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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2010/29802

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

G: M

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Coram: Lagrange AJ

Heard: 17 - 19 October 2018

Delivered: 26 October 2018

Summary: (Claim for damages – vehicle accident– damages and quantum – injury relating to expected loss of future earnings not proven to have arisen from accident)

JUDGMENT

LAGRANGE, J:

Introduction

[1] In this matter, the parties are agreed that the defendant is liable for such damages which arose from a motor vehicle accident in which the plaintiff was injured occurring on 26 September 2008. The only issues for the court to determine are what damages he suffered as a result of the accident and the quantum thereof. In so far as there are any general damages, the parties are agreed that this is a matter to be determined by the Health Professionals Council of South Africa. Accordingly, the court is not seized with considering those damages.

Material evidence

[2] It is common cause that following the accident, the plaintiff was unable to fly for a period of three months. Although he was paid his ordinary salary during this period, he did not receive the subsistence and travel allowance which he would normally have been paid whilst on active duty and which formed a significant part of his income.

[3] Apart from the plaintiff himself, a number of experts gave evidence, even though joint minutes had been concluded by the parties' occupational therapists, industrial psychologists and orthopaedic surgeons. The joint minutes of the occupational therapists and the orthopaedic surgeons, nevertheless, reflected some fundamental points of disagreement between them. The expert evidence was relevant to prove, or disprove, his claim for future loss of earnings premised on a diminution of his promotion prospects and possible early retirement.

[4] The plaintiff is a pilot, and has attained the rank of first officer, employed by South African Airways [SAA]. He has been flying as a pilot since 1992, firstly for the South African Air Force, and for SAA since 2004. He is passionate about his occupation and is committed to his job. He currently flies on long haul freight routes. It is not in dispute that owing to lower back pain, he finds it necessary to be relieved by another pilot roughly every three hours on such flights. It was his evidence that such pain is intermittent.

[5] Under cross-examination, the plaintiff was asked whether he had any other evidence to support his claim that he suffered from back pain, to which he responded that he could only mention that he had complained about it to his general practitioner. His general practitioner had prescribed painkillers and 'Devils Claw' for pain relief. Although he testified that he suffered from back pain after the accident he did not claim that he had complained of back pain to Professor Scheepers when he was examined by him in June 2015.

[6] When he was admitted to hospital, the nurse who authored the Nursing Assessment form at the Netcare Accident and Emergency Unit, noted that he complained of injury to his right shoulder and 'back pain'. In the examining doctor's subsequent clinical record of his examination of the plaintiff at the same emergency unit he recorded the plaintiff was complaining of pain in his right shoulder and right upper chest. The only back injury recorded by the doctor on examination was: 'self maintained cervical spine tenderness'. It is not in dispute that the plaintiff suffered a broken right clavicle and injury to his right upper chest. This evidence emerged under the plaintiff's cross-examination of the orthopedic surgeon, Dr A Scheepers, who was asked to interpret the relevant medical notes from the Accident Unit, and was not disputed.

[7] In their joint report, the orthopaedic surgeons differed in their findings on the injuries sustained. Doctor K. S. Bila found that apart from the fractured right clavicle, on which they both agreed, the plaintiff had also sustained fractured ribs on his right side and a lower back injury. When Dr. Bila examined the plaintiff on 28 August 2017 the spinal injuries he noted were to the lumbar sacral spine evidenced by: the plaintiff's

inability to bend and touch his toes; painful lateral motion on the left side; tenderness of the lumbar spine and a positive result in the straight leg raising test. He also commented that the radiologists noted a loss of lumbar lordosis.

[8] Professor A. Scheepers did not dispute the results of Dr Bila's examination but testified that, at the time of his own examination of the plaintiff on 24 June 2015, the plaintiff did not complain of back pain and his examination revealed no clinical evidence of such a problem. At the time of that examination, all the plaintiff had complained of was that he had suffered shoulder stiffness for two years after the accident. Professor Scheepers readily agreed that it was possible such back pain had developed by the time the plaintiff was examined more than two years later by Dr Bila. However, he was adamant that if the back pain had been a result of the accident, the injury would have been evident by the time he saw him in 2015. When he examined the plaintiff he could move freely, meaning he could move from side to side, could rotate and bend forward. In relation to the loss of lumbar lordosis noted by the radiologists, Professor Scheepers testified that this could only be established clinically and not on the basis of x-rays because the x-ray results may depend on how the patient was positioned on the x-ray table at the time of the x-ray being taken.

[9] Although the joint report of the orthopaedic surgeons recorded that in respect of their physical examination and clinical studies 'there was not much difference between the findings of the two experts', it is evident from the report itself that their findings on the injuries sustained by the plaintiff were markedly different. It is also apparent that Dr Bila's prognosis, that the plaintiff may have to retire two years earlier on account of a progressive deterioration of his back condition, was not part of the joint minute.

Evaluation

[10] The plaintiff's loss of his subsistence and travel allowance, was clearly a direct consequence of him being unable to fly as a result of the injuries sustained in the accident. Accordingly he is entitled to damages for that loss which I accept amounted to R40,264-00 based on the actuarial report of Independent Actuaries & Consultants, which amount was not contested.

[11] However, even though there is no dispute that he currently suffers from lower back pain, which necessitates him being temporarily relieved by a co-pilot approximately every three hours whilst flying, the plaintiff has failed to prove on a balance of probabilities that the back pain arose from the vehicle accident. Other than his say-so that he suffered from back pain 'after the accident', the preponderance of evidence tends to show that such pain only developed in the period between his examination by Dr Scheepers in June 2015 and his examination by Dr Bila more than two years later. Accordingly, I am not satisfied that the back pain suffered by the plaintiff was caused by an injury sustained in the vehicle accident, and the damages claimed for future loss of earnings consequential thereto must be disallowed. Those damages constitute the bulk of the damages claimed amounting to some R 2,6 million odd.

Costs

[12] As the plaintiff attained only limited success in relation to a relatively small portion of his claim it would not be appropriate to award him all his costs. As the expert evidence led was in support of his claim for future loss of income, which was unsuccessful, it would also not be appropriate to reimburse him for the fees of such experts.

Order.

1. The defendant is liable for the plaintiff's loss of past income amounting to R40,264-00.
2. The plaintiff's claim for expected loss of future earnings is dismissed.
3. The defendant must pay 20 % of the plaintiff's costs excluding the fees of expert witnesses.

Lagrange J

Acting Judge of the High Court

APPEARANCES

FOR THE APPLICANT:

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RESPONDENT:

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