount of between R1 500,00 and R3 000,00 per month for 10 years from the end of 2009.*
- *Loss will continue until retirement age of 65.*"

An actuarial report (Exhibit B) compiled by Mr. Munro was also handed into Court by consent. In making his calculations Mr. Munro postulated two scenarios, the first being that a station commander did not work overtime and the second being that he did. Plaintiff's evidence was to the effect that a station commander did indeed work overtime and that he was paid for such work. Mr. Gajjar, who appeared for defendant, fairly conceded that he could not argue to the contrary and that it was therefore appropriate to use the second scenario in calculating plaintiff's gross loss of earning capacity.

In his report Mr. Munro calculated plaintiff's past loss of earnings derived from the tracing agent business as being R78 200,00 and his future loss of earnings derived therefrom as being R325 000,00. These calculations were based on the assumption of earnings of R4 000,00 per month. Mr. Gajjar submitted that this assumption was contrary to the figures contained in the joint report of the industrial psychologists and that, based on those figures, plaintiff's average monthly income was in fact R2 250,00. In my view, however, this submission overlooks plaintiff's evidence as to his income in "*good months*" being as much as R8 000,00.

I agree, with Mr. Niekerk, who appeared for plaintiff, that the fairest approach to the income derived from the tracing agent business would be to apply a 40% deduction to the loss calculated by Mr. Munro, resulting in a past loss of R46 920,00 and a future loss of R195 540,00.

Mr. Munro further calculated plaintiff's past loss of income as a firefighter to be R45 700,00 and his future loss of income as a firefighter to be R838 300,00. These calculations were accepted as correct by Mr. Gajjar, the

only point of dispute between himself and Mr. Niekerk being the appropriate contingency deductions, if any, to be applied thereto.

In the well known case of Southern Insurance Association Ltd v Bailey N.O. 1984 (1) SA 98 (A) Nicholas JA stated, at 113 F that "*any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.*"

At 116G – H, the learned Judge stated as follows:

> "*Where the method of actuarial computation is adopted, it does not mean that the trial Judge is* 'tied down by inexorable actuarial calculations'. *He has* 'a large discretion to award what he considers right' *(per Holmes JA in Legal Assurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for* 'contingencies*' or the* 'vicissitudes of life*'. These include such matters as the possibility that the plaintiff may in the result have less than a* 'normal' *expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case.*"

With regard to plaintiff's past loss of earnings in respect of his employment as a firefighter Mr. Niekerk submitted that it would not be appropriate to apply any deduction in respect of contingencies whereas Mr. Gajjar contended for a deduction of 5% in this regard. It is so, as was submitted by Mr. Niekerk, that few of what may be termed the usual factors to be taken into account in determining the deduction to be made for contingencies are of application. As was submitted by Mr. Gajjar, however, plaintiff's occupation as a firefighter involved a higher degree of risk than that to which an office bound employee

would be exposed and the possibility that plaintiff might have been injured on duty in the period of seven years which has elapsed since the accident occurred must be afforded some degree of recognition in the award of damages. In my view therefore it would be fair and appropriate to allow a deduction of 5% from plaintiff's past loss of income.

As regards future loss of income Mr. Niekerk pointed to the fact that plaintiff was and still is employed by a sympathetic employer, to the extent that a post had been especially created for him, and submitted that the risk of plaintiff losing his employment was accordingly negligible. He submitted further that although there might be some uncertainty regarding plaintiff's promotion to the level of station commander the evidence was that there are at present three posts which are vacant. It had been plaintiff's intention to eventually achieve a promotion to the post of divisional officer, which defendant's industrial psychologist, Mr. Benade, regarded as having been quite possible. Furthermore, so Mr. Niekerk submitted, plaintiff is already 45 years old and his future loss would occur over a maximum period of only 20 years. In all the circumstances he submitted that a 5% contingency deduction in respect of future loss of income would be appropriate.

Mr. Gajjar again emphasised the fact that plaintiff would have been exposed to potential dangers and certain levels of risk associated with an operationally active shift commander and station commander of a fire station. He submitted that those risks must be reflected by the application of a higher contingency deduction of 20%.

Whilst there is indeed a higher degree of risk attached to plaintiff's duties as shift commander as I have stated above, the fact is that once plaintiff had obtained a promotion to the level of station commander he would no longer be operationally active in the actual fighting of fires and would therefore not be exposed to the same levels of risk to which an ordinary firefighter or shift commander would be exposed.

In my view, taking into account all the circumstances it would be fair and

reasonable to apply a deduction of 10% to plaintiff's future loss of income.

In the circumstances plaintiff is entitled to:

1. Past loss of income in respect of the tracing agent business	R 46 920,00
2. Future loss of income in respect of the tracing agent business	R 195 540,00
3. Past loss in income in respect of plaintiff's firefighting employment	R 43 415,00
4. Future loss in income in respect of plaintiff's firefighting employment	R 754 470,00
TOTAL	R1 040 345,00

General damages

It is trite that in determining an appropriate amount for general damages the Court is called upon to exercise a broad discretion to award what it considers to be fair and adequate compensation. In so doing the Court must consider a broad spectrum of facts and circumstances connected to the plaintiff and the injuries suffered by him. In the assessment of general damages I have taken into account the remarks of Navsa JA in Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) as well as the supplementary comments of Brand JA in De Jongh v Du Pisani N.O. 2005 (5) SA 457 (SCA).

I have been referred by counsel to a number of cases including Road Accident Fund v Maasdorp 2003 QOD 37 (NCD); Lawson v Road Accident Fund 2010 QOD 1 (ECP); Howard v Road Accident Fund 2011 QOD 31 (GNP) and Ambrose v Road Accident Fund 2010 (6) QOD (ECP).

Having regard to the above matters Mr. Niekerk submitted that an award of R250 000,00 would be appropriate whereas Mr. Gajjar submitted that an award of between R200 000,00 to R225 000,00 would be appropriate.

I do not intend to repeat what is set out above concerning the nature of

plaintiff's injuries. It cannot be disputed that they were indeed of a serious nature and that plaintiff experienced severe pain and discomfort for an extended period as well as having to undergo painful surgical interventions. He will continue to suffer a moderate degree of intermittent discomfort in future. He has also suffered a serious loss of amenities of life.

In my view, taking into account all the circumstances of the matter an award of R240 000,00 would be appropriate in respect of general damages.

The total award of damages is therefore R1 280 345,00.

The following order will accordingly issue:

1. Defendant is ordered to pay plaintiff damages in the sum of R1 280 345,00.
2. Defendant is ordered to pay interest on the aforesaid amount at the legal rate of 15,5% per annum, payable as from 14 days after date of judgment until date of payment.
3. Defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, no 56 of 1996, to pay to the plaintiff the costs of future accommodation in a hospital or nursing home, or the treatment of, or the rendering of a service to, or the supplying of goods to the plaintiff, as a result of the injuries sustained by him in the motor vehicle collision which occurred on 9 January 2006 in Port Elizabeth, and the *sequelae* thereof, after the costs have been incurred and upon proof thereof.
4. Defendant is ordered to pay plaintiff the taxed party and party costs, such costs to include the reasonable and necessary qualifying, preparation, reservation and travelling expenses of the following expert witnesses:
   4.1 Dr. R.J. Keeley;
   4.2 Dr. P.A. Olivier;
   4.3 Letitia Strauss;

4.4 Dr. P. Whitehead; and

4.5 Mr. A. Munro.

5. Defendant is ordered to pay interest on the taxed costs at the legal rate of 15,5% per annum from 14 days after allocator to date of payment.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. Niekerk
Instructed by: Jock Walter Inc, Mr. Walter

Appearing on behalf of Defendant: Adv. Gajjar
Instructed by: Wilke Weiss van Rooyen Inc, Mr. Jordaan