IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case No: 14168/17

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

26/10/2020

In the matter between:

BW MOSEMAKA Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

SK HASSIM AJ

[1] On 3 March 2016, a truck ("*the first insured vehicle*") driven by the first insured driver and a Toyota Hilux motor vehicle ("*the second insured vehicle*") collided. The

plaintiff who was passenger in the second insured vehicle was employed as a security office and aged 39. The plaintiff seeks compensation for bodily injuries sustained by him therein. There was no appearance for the defendant at the hearing notwithstanding proper notification of the trial date and several e-mails to the claims' handler from at least 10 June 2020. The applicant delivered reports by an industrial psychologist, an occupational psychologist, an orthopaedic surgeon and an actuary. The defendant filed only one report, that of an orthopaedic surgeon, Dr Prins.

[2] The defendant disputes liability to compensate the plaintiff. I am therefore called upon to determine whether the defendant is liable to compensate the plaintiff and if so, the quantum to be awarded to the plaintiff for loss of earnings and general damages. The claim for future medical expenses will be resolved by an order that the defendant furnishes to the plaintiff the undertaking contemplated in section 17(4)(a) of the Road Accident Fund Act, Act No. 56 of 1996.

[3] It is the plaintiff's case that the collision was caused by the negligence of the first insured driver and therefore the plaintiff must succeed in his claim if 1% negligence on the part of the first insured driver is proven.

[4] The plaintiff's testimony is contained in an affidavit deposed to by him on 12 April 2016 in which his version of how the collision occurred is set out.

[5] The plaintiff was a front seat passenger in the second insured motor vehicle. At around 6h25 on London Road in Alexandra, the driver of the second insured vehicle attempted to avoid colliding into a stationery truck (the first insured vehicle) but was unsuccessful because he did not apply the brakes of the vehicle timeously.

[6] On the evidence I am prepared to find that both insured drivers were negligent and that their joint negligence caused the collision. This being so, I find that the defendant is liable to compensate the plaintiff to the full extent of his proven loss.

[7] The plaintiff repeated Grade 11. He holds a Grade E, D and C security certificate issued by PSIRA. [1] He also holds a Code 10 driver's license. Save for an extended period of unemployment between April 2009 and February 2014, the plaintiff has been employed since 1996. The extended period of unemployment was attributed to the absence of employment prospects in the Standerton area.

[8] The Plaintiff had been employed as a grade C security officer at Survey Security Services since 29 March 2014. At the time of the accident he was stationed at the Ster Kinekor head office in Kramerville.

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[1] However, the security certificate issued by PSIRA has expired.

[9] As security officer he was required amongst others to control access at the gate to an office park, patrol the entire office park (which usually took around three (3) hours). The job demanded frequent standing and the occasional climbing of stairs. He worked twelve hours a day for three days a week. He returned to work after the accident but his employer was not prepared to retain him because of the restrictions imposed by the injuries suffered in the collision and the fear on the part of the employer that the plaintiff may injure himself while on duty. The UIF reflects retrenchment as the reason for the termination of his employment.

[10] The plaintiff was unable to secure employment after the accident. However, after relocating to Pretoria he secured employment at Servest Security Services from 29 March 2014 to 3 March 2016. He was retrenched because of his injuries. He has been unemployed since then. He has applied for work as a general worker but was told that he lacked physical strength to qualify.

[11] Dr SP Maelane, the plaintiff's orthopaedic surgeon completed the RAF 4 Form. He is of the opinion that the plaintiff qualifies under paragraph 5.1 of the Negative narrative test for serious long-term impairment for loss of body function. The total WPI according to him is 10%.

[12] It is evident from the various documents and reports filed by the plaintiff that the plaintiff was injured in the collision. He sustained a scalp laceration and an Achilles tendon

rupture. He underwent amongst others a debridement of the left ankle and a repair of the raptured Achilles tendon.

[13] Due to his injuries the plaintiff was hospitalized for about a month. After his discharge he remained reliant on crutches for mobility until December 2016.

[14] Having examined the plaintiff Dr Maeleane found that the plaintiff was suffering from post-traumatic osteoarthritis of the left ankle. The X-Rays reflected (i) a healed medial malleolar fracture of the left ankle; (ii) a healed base of the second metatarsal fracture; (iii) diffuse osteopaenia of the bones in the left foot, with decreased ankle joint space.

[15] The plaintiff also consulted the defendant's orthopaedic surgeon Dr Prins. Dr Prins concluded that the plaintiff had sustained an open fracture of the left calcaneus which had been treated surgically. However, the plaintiff has been left with a mal-united calcaneus and a painful scar with decreased function of the ankle.

[16] The plaintiff complained to the industrial psychologist that he suffers from daily headaches and a lack of sleep causes his eyes to hurt. Both his arms hurt when he lifts heavy objects. He experiences pain in the lower back when rising from a bed and when undertaking physical activities. Walking for long distances results in pain in both legs from the knees down. The plaintiff's left leg according to the industrial psychologist is shorter than the right leg and this causes pain in the right leg. According to the industrial

psychologist the plaintiff does not take medication to relieve his headaches but sleeps instead.

[17] His other complaints to the industrial psychologist were (i) a disrupted sleep caused by pain and discomfort in his legs; (ii) nightmares; (iii) impairment of short-term memory; (iv) inability to remain focused; (v) feelings of anger which cause him to cry; (vi) anxiety when traveling in a vehicle; (vii) the inability to participate in pre-morbid recreational and leisure activities such as table tennis and soccer.

[18] Dr Prins is of the opinion that the decreased function of the plaintiff's left ankle renders him an unequal competitor as (i) a security officer and (ii) in the open labour market. In his view the plaintiff has reached maximal medical improvement.

[19] The occupational therapist is of the opinion that the plaintiff partially meets the demands of sedentary and light demand work. He does though present with considerable standing and walking restrictions which would restrict his prospects within the light classification (despite his load handling capacity falling within the light category). The plaintiff displayed limitations when it comes to prolonged periods of sitting. This restricts his prospects within the sedentary classification unless the position allowed for regular changes in position. The plaintiff was accordingly best suited to semi-sedentary work demands in which he can take regular self-select movement breaks and alternate between sitting, standing and walking as needed, and where frequent load handling is not required of him. Furthermore, because of the

underlying left ankle foot and joint pathology alluded to by the orthopaedic surgeons the plaintiff is regarded permanently best suited to semi-sedentary type work where high agility demands as sustained positioning or weight bearing is not required.

[20] The occupational therapist's assessment of the plaintiff's prospects of future employment are that the plaintiff is not deemed to be suited to perform work as a Security Officer because his current physical ability is not in keeping with the critical demands. It is also unlikely that he will be able to secure a suitable alternative position in the open labour market and his lack of experience in administrative or clerical work renders the plaintiff an unlikely candidate for a sedentary position.

[21] The industrial psychologist accepts that in the "but for" scenario the claimant would have been able to do any type of employment, relying on his physical strength. He if of the opinion that it cannot be concluded that the plaintiff is unemployable in the open labour market because he will be able to function as a Grade D Security Guard where it is only expected of him to do access controlling. However, considering that the plaintiff will only be able to do work which is of a semi-sedentary capacity and has never worked in a typical sedentary employment he will not secure such employment easily. The plaintiff's job choices have therefore been severely truncated. The industrial psychologist holds the view that the plaintiff's chances of being employed in the future and sustaining employment are slim.

[22] On a conspectus of the evidence the plaintiff is for all intents and purposes unemployable unless he is able to secure sympathetic employment.

[23] The actuary has calculated the plaintiff's past loss of earnings to be R495 312.00 and future loss of earnings to be R2 078 380.00. Insofar as the deduction for contingencies is concerned, the actuary has applied 5% on past loss of earnings and 10% on future loss. I find no reason to depart from the contingency deduction of 5% on past loss of earnings.

[24] Considering that the plaintiff is 43 years old, a higher contingency deduction for future premorbid loss of earnings is warranted. A 15% contingency is appropriate in the circumstances.

[25] Insofar as post-morbid loss of earnings is concerned, I cannot ignore the chance, albeit slim, that the plaintiff may secure semi-sedentary type of work in which he can take regular self-select movement breaks and alternate between sitting, standing and walking as needed, and where frequent load handling is not required or that he may secure employment as a Grade D Security Guard where it is only expected of him to do access control. In view of some residual earning capacity, a contingency deduction of 20% is warranted in the circumstances.

[26] The actuary's report is dated 11 June 2020. The plaintiff is directed to obtain a revised and updated calculation of the plaintiff's loss of earnings taking into account the contingency deductions assessed by me.

[27] The final issue that I must determine is the plaintiff's claim for general damages. I must do so with reference to the facts and circumstances surrounding this particular case. While I may have reference to comparable awards, ultimately the award must be fair to both the plaintiff and the defendant. The plaintiff did not testify as to his injuries and the sequelae thereof. The affidavit by the plaintiff is confined to how the accident occurred. I therefore have to rely on what is recorded in the reports of the experts.

[28] While the plaintiff complained of daily headaches it is significant that he does not take any medication for pain relief. This being so I cannot find that the headaches are severe or debilitating. Incidentally, the plaintiff did not mention that he suffered from daily headaches to the defendant's orthopaedic surgeon.

[29] The plaintiff informed the industrial psychologist that he has become forgetful, easily angers and is unable to stay focused. There is however no evidence as to what causes the headaches and these other ailments. I am not unmindful that the plaintiff sustained a scalp laceration. There is however no evidence that the plaintiff suffered a head injury that may be causing the headaches and the other ailments.

[30] The plaintiff complained to the industrial psychologist that his arms hurt when he lifts heavy objects and experiences pain in the lower back when rising from a bed and undertaking physical activities. Walking for long distances results in pain in both legs from the knees down. There is no evidence that the plaintiff suffered an injury to his arms.

[31] The plaintiff's industrial psychologist observed that the plaintiff's left leg is shorter than the right leg. However, the defendant's orthopaedic surgeon in his report (which is not confirmed under oath) records that he did not find any leg length discrepancy nor any difference in leg circumference. He does however note that the plaintiff walks with a slight antalgic gait on the left-hand side. The plaintiff reported to the latter chronic pain in the left foot and a loss of feeling in the toes and that he uses over-the-counter medication for pain relief. The defendant's orthopaedic surgeon noted a prominent scar over the postero-medial aspect of the plaintiff's left ankle.

[32] The plaintiff is not able to engage in the recreational activities he enjoyed such as playing soccer and table tennis. He mentioned to the occupational therapist that he witnessed the death of a fellow passenger in the accident and it seems that he was traumatized thereby. The difficulty I confront is that this is not supported by a clinical psychologist.

[33] The proposed treatment regime for the plaintiff is physiotherapy and analgesics. The plaintiff may have to undergo surgery to remove the posterior bony fragment.

[34] I am prepared to accept that the plaintiff suffered and continues to suffer pain and discomfort and that this will continue in the future and may be intense following the surgery to remove the bony fragment.

[35] Having regard to the evidence and the awards made for general damages by the courts over time, I have come to the view that a fair award for general damages in the circumstances would be R450 000.00.

[36] Upon receipt of the revised and updated actuarial calculations the plaintiff is requested to prepare a draft order reflecting the compensation for past and future loss of earnings as well as the award for general damages. Provision should also be made therein for the plaintiff to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act No 56 of 1996 and for the payment of interest and costs.

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

26 October 2020

Date of hearing: 29 June 2020

Appearances:

Plaintiff: Adv. G Lubbe

Defendant: No appearance.