REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE No. 868/2014

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
……
……

DATE…… SIGNATURE……

In the matter between:

KOKETSO MATJILA : PLAINTIFF

And

THE ROAD ACCIDENT FUND : DEFENDANT

JUDGEMENT

SEMENYA J:

1. The plaintiff was a passenger in a motor vehicle with registration numbers and letters [C...] when it collided with another motor vehicle on the 13 August 2013. It is common cause that the said collision took place along Polokwane –Modjadjiskloof road. This action is for general damages and loss of income/earning capacity the plaintiff suffered as a result of injuries sustained in the collision. The amount claimed is R1 500 000.00 for general damages and R1 200 000.00 for loss of earning/earning capacity.

2. The parties agreed in a stated case that the issue of future medical expenses will be settled by way of an undertaking in terms of section 17 (4) of the Road Accident Fund Act 56 of 1996.

3. The parties informed me that they will rely on the reports filed as well as the joint minutes of orthopaedic surgeon Drs H Sithebe (for the plaintiff) and A A Aden (for the defendant); occupational therapists Ms N Sibanyoni (for the plaintiff) and Mr J Masango (for the defendant); Industrial Psychologists Mr P Brits (for plaintiff) and Ms S Vos (for defendant) and actuarial calculations by Gerald Jacobson. The plaintiff

also relies on the report compiled by Dr Mazwi who is a neurosurgeon. The defendant did not appoint its own neurosurgeon. No oral evidence was led by either of the parties.

4. It is stated in a court order dated the 25 January 2016 that the defendant shall be liable for 100% of the plaintiff's agreed or proven damages. In their opening address the parties stated that the main issue is the head injuries as noted in the report compiled by Dr Mazwi. The defendant contends that there is no evidence to support this conclusion.

5. According to the entry in the hospital records dated the 13 August 2012 the plaintiff's injuries on admission are recorded as fracture of the left numerous, left metartasal fracture as well as shoulder dislocation. It is further recorded that the plaintiff sustained multiple facial lacerations. The parties agree on these injuries. A Glasgow Coma Scale (GCS) of 15/15 was recorded and the plaintiff was said to be fully awake and communicating well with no confusion.

6. On the 16 August 2012, the plaintiff singed a form in which he stated that he has decided to leave the hospital on his own responsibility and against the advice of the attending doctor. It is noted in the hospital records that his own sister failed to convince him to stay. However, it would appear from the records that he was readmitted on the 17 August 2012 and was finally discharged on the 23 August 2012.

7. On page 3 of his report, Dr Mazwi reports that according to hospital records and RAF1 the plaintiff suffered from head injury with GCS 15/15, left foot metatarsal fracture, humerous fracture, left shoulder dislocation and facial abrasions. He goes

further to state that the plaintiff has significant memory disturbances and severe difficulty with concentration. According to the doctor, these are the sings of head injury.

8. On page 12, Dr Mazwi records that according to American Academy of Neurology Grading (AAN), Glasgow Coma Scale and American Congress of rehabilitation medicine definitions, a score of 13/15 to 15/15 means that one has mild head injury or a concussion

9. In support of its case the plaintiff argued that the bleeding facial abrasions noted in hospital records upon admission are indicative of head injury. It was contended that the court should find, based on this aspect and Dr Mazwi's report that the plaintiff has discharged his onus of proving, on a balance of probabilities, that he sustained head injuries.

10. The plaintiff contended that the conclusion arrived at by Dr Mazwi remains unchallenged in view of the fact that the defendant did not appoint its own neurosurgeon to counter this conclusion.

11. The defendant on the other hand contended that the fact that it failed to appoint a neurosurgeon alone is not to be regarded as an admission of the conclusion arrived at by the plaintiff's expert. It was contended that the plaintiff is still expected to discharge the onus that rests on him to prove, on a balance of probabilities, based on the available evidence, that he sustained the head injuries as noted by Dr Mazwi.

12. The defendant further argued that the court cannot, on the strength of the facial abrasions as they appear in the hospital records, conclude that they translate into head injuries. It was contended that such head injuries do not appear anywhere in RAF 4 form as stated in Dr Mazwi's report or on X-rays filed on behalf of both parties.

13. I have thoroughly perused the hospital report from the date of admission to the date on which the plaintiff discharged himself. I am unable, contrary to the contents of Dr Mazwi's report, to find where it is recorded that the plaintiff sustained head injury, neither is same reported on RAF1 form. The defendant is therefore correct in this regard. I therefore find that the doctor's statement in this regard has no factual basis.

14. It is stated in the expert reports filed by the plaintiff that the plaintiff was admitted in hospital for three months contrary to the entries in the hospital records. The plaintiff discharged himself only three days after admission, was readmitted again but discharged few days thereafter. I fail to find any reason why the plaintiff would lie about this fact, safe to say that he wanted his injuries to appear more serious.

15. Furthermore, Dr Mazwi stated that a GCS score of 13/15 and 15/15 symbolizes mild head injuries. It is unfortunate that Dr Mazwi did not attach a copy of the AAN report for ease of reference. I have however done my own research and found that the AAN states that the GCS of 13/15 indeed shows that a patient suffered mild head injury. However, I could not find anywhere where it is stated that 15/15 also indicates head injury. In any event, I agree with Mr Brits, one of the industrial psychologists who examined the plaintiff, that mild head injury does not necessarily mean that the patient has suffered a brain injury.

16. In a book titled Pocket Essentials of CLINICAL MEDICINE fourth edition, paragraph 721 the authors explain that GCS is a simple grading used to assess the level of consciousness. According to the authors, a GCS of 15/15 simply means that the patient is fully conscious, orientated and responds well to questions. This fact lends support to the entries in the hospital records upon the plaintiff's admission.

17. The onus of proving that the plaintiff sustained head injuries rests with the plaintiff. With regard to this onus, **Davis AJA in Pillay v Krishner 1946 AD 946** stated that

> *" In my opinion, the only correct use of the word onus is that which I believe to be its true original sense, namely the duty which is cast on a particular litigant, in order to be successful, of finally satisfying the court, that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent."*

18. I find that Dr Mazwi's finding that the plaintiff suffered from mild head injury has no factual basis. On this basis, I find that the plaintiff failed to adduce evidence to satisfy me that he is entitled to succeed on his claim that he sustained mild head injury. I however accept that the plaintiff succeeded in proving that he sustained the following injuries: left foot metatarsal fracture, left humerous fracture, left shoulder dislocation, multiple facial and foot abrasions.

19. On the issue of general damages, the radiologist appointed by the defendant opines that the plaintiff's daily living, work capacity and labour capacity has been impaired by the accident. Dr Aden reports that the plaintiff's overall body capacity has decreased and his quality of life has been compromised. The doctor reports that the plaintiff has suffered severe pain for three months after the injury and was on regular analgesics with loss of independence. He did not regain all pre-accident amenities.

His left arm and shoulder and left foot have remained symptomatic and they cause limitation of his capacity and endurance at many physical activities.

20. Dr Aden concludes that the plaintiff's basic activities of life like reaching above head, lifting and carrying heavy things, keeping standing position, walking, running and working are difficult. He states that the plaintiff has 13% personal impairment. Based on this report, I accept that he qualifies for an award of general damages.

21. In **Chetty v Road Accident Fund 2012 (6J2)QOD 115 (KZN)at [33]** van Zyl J stated the following with regard to an award for general damages:

> *"The assessment of such damages also needs to strike a balance between the entitlement of the plaintiff, on the one hand, to adequate compensation and the entitlement of the defendant, on the other hand, not to be saddled with a liability which is unreasonable, or which unduly favours the plaintiff by reason of sympathy for his plight. Whilst previous decisions are therefore useful aides to arriving at a determination in the case under consideration, their importance should not be overestimated."*

22. It would appear that the amount claimed for general damages was based on the assumption that the plaintiff has suffered mild head injury. I have already ruled that Dr Mazwi's conclusion is unsupported by the evidence and have rejected it on that basis. It is now trite that when considering general damages, the court has a wide discretion to award what it considers fair and adequate compensation to the injured party.-See **Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) at 169 E-F.**

23. I consider the fact that the plaintiff is not permanently disabled and has retained his mobility. I further consider the fact that he is right handed and still able to perform light tasks. In the circumstances, I find that an amount of R900 000.00 would be a fair and adequate compensation for the plaintiff.

24. With regard to loss of earning capacity, the two occupational therapists agree that the plaintiff's highest level of education is grade 9 (I note that he gave different levels of education to different experts). They also agree that he does not have any formal or informal skills training. The therapists also agree that at the time of the accident the plaintiff was working as a carpenter, which is presumed to have medium physical demands, on a part-time basis. According to the therapists, the injuries rendered plaintiff unemployed and will not be able to return to work as a carpenter.

25. The occupational therapist agree further that the plaintiff's limited educational skills restricts him to manual job and depends on his physical strength to compete in the open labour market. His level of education may therefore probably affect his ability to acquire sedentary type of work. I have no reason to differ with the occupational therapists on these points.

26. The Industrial Psychologists opine that the plaintiff's employment prospects prior the accident were limited by his educational qualifications and vocational exposure. These experts note that persons of the plaintiff's level of education are employed for their ability to do work of a physical nature and not for their academic achievement and cognitive capacity.

27. The psychologists propose that, but for the accident, the plaintiff's career would have been confined to any unskilled position for which he was suitably qualified. It is anticipated that the plaintiff's income would have ranged between the median to upper quartile (R20 600 - R59 000 per annum) of unskilled non-corporate workers depending on the type of work performed. The estimated retirement age is said to be between 60 and 65 years.

28. The psychologists note that the plaintiff did not return to his carpentry work after the accident and remained unemployed until 9 February 2015. He secured employment as a cleaner where he was earning R3200.00 per month. Mr Brits states that more information is required as to actual reasons why Survest terminated the plaintiff's employment. In the absence of concrete reason from the plaintiff's former employer as to why he left, I am unable to find that the injuries sustained in the accident are the result why he left his work.

29. Dr Aden and Dr Sethibe (orthopaedic surgeons) agree that the plaintiff is unemployable post- accident. I agree with this conclusion in view of the fact that, as a carpenter or a person whose employment opportunity is limited to work requiring physical strength, the plaintiff would not be in a position to compete fairly in the labour market, due to the injured foot and shoulder. I will therefore disregard Mr Brits's opinion that the plaintiff is still employable. I will, on this basis, confine myself to the actuarial calculations based on Ms Vos's opinion.

30. With regard to the calculation of loss of income, I find the following statement made by Nicholson JA in **Southern Insurance Association Limited v Bailey NO 1984 (1) SA 98 (A)** at 113F – 114E to be of assistance. It was stated that ….While the results of an actuarial computation may be no more than "an informed guess, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge's "gut feeling" (to use the words of the appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."

31. Gerard Jacobson Consulting Actuaries calculates the plaintiff's past loss, after deductions of contingencies of 5% to be R697 484. The actuary calculates future loss, after deduction of 20% contingency at R621 904. This calculation is based on the report that the plaintiff is unemployable, the fact that I have accepted.

32. The contingencies (hazards of life), being illness that may befall the plaintiff, early retirement and death as per the actuary I found by me to reasonable in the circumstances of the plaintiff in this matter.

In the result I give judgement for the plaintiff as follows:

1. Payment of the sum of:

1.1 R900 000.00 for general damages;

1.2. R697 484.00 for future loss of earnings;

1.3. R621 904.00 for future loss of earnings.

2.

2.2. The defendant would not be liable for payment of interest on condition that payment is made timeously;

2.3. In the event of the defendant not making payment timeously, the defendant will pay interest at the rate of 10% per annum on the amounts stated in 1.1, 1.2 and 1.3.

3. In addition the defendant shall pay the following costs:

3.1. The defendant shall pay the plaintiff's costs of suit on the High Court party and party scale. Such costs shall include the fees and qualifying expenses of all expert witnesses that prepared medico-legal reports that were referred to during argument;

3.2. Costs of travelling costs of the plaintiff to attend the medico-legal examinations with the defendant's experts.

3.3. The reasonable costs of attending the examinations and obtaining the medico-legal ,reports and such reports, addendum and any joint reports;

3.4. The costs of preparation of the trial bundle; and

3.5. The reasonable costs of the plaintiff's attorney which shall include travelling costs, attendance to court, costs of preparation of pre-trial conferences and formulation of pre-trial minutes and the costs of actual attendance of pre-trial conferences.

SEMENYA M.V
JUDGE OF THE HIGH COURT, POLOKWANE;
LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : M MOGASHOA
INSTRUCTED BY : MAFETSE MOGASHOA ATT
FOR THE DEFENDANT: NOKO MAIMELA ATT.
INSTRUCTED BY :
DATE OF HEARING : 08 MARCH 2018
DATE OF JUDGEMENT: 09 MAY 2018