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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Appeal number: **4390/2017**

In the matter between:

J KHUMALO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM:

AS BOONZAAIER AJ

HEARD ON:

23 MARCH 2021

JUDGMENT BY:

BOONZAAIER AJ

DELIVERED ON:

26 MARCH 2021

- [1] This is a personal injuries claim, for injuries sustained as a result of a motor vehicle accident which occurred on 11 November 2016. The plaintiff a (21 year and 2 months) old male, was at the time on duty waving his flag on the N1 toll road between Koppies and Parys.
- [2] The quantum and merits were separated. The merits was conceded to and the court made an order on the 26th of June 2018 that the defendant is liable to pay 100% of the plaintiff's proven or agreed damages.
- [3] The wheel of a trailer of the insured vehicle with registration number [...] came loose and hit the plaintiff who was a pedestrian at the time.
- [4] Defendant was absent without any reasons on the quantum trial date.
- [5] Plaintiff requested the court to proceed with default judgment in terms of the Uniform Rules of Court.
- [6] The plaintiff issued summons for damages he suffered in the amount of R2 443 027.75.
- [7] The Medico-Legal reports are not contested.
- [8] The only issue which falls for determination on quantum is the loss of earnings. The issue of loss of earnings is separated from all the other issues in terms of Rule 33(4) with the remainder of the

issues of general damages being referred to the pre-trial roll in May 2021.

- [9] The minutes of all experts including the Forensic Actuary report by Johan Saur are submitted to court with the request to accept it as for what it purports to be.
- [10] The reports of Dr. LF Oelofse the Orthopaedic Surgeon was placed on record and the following findings were made:

10.1 Sick Leave:

Although the patient is currently unemployed, he still may enter the workforce. Therefore, provision for sick leave must still be made.

10.2 Productivity and retirement:

I believe that the injury sustained had an impact on the patient's productivity and amenities of life and still does.

- [11] The reports of Ingrid Erasmus were placed on record and the following findings were made:

11.1 Education and vocational qualifications:

- The plaintiff completed Grade 9 at Jeppe Education Centre in 2013.
- He repeated Grade 1 and Grade 9.

- In 2013 he completed a certificate in Computer Ergonomics.
- In 2016 he completed a flagging (traffic controlling) certificate as part of in-service training.
- He has no other qualification.

11.2 Pre-Accident Employment Description:

- **Estimated Salary**

R27.18 per hour

- **Job duties / tasks**

As a traffic controller he was mainly responsible for:

- Regulating traffic at the road closures / road works (e.g. flagging to make sure vehicles slows down when required to). There were three road closures (each road closure was 4 km in distance).
- Place hazard signs to indicate the road / lane deviations (at all three road closures – 4 km each).
- Place warning signs at the correct points to indicate road works.
- Patrolling to check if hazard signs are broken and replace with a new one if broken.
- Place speed straps in the road.

- **Critical physical demands -**

Standing (frequently):

- When regulating traffic i.e flagging.

Walking (frequently):

- When placing signs or when patrolling. Also required to run (occasionally) especially in the morning when they must place hazard signs at a fast pace in order not to delay traffic.

Forward bend standing (occasionally)

- When placing hazard- and warning signs on the road.

Manual handling (occasionally)

- Carrying new hazard signs to replace broken ones (a pack of 10 signs is ± 2 kg) or carrying sandbags (± 5 kg) to place on the back of the hazard signs to keep it in place.

11.3 Post-accident and current employment:

- The plaintiff returned to work in January 2017 (± 2 months following the accident). He indicated that he has not fully recovered when he returned to work (i.e. was still limping due to the accident related injury).
- The plaintiff was therefore temporarily placed on “light duty” and was responsible for assisting in the storeroom and office (e.g. helped with the signs).
- He reported that in February 2017 he was dismissed due to medical incapacity.
- On the day of my assessment, the plaintiff was still unemployed.
- He indicated that he attempts to find employment, however, is unable to perform heavy work.

11.4 Gait:

The plaintiff entered the consultation rooms independently, ambulating without assistive devices. Antalgic gait was observed i.e. he walked with decreased weight bearing on the left lower extremity.

11.5 Posture:

Asymmetrical posture observed (i.e. asymmetrical spinal curvature likely secondary to antalgic gait and compensatory movement patterns due to left lower leg symptoms).

11.6 Atrophy / Oedema:

Calve girth:

Left: 29.1 cm and Right: 30 cm

Above ankle girth (10 cm above lateral malleoli):

Left: 21 cm and Right: 20 cm

Above measurements indicated atrophy of the left calve muscle and oedema of the left distal lower leg when compared to the right.

11.7 Musculoskeletal system

- Flexion of the left knee:

Normal ROM: 135°

Range of motion: Mildly restricted ROM

- Plantar Flexion of the left ankle:

Normal ROM: 50°

Range of motion: Mildly restricted ROM

11.8 Comments on quality of motion

- Left knee flexion is mildly restricted.
- Pain was reported with knee flexion.
- Muscles surrounding the left knee and ankle present with decreased strength.
- All other lower limb joints were observed to have intact range of motion.
- Trunk range of motion observed to be intact.

11.9 Knee squats (20)

Facial grimace noted, likely due to pain experienced. He reported left knee pain and pain above the left ankle.

11.10 Neuromuscular system

Above-mentioned indicates impairment pertaining to dynamic balance, which may have some negative effect on the plaintiff's ability to mobilise over uneven terrain. Decreased

weight bearing on the left lower extremity was observed during balance testing.

11.11 Postural Abilities

Sitting: Slight / No limitation (Frequent)

Walking: Some Limitations (Occasional)

Standing Work: Some Limitation (Occasional)

Forward Bend Standing: Some Limitation (Occasional)

Crouch: Significant Limitation (Rarely)

Kneel / Half Kneel: Significant Limitation (Rarely)

Stairs: Some Limitation (Occasional)

11.12 Whole body range of movement – VALPAR 9

On the VALPAR tests there are 4 main levels of work competency rates:

- Meets may exceed:

This refers to exceptionally fast time scores. If the score falls within this level, the person has demonstrated a rate of work well above MTM standards ("cut-off percentage equals 115%).

- Meets:

This indicates scores that demonstrate a rate of equal to MTM standards ("cut-off percentage equals 87.5%).

- Does not meet A:

This refers to rates of work below competitive rates. A deficiency in any one of the required traits may account for the person's failure to meet this standard. ("cut-off percentage equals 62.5%).

- Does not meet B:
("5% to 60%)

Second Transfer:

- Above shoulder height to waist height:
Current level of performance: 80% (does not meet A).

Third Transfer:

- Waist height to below knee height:
Current level of performance: 68.6% (Does not meet A).

11.13 Job Specific testing (WorkWell)

- Running:
Significant limitation (Rarely)

11.14 Lifting Strength (WorkWell)

Waist to floor

- Significantly decreased weight bearing on the left lower extremity resulting in unsafe participation (i.e impaired balance when lifting).
- Less control i.e. putting down weight with increased force.

- Excessive bulging of the upper trapezius and neck flexors.

Front Carry

- Slow performance (significantly decreased speed when walking).
- Increased antalgic gait and significantly decreased weight bearing on left lower extremity.
- He was unable to maintain control with increased weight.
- He reported left knee and pain above the left ankle when handling a weight of 5 kg.

11.15 Comments on lifting strength

When considering his weight handling capacity pertaining to lifting and carrying, he could handle sedentary weights (2.5 – 5 kg on an occasional basis).

11.16 Discussion and recommendations: Summary of accident and sequelae

- On 11 November 2016 (2 years 5 months ago), at the age of 21 years old, the plaintiff was involved in a pedestrian vehicle accident when he was working at the side of the road.
- He sustained fractures of the distal third of the left tibia and fibula and underwent an open reduction and internal fixation.

- He is left with complaints of difficulty with prolonged walking, prolonged sitting, dancing and worshipping in church and that he is unable to perform heavy duty work.
- Refer to section 3 of this report for detailed information.

[12] The reports of the Industrial Psychologist Ben Moody was placed on record and the following findings were made:

12.1 Career History:

Mr Khumalo started looking for work. He secured employment at New Roads Construction his salary as per the payslips received (refer to Annexure B), around the time of the accident, Mr Khumalo was remunerated at an hourly wage of R29.40 and at 1.5 x for working on Saturday's. In the pay period from January 2017 – May 2017, Mr Khumalo worked an average of 146.8 normal hours (i.e. R4 315.95) per month and an average of 15.2 Saturday/overtime hours (i.e. R670.32) per month. His average monthly earnings following the accident therefore amounted to R4 986.27 per month / R59 835.24 per annum.

But for the accident, Mr Pholo believed that Mr Khumalo's contract would have been renewed for as long as the

company had work for him. There were no promotional opportunities and there is always a risk involved with contractual employment that a contract will not be renewed based on the company's workload.

According to Mr Ben Bariger who was contacted on 082 417 1866 GW Green Labour Consultants, they do not implement a retirement age for contract workers.

12.2 Pre-Accident Income Potential:

Writer postulates that Mr Khumalo would therefore, but for the accident have continued working as a Traffic Controller/General Assistant, or in any other Unskilled position, on similar earnings, as per his registration with the Labour Consultants. It is noted that the earnings ceiling for individuals in the Unskilled category of work is R86 000 per annum in 2020's monetary value, as per Robert Koch's, The Quantum Yearbook. When taking into consideration his young age at the time (20 years), his drive to upskill himself and the positive performance feedback received from his Supervisor, and that he had already reached earnings of R29.40 per hour, Writer considers it reasonable to assume that Mr Khumalo would have been able to increase his earnings to R43.75 per hour/R350 per day/R1 750 per week/R7 583 per month/R91 000 per annum, exclusive of overtime hours and the possibility of a 13th cheque, by the age of 30.

12.3 Post-accident income potential

When taking into consideration the opinion of Ms Ingrid Erasmus – Occupational Therapist (2019; p 27 -28), this appears to be justified, Ms Erasmus deemed Mr Khumalo unfit to continue in his position as Traffic Controller, which can be classified as light in nature. Mr Khumalo has therefore suffered a total loss of income to date, for which he should be compensated.

When taking into consideration the opinions of the relevant experts, it is noted that Mr Khumalo's left leg injury has left him limited to work of a sedentary nature and as a result, an unequal competitor in the open labour market. It is commonly known that chronic pain has a negative impact on an individual's psychological wellbeing. Mr Khumalo only holds a Grade 9 (NQF 1) level of education and has only gained work experience in physically based general work. It is noted that employment which is sedentary in nature is generally administrative/clerical in a nature and reserved for individuals who hold a Grade 12 or higher. Considering his qualifications and work experience I am of the opinion that it is unlikely that the plaintiff will find suitable sedentary work and that he has become an unfair competitor for work in the open labour market.

Mr Khumalo was fortunate in obtaining work of a light nature prior to the accident, individuals with an education level of

Grade 9 or lower are generally limited to work which is medium to heavy in nature. Light work opportunities are scarce, and it is considered highly improbable that he would be able to secure similar work in the future. In the event that he does secure employment, it will still likely be in the Unskilled category of work and of a medium – heavy nature. He can be expected then to enter on the minimum wages of approximately R3 600 per month, after which he is expected to progress in a straight line, to his postulated pre-accident earnings of R91 000 per annum by the age of 45, following which, he will receive inflationary increases only.

With his physical abilities limited, he is being excluded from most work opportunities of an unskilled nature; as such work requires physical strength mostly. In addition to his limitation to sedentary work, the emotional sequelae related to the accident in question could also affect his ability to function effectively in any work environment.

[13] The reports of Mr Saur were placed on record and the following findings were made:

Post-morbid: secure employment

- Contingency deductions already subtracted
- Contingency deduction on past earnings (5% / 5%)
- Contingency deduction on future earnings (15% / 35%)

Earnings had the accident not happened (Pre-morbid)

- On a contractual basis, R4 986 per month in 2016/11/11 monetary terms. Thus an annual income of R59 835 ($R4\,986 \times 12$) in 2016/11/11 monetary terms. We project this income with linear increases until age 30, therefore until 2025/09/11, when he would have reached his career ceiling. Thereafter he would have been able to earn, in a similar capacity, R7 583 per month in current monetary terms. Added to this is a thirteenth cheque. Thus an annual income of R98 579 ($R7\,583 \times 13$) in 2020/07/01 monetary terms, or R101 539 in current monetary terms. We project this income with inflationary increases until retirement at age 65.

Earnings now that the accident has happened (Post-morbid)

- According to the report of Ben Moodie (Industrial Psychologist), dated 2020/05/14, paragraph 6, we project no income for Mr. J. Khumalo for 2 months, therefore until 2017/01/11, as he was absent from work recovering from his accident related injuries. After that we assume the same post-morbid earnings as in the pre-morbid scenario, but only until 2017/05/15, when his contract was terminated. Subsequently, we project no income until 9 $((6 + 12) / 2)$ months after the date of calculation, therefore until 2021/12/24, as he remains unemployed to date. After that he will be able to earn, equal to the minimum wage, R3 600 per month in current monetary terms. Thus an annual income of R43 200 ($R3\,600 \times 12$) in 2020/07/01 monetary terms, or R44 497 in current monetary terms. We project this income with linear increases until age 45, therefore until 2040/09/11, when he will reach his career ceiling. Thereafter

he will be able to earn, on par with his postulated pre-accident earnings, of R91 000 per annum in 2020/07/01 monetary terms. Thus an annual income of R93 733 in current monetary terms. We project this income with inflationary increases until retirement at age 65.

- [14] Counsel for plaintiff argued that a contingency percentage of 40% needs to be applied. He referred to the Actuarial certificate on page 189 of the expert notices volume 2:

14.1 If the 40% be applied the following calculation was made:

a. Now that Accident has happened.

Future earnings:	R1 724 992.00
Less 40% contingency deduction:	<u>R 689 996.80</u>
Total loss of future earnings:	R1 034 995.20

b. Had the accident not happened.

Total loss of future earnings:	R1 942 248.80
Less total loss of future earnings:	<u>R1 034 995.20</u>
Total loss of earnings:	R 907 252.80

c. Difference in loss.

Total loss of past earnings:	R 268 707.00
Plus total loss of future earnings:	<u>R 907 252.80</u>

Total loss of earnings: R1 175 959.80

ORDER

[15] Therefore I make the following order:

1.

1.1 The Defendant shall pay the Plaintiff the sum of **R 1 175 959.80** in respect of loss of earnings;

1.2 The Defendant shall pay the Plaintiff the sum of **R 1 175 959.80** into the Plaintiff's attorneys trust account;

The Plaintiff's Attorney's trust account details are as follows:

ACCOUNT HOLDER : VZLR INC

BRANCH : ABSA BUSINESS BANK HILLCREST

BRANCH CODE : 632005

TYPE OF ACCOUNT : TRUST ACCOUNT

ACCOUNT NUMBER : [....]

1.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at 7% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment;

- 1.4 The Defendant is to request and load payment within 14 (fourteen) calendar days from date of this order, with proof of same to be sent to the Plaintiff's attorneys within 5 (five) calendar days of doing same
- 1.5 The issue of Loss of Earnings is separated from all the other issues in terms of Rule 33(4), with the remainder of the issues of general damages being postponed to the Pre-Trial roll of **23 August 2021**.

2.

The Defendant to pay the Plaintiff's taxed or agreed party and party costs, up to and including the trial dates of and the date when this order is made an order of court, for the instructing and correspondent attorneys, which costs shall include, but not be limited to the following:

- 2.1 All reserved costs to be unreserved;
- 2.2 The fees, including but not limited to the preparation for trial, travelling expenses, preparation, consideration and completion of the heads of argument accompanying this order; and day fee in respect of the trial date of 23 March 2021 of Senior Junior Counsel;
- 2.3 The costs of obtaining all expert medico legal- and any other reports of an expert nature which were furnished to the Defendant and/or it's experts;

- 2.4 The costs of obtaining documentation / evidence, scans, considered by the expert(s) to finalise their reports;
- 2.5 The reasonable taxable qualifying, preparation fees of all experts whose report(s) were provided to the Defendant and / or its experts,
- 2.6 The reasonable costs of consultation fees between the Plaintiff's experts and the Plaintiff's the legal teams regarding the matter;
- 2.7 The reasonable cost of one consultation between the Plaintiff and the Plaintiff's legal team to consider the offer to settle;
- 2.8 The reasonable taxable reservation fees, of the following experts:
- Dr Oelofse – Orthopaedic Surgeon
Rita Van Biljon – Occupational Therapist
B Moodie – Industrial Psychologist
J Sauer – Actuary
- 2.9 The reasonable traveling- and accommodation cost, incurred in transporting the Plaintiff to all medico-legal appointments.
- 2.10 The reasonable cost for an interpreter's attendance at the medico legal appointments for translation of information;

2.11 The above-mentioned payment with regard to costs shall be subject to the following conditions:

2.11.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

2.11.2 The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs;

2.11.3 The Defendant is to request and load payment within 14 (fourteen) calendar days from date of settlement / taxation of the bill of cost, with proof of same to be sent to the Plaintiff's attorneys within 5 (five) calendar days of doing same;

2.12 In the event of default on the above payment, interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

AS BOONZAAIER AJ

On behalf of Plaintiff : Adv A. Sander
Instructed by : Du Plooy Attorneys
Bloemfontein

No appearance on behalf of Defendant