IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: NO

2017

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CASE NO: 2016/4995

8/12/2017

In the matter between:

A, D Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

BALOYI AJ:

[1] This is a claim for past and future loss of earnings following injuries suffered by the plaintiff in a motor vehicle accident on 23 October 2014. The plaintiff was a passenger in a armoured vehicle when it collided with another vehicle during a so-called cash-in-transit heist.

[2] In determining the issue of loss of income, past and future, I am required to determine – (i) the plaintiff's pre-accident potential, namely, whether but for the accident the plaintiff would have been promoted; (ii) whether the plaintiff's employment will be terminated, and if so, the probable date for termination; (iii) past loss of income; and (iv) the plaintiff's pre-accident retirement age.

[3] The defendant has conceded liability for 100% of the plaintiff's damages and the parties have agreed to refer the determination of general damages to the Health Professionals Council of South Africa. The plaintiff's injuries, are detailed in the reports of neuro surgeon, Dr Marus, plastic surgeon, Dr Chait and orthopaedic surgeon, Dr Read, as follows - multiple facial bone fractures, cervical spine C7 spinous process fracture, thoracic spine T4 compression fracture,various facial scarring, scarring to the scalp, dental injuries viz. loose teeth and injury to the right knee, are admitted. The defendant disputes that the injury to the right knee is a *sequelae* of the accident.

[4] The defendant has admitted the expert reports of Drs Marus, Vorster, Chait and Mr L Roper. The plaintiff, his wife, Mrs Lee Viona Anderson, Brink SA Human Resources Manager, Mrs Bonita Meyer and Industrial

Psychologist, Mr D De Vlamingh testified in support of the plaintiff's claim and Industrial Psychologist Mr T Tsiu testified on behalf of the defendant.

[5] At the time of the accident, the plaintiff was employed by the company, Brink Armoured Security SA as armoured vehicle escort for the transportation of high commodity assets. His monthly salary included a basic salary and overtime pay for overtime work. Following the accident, the plaintiff was absent from work for a period of 3 months and upon return to work, he was and continues to be accommodated in office-based administrative duties in the control room, in which position he earns only a monthly basic salary and does not work overtime and therefore earns no overtime. He was booked off work for a further period. There is an issue about overtime payment to the plaintiff in August and September 2015 (although according to the salary slips presented as evidence it appears that payment was in October and not September).

[6] The parties agree that the plaintiff is no longer suited for his pre-accident position, he will no longer be able to achieve his pre-accident career and earning potential, he will retire early, once his employment is terminated he will probably remain formally unemployed. With respect to the termination of employment, the plaintiff contends that his employment will be terminated in June 2018 whilst the defendant holds that the date of termination is an unknown date in the future.

Past loss of income

[7] According to Mrs Meyer, as at October 2014, the plaintiff earned a monthly basic salary of R12 103.48, and an average monthly overtime

earnings in the amount R1 978.00 over the preceding twelve months period. I accept this evidence of Mrs Meyer.

[8] Whilst the plaintiff testified that he did not receive any overtime pay in the entire period after the accident, he conceded in cross-examination that he was paid overtime as appears on the payslips I have referred to in paragraph 5 and explained that he was not aware that he was paid these amounts. I have no reason to disbelieve the plaintiff. According to Mrs Meyer, the overtime payments were monies owed to the plaintiff for past overtime and not overtime worked in the months indicated in the payslips. Mrs Meyer also testified that the plaintiff has not worked overtime since the accident, which evidence accords with that of the plaintiff. I have no reason not to accept the plaintiff's and Mrs Meyer's evidence that the plaintiff has not worked overtime since he was injured in the accident and accordingly accept this evidence. It follows that the aforementioned amounts are not to be deducted from the amount to be awarded for past lost income.

[9] From the above, it appears that but for the accident, the plaintiff would have continued to earn overtime for as long as he carried on the duties of armed escort. The defendant has not contended otherwise. However, contigencies must be applied to this scenario due to the uncertainty of hours that would in fact have been worked, if any. Whilst in her submissions counsel for the defendant contended for a higher contingency deduction of 10% to be applied to the value of past income, contrary to the lesser percentage deduction of 5% applied by the defendant's actuary, Dr Jacobson, no explanation was offered for the

departure from Dr Jacobson's proposed percentage of 5%. I am mindful that there is no art to the determination of a correct or accurate contigency deduction percentage and that the court must cautiously use its discretion, taking into account relevant facts, to arrive at what it considers fair and reasonable. As the Appellate Division (as it then was) said in Southern Insurance Association Ltd v Bailey 1948(1) SA 98 (A) 113H, "*Any enquiry into damages for loss of earning capacity is of its nature speculative …* ".

[10] It is apposite at this stage to raise the difficulty with reliance on the expert report of the the plaintiff's actuaries, Munro Forensic Actuaries. As counsel for the defendant correctly points out, the calculations of Munro is premised on an incorrect higher salary as a basis. Munro's calculations proceed on the basis that the plaintiff earned a monthly salary of R15 288. Notwithstanding the evidence of Mrs Meyer about the correct salary of the plaintiff (R12 103.48), the plaintiff's counsel persisted to submit that I accept the calculations of Munro as appear in the report. Quite evidently, the evidence of Mrs Meyer, which I have accepted, undermines the calculations and conclusions arrived at by Munro. It follows that I agree with the submission of the defendant's counsel that in the circumstances, I should not rely on the claculations of Munro and the conclusions arrived at.

[11] I am satisfied that a lesser percentage of 5% as applied by Dr Jacobson for past loss, and I might mention that Messrs De Vlamingh and Tsiu agreed on the pre and post morbid value of past income (R606 773) and (R495 667) respectively, is appropriate. Accordingly, a 5% contigency

deduction should be applied to the value of income but for the accident (R606 773 less 5% = R576 434) less 5% contigency deduction from value of income after the accident (R495 667 less 5% = 470 884). The resulting net past loss is R105 550. As I have found, the amounts paid to the plaintiff on 31 August 2015 and 31 October 2015 are not to be deducted from this amount.

Future loss of income

[12] Under this heading, I must consider the plaintiff's prospects for promotion but for the accident; the probable date of termination of the plaintiff's employment; and the plaintiff's pre morbid date of retirement

[13] The parties are agreed that the plaintiff's vocational capacity has been reduced and that he has been rendered vulnerable and less competitive in the open labour market in the aftermath of the accident, his future vocational capacity is largely dependent on the outcome of psychological and physical intervention programmes recommended, his injuries are amendable to treatment and the orthopaedic injuries sustained in the accident will not have any long-term effect on his employment. The plaintiff's intellectual abilities are described ascommensurate with his pre-accident educational and work levels; he did not suffer a brain injury or focal injury to the brain as a result of the accident; he suffers secondary anxiety, stress and mood disorder some of which is treatable and has features of a secondary chronic pain syndrome and a somatoform disorder and has developed a dependency on family to assist him with basic functions such as dressing.

The prospects for promotion

[14] At the time of the accident, the plaintiff was 40 years old and is presently 43 years of age. According to the retirement policy of his employer, the plaintiff would have had to retire at 65 years of age.

[15] The plaintiff testified that he holds a grade 10 school pass and grades E, D, C, B Sera certificates. Prior to his employment at Brink SA, he was employed as a security guard at Asset Secuirty and at Nforce for 3 and 6 years respectively. At the latter, he was promoted to the position of inspector of security guards. He would have been eligible for promotion to the position of supervisor but for the accident and would retire at 65 years of age.

[16] The evidence of Mrs Meyer may be summarised as follows – she joined Brink SA in August 201;, according to her colleagues who worked with the plaintiff before the accident, the plaintiff would have been promoted to position of supervisor before age 45 years; the company's promotion policy is to promote internal candidates and is not based on academic qualifications; supervisor positions become available every 2 to 4 years. Mr De Vlamingh testified that he assessed the plaintiff on 19 May 2016, the prospects for the plaintiff to be promoted to supervisor by age 45 were good because the criteria for the position of supervisor does not require academic ability and his progression was good; the internal policy of promotion means that the plaintiff had a realistic expectation for promotion; the plaintiff completed schooling at grade 10 and never failed in his schooling years; with his experience and qualification, the plaintiff

could have been easily employed elsewhere and with his ability would easily make the position of supervisor. Mr Tsiu assessed the plaintiff on 1 December 2016 and concluded that prior to the accident, the plaintiff had no prospect of promition because a grade 10 school qualification is not sufficient; the plaintiff's age at the time of accident diminished the prospect for promotion by age 45, promotions are competitive and the plaintiff lacks the necessary academic qualification of grade 12.

[17] I am unable to find that pre accident the plaintiff had good or probable prospects for promotion to supervisor.

17.1 The plaintiff was overlooked for promotion pre-accident for the given reason that he did not meet the required criteria. It was not suggested that following this, he acquired further skills that met the criteria for promotion. There is no evidence before me that contrary to the conclusion when he was denied promotion, he in fact did possess the necessary requirements for promotion. According to Ms Meyer, promotions occur only when an opening of a position arises, which, according to her is, on average every two to four years. To find that an opening would have opened up and that the plaintiff would have been found to meet the requirement for promotion invites speculation.

17.2 Mrs Meyer's conclusion that the plaintiff would have been promoted is based on what she was allegedly told by her colleagues who knew the plaintiff pre accident. This evidence is not corroborated by other placed before me and there is no explanation for absence of corroborating evidence on what is obviously an imporatnt issue. I must agree with the

defendant's counsel that this is hearsay evidence which, in the absence of corroboration, as happened, cannot be relied upon. For the same reason, I place no reliance on the letter of Ms Meyer dated 21 October 2016, adressed to no one in particular, in which she appears to convey that but for the accident the plaintiff would have been promoted. I deliberately choose the word "appears" because it is not evident that that is the intention of the letter. I mention in passing that curiously, none of the persons who knew the plaintiff pre accident or who with knowledge of his pre accident unsuccessful application for promotion were called to shed light on this obviously important topic.

17.3 Mrs Meyer's testimony that promotions are from internal candidates does not take the matter any further – there is no evidence that any of the 4 supervisor positions att Brink SA would become available for consideration of the plaintiff whilst he was still eligible for promotion.

17.4 Contrary to Mrs Meyer's evidence, and perhaps that of Mr De Vlamingh, it is evident from the plaintiff's failure to be promoted when he applied that promotions are competitive. I must in the event find that the plaintiff has not shown that he would have been promoted by age 45. I do not overlook the evidence that the plaintiff was promoted to inspector of security guards in his previous employ. However this does not assist the plaintiff for the following reasons – his previous employment where he became inspector of security guards was, on the plaintiff's ownevidence, a smaller company to his present employer and there is no evidence before me that the position of inspector of security guards carries the

same qualification criteria as the requirements for supervisor at the present employer.

[18] In the event, I find that the evidence before me does not establish that pre accident, the plaintiff had any or probable prospects for promotion. The evidence before me simply does not go that far.

Termination of employment

[19] It is common cause that the plaintiff is presently accomodated in administrative duties. The parties are in disagreement about the probable date for termination, which Mrs Meyer says is imminent in June 2018. The defendant, whilst accepting that the plaintiff's employment will terminate before he reaches age of retirement, contends that the date of dismissal is at this stage unknown.

[20] Ms Meyer testified that she has made a recommendation to Brink International, the head office of Brink SA, that the plaintiff be discharged from employment on the ground that he is unable to fully perform his duties in the current accomodated position – he is forgetful and as a result cannot be trusted with certain responsibilities, he often complains of pain and sleeps in his car when he should be working. As a result, Mrs Meyers says, the plaintiff does not meet the performance requerements for the present position. Mrs Meyers also testified that the final decision on the plaintiff's termination lies with Brink International and is yet to be made. The evidence of Mrs Meyer that the plaintiff's termination is imminent does not accord with the report of Mr L Roper, who records in his report that he consulted with the plaintiff's manager who reported to him that the

plaintiff's performance was good and his memory and concentration abilities intact. It also does not accord with the evidence of Mr Tsiu that he consulted with the plaintiff's immediate supervisor, who does not know anything about the imminent termination of the plaintiff's employment in June 2018. This in my view is a curiosity which lends itself to the possibility that Mrs Meyer may well have exaggerated the circumstances of the plaintiff and the imminence of his dismissal.

[21] A further reason that I conclude that Mrs Meyer may well have exaggerated the plaintiff's circumstances is that the parties agree that with the recommended treatment and adherence thereto, which the plaintiff is presently not receiving, the condition of the plaintiff should improve. Whilst this will not return him to armed escort duties, there is no evidence before me that he will not be able to perform other duties suited to his circumstances, including the present administrative duties.

[22] Mr Tsiu also testified that in the event of a discharge from employment, the plaintiff would be entitled to the statutory protection that prescribes that the employer consider reasssignment to other duties, compliance with incapacity dismissal processes including medical boarding. I agree.

[23] On the evidence before me, I am unable to find that the termination of the plaintiff is imminent to June 2018. This does not negate termination on some future date, which the defendant has conceded and I find accordingly.

The plaintiff's pre-morbid retirement age

[24] The pre-morbid retirement age of the plaintiff is 65 years. This is according to the retirement policy of the employer and his own evidence. The plaintiff asserts that I must allow for the full amount of R3 448 300.00 for future loss of earning as determined by Munro on the basis of a higher salary than was testified to my Mrs Meyer, whose evidence in this regard I have accepted; that the plaintiff would be promoted before the age of 45 years but for the accident; that the plaintiff's employment will be terminated in June 2018 and a pre-morbid retirement age of 67.5 years. I am unable to rely on these calculations, at least for the reasons that the calculation is based on an incorrect salary and retirement age and have in fact already decided that I will not rely on Munro's calculations. For completion, I point out that notwithstanding the evidence of Mrs Meyer on the correct salary and the evidence about the retirement age as per Brink SA policy and the plaintiff's own evidence that he would retire at 65 years of age, the plaintiff's counsel persisted in contending for reliance on the calculations of Munro.

[25] This leaves with the report of Dr Jacobson. Dr Jacobson determines the plaintiff's value of income but for the accident at R3 808 876 and proposes to apply a 15% contigency deduction resulting in a net value of R3 237 545. He determines the value of income after the accident at R3 109 019 to which he applies a higher contigency deduction of 20% resulting in a net value of R2 487 215 after the accident and a net future loss amount of R750 330. Contrary to Dr Jacobson's determination, counsel for the defendant submitted that I apply a contingency deduction of 11% to the pre-morbid income of R3 808 876 (R418 976.36) and a

marginally higher deduction of 21% to the post-morbid income of R3 109 019 (R652 893.64). This results in a contingency differential of 10%, resulting in a net sum of R933 774.63.

[26] Whilst there is no exact or accurate manner of determining the correct percentage contigency deduction, I have the discretion to make an award that I consider right and am not bound by the actuarial calcualtions urged upon me – see Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A) 614F-G. I consider that a pre-morbid contigency deduction of 8% and post-morbid deduction of 22.5% is appropriate. This results in a pre-morbid deduction of R304 710.08 and a net value of R3 504 165.92. An application of a post-morbid contigency of 22.5% yields R699 529.27, resulting in a post morbid earnings of R2 409 489.00 with the total loss being R1 094 675.92.

[27] The total loss of income is accordingly R1 169 954.62 (R1 094 675.92 (future) + R75 211.70 (past)).

[28] The defendant submits that the plaintiff has received compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 in the amount R187 445.41, which is not disputed by the plaintff, and that the full amount of compensation must be deducted from the award to the plaintiff. I agree that this amount must be deducted from the award in accordance with section 36 of COIDA which reads -

> "*36(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than*

the employer of the employee concerned (in this section referred to as the "Third Party") being liable for damages in respect of such injury or desease-.

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

…

(2) *In awarding damages in an action referred to in ss(1)(a) the court shall have regard to the amount to which the employee is entitled in terms of the Act"*.

[29] Accordingly, the award to the plaintiff will be R982 509.21 (R1 169 954.62 – R187 445.41) – see RAF v Maphiri 2004 (2) SA 258 SCA.

Future medical costs

[30] The defendant makes, and the plaintiff accepts, an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay the plaintiff's cost for future medical examinations by medical practitioners, future accomodation in hospitals, medical facilities and/or nursing homes for the treatment of or rendering of medical services or supplying goods to the plainitff arising from the accident. I agree with the defendant that, due to the unresolved dispute about the alleged knee injury recorded in the report of Dr Read, the undertaking must exclude the costs associated with the knee injury and I intend to make an order accordingly.

[31] In the result, I make the following order -

1. The defendant must pay to the plaintiff R982 509.21 for loss of income.

2. The defendant must pay interest on the aforesaid amount at the legally prescribed rate from 14 days after the delivery of this judgment to date of payment.

3. The defendant must give an undertaking to the plaintiff in terms of section 17(4) of the RAF Act 56 of 1996 to pay the costs for future medical examinations by medical practitioners, future accomodation in hospitals, medical facilities and/or nursing homes for the treatment of or rendering of medical services or supplying goods to the plainitff arising from the accident, excluding the costs associated with a knee injury referred to in the orthopaedic reports of Dr Read.

4. The defendant pay the costs of suit, including the qualifying fees of the plaintiff's experts – Drs Marus, Chait, Read, Vorster, Messrs Roper, De Vlamingh, Georgiou, Munro.

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BALOYI AJ
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 2 August - 4 August 2017

Judgment Delivered: 8 December 2017

APPEARANCES

For the Plaintiff:	Adv U Jordaan
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