

SOUTH AFRICA / JUDGMENT

Bezuidenhout v Road Accident Fund (47566/2020) [2021] ZAGPPHC 632 (28 September 2021) [2021] ZAGPPHC 632

COURT

North Gauteng High Court, Pretoria

BEFORE

Khwinana

CASE / FILE NUMBER

47566/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: 47566/2020

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

28

September 2021

In

the matter between:

L

BEZUIDENHOUT Applicant/Plaintiff

and

ROAD

ACCIDENT

FUND Respondent/Defendant

JUDGMENT

KHWINANAAJ

Introduction

- [1] The plaintiff has instituted an action against the defendant pursuant to a motor collision.
- [2] The plaintiff issued summons against the defendant on the 17th of September 2019. The summons was served on the defendant on the 18th of September 2019. The matter was not defended by the defendant. The plaintiff applied for default judgment on the 19th of April 2021. The defendant has been served electronically on 20 May 2021 with a notice of set-down, however did not appear in court.
- [3] The plaintiff claimed for past & future loss of income and general damages (R400,000-00), with the quantified future loss of earnings the total claim is R1,075,069-00. An undertaking to pay future medical costs in terms of Section 17(4)(a) of Act 56 of 1996 will be necessary. The plaintiff amended his particulars of claim prior to the hearing of this matter.
- [4] I have therefore been requested to determine both merits and quantum.

Parties

- [5] The plaintiff is L Bezuidenhout an adult male 58 years residing at an old age home in Turffontein, Johannesburg South.
- [6] The defendant is the Road Accident Fund a schedule 3A public entity, established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996 with its service office situated at 38 Ida Street Menlo Park Pretoria Gauteng Province.

The merits

- [7] The plaintiff, a 58-year-old male general labourer and car assembler, stopped at a stop street in West Turffontein Road at the intersection with Turf Club Street (also known as Webber Street) on his motorcycle. He waited for the traffic from both sides to clear and started to cross Turf Club Street while it was safe to do so.
- [8] The insured driver was standing with his vehicle across Turf Club Street at another stop sign. He turned to his right into Turf Club Street and collided with the plaintiff whereas he had the right of way. The accident happened on 12 February 2019 at around 07:00 while the sight was good and on a stable tar surface.
- [9] The plaintiff alleges that the insured driver was solely responsible for the accident. The plaintiff did not submit an Accident Report nor a statement from the insured driver. The version of the plaintiff has not been challenged and remains unrebutted. Counsel for the plaintiff submits that an award should be granted at 100 % of his proven or agreed damages.

[10] The evidence of the plaintiff has not been challenged and therefore the plaintiff is entitled to 100% proven or agreed damages.

Injuries

[11] Dr. T. Enslin recorded in the RAF4 that the plaintiff sustained the following injuries:

- "A fractured Tibia/Fibula with a 2cm length discrepancy and moderate to severe motion deficit in the left ankle;
- An impingement of the left shoulder; and
- A post-traumatic stress disorder."

[12] He further recorded RAF4 "Serious Injury Report":

- "assessed the plaintiff to qualify for general damages award on a Whole Person Impairment of 17% and also qualifies the plaintiff under the narrative test for the following category namely:
- Serious long-term impairment or loss of bodily function 4.2"

[13] Dr. H.B. Enslin, the Orthopaedic Surgeon, confirmed the injuries of the plaintiff and also made the following comment: "Due to an accident in 2000 where he accidentally shot himself and injured his Tibia, 30 % apportionment to his non-pecuniary damages of that earlier incident."

[14] The narrative test outcome of a serious musculoskeletal injury is confirmed:

- Confirms that the plaintiff qualifies for non-pecuniary (general) damages.
- The report of East Coats Radiology was used to confirm the findings of Dr. Enslin.

Treatment and sequelae

[15] After the accident the plaintiff was taken to Charlotte Maxeke Johannesburg Academic Hospital where he was admitted for three weeks. The Orthopaedic Surgeon, Dr. H.B. Enslin reported as follows regarding the injuries suffered by the plaintiff and the sequelae thereof on her general quality of life and ability to work:

"15.1 Clinical notes from the Charlotte Maxeke Johannesburg Academic Hospital state that the burr holes were drilled in 2018, and not in 2019, which was probably due to a head injury he sustained prior to the accident on 12.02.2019.

15.2 Mr Bezuidenhout had a history of epilepsy. He gives history of a previous fracture of his left tibia/fibula, which appears impacted compared to the previous fracture of the middle third of the left tibia.

15.3 His leg length discrepancy is partly due to the injury he sustained on 12.02.2019 as impaction is noted on the AP and lateral views of his left tibia.

15.4 The loss of movement in his left ankle is also partly due to the injury he sustained in the accident on 12.02.2019.

15.5 He remains symptomatic in his left shoulder. While symptoms and signs of the condition may wax or wane over time, further overall recovery or deterioration is not anticipated.

15.6 Mr Bezuidenhout's whole person musculoskeletal impairment has been assessed at 9 % by Dr T.J. Enslin. Mr Bezuidenhout has been left with serious long-term musculoskeletal impairment due to the fracture of his left tibia/fibula with leg length discrepancy and moderate to severe motion deficits in the left ankle, as well as the effects thereof on his ability to mobilise. He qualifies for non-pecuniary damages."

[16] Mrs. M. Beytel, the Industrial Psychologist reported the following current problems experienced by the plaintiff as a result of the accident:

- "He cannot stand or walk for long periods of time, because his left leg is shorter than his right leg, which affects his right lower back and right leg as well;
- He cannot run;
- He cannot sit on his knees or squat;
- He cannot pick up or carry heavy items due to pain in the left shoulder and left leg;
- He can only sleep on his back;
- He has to use rails when climbing stairs and must negotiate the steps with care;
- He struggles to negotiate uneven terrain due to his left leg, as he feels uncertain and scared that he might fall and hurt something else;
- His left leg is more painful in cold and inclement weather;
- His left arm becomes numb when he has to work above shoulder height;
- His left shoulder becomes very painful for no reason;
- He says he has to take taxis, and is very scared as a passenger in a taxi (it is his only way of transport); and
- His left leg is very stiff in the morning and he limps until his leg is warmer, however, he presented with a limping gait.
- He has become very forgetful;
- He is short-tempered and becomes irritable for no reason;
- He easily angers for no reason;

- He has become very emotional;
- He has become withdrawn and prefers to be left alone;
- He is very anxious as a passenger in a vehicle;
- He sometimes consumes alcohol;
- He suffers from headaches on a regular basis;
- He sometimes becomes dizzy;
- He suffers from pins and needles in his left arm and hand, as well as his left leg;
- Sometimes his left leg becomes numb; and
- His vision has been negatively affected by the accident in question."

Personal circumstances

[17] He is divorced and lives with his mother in a 1- bedroom house at the old age home.

Medical experts

[18] Dr. T. Enslin, the General Practitioner compiled the RAF4 serious injury form, and stated that the plaintiff's injuries total whole person impairment is = 17%.

[19] Industrial Psychologist, opines that Mr Bezuidenhout's family's employment history falls in the formal and informal labour market. The plaintiff is reported to have completed Grade 10 in 1978 and did not fail any grades during his school career. He is said to have enrolled in the South African National Defence Force for two years.

[20] He is currently unemployed. He has been unable to find work. He is fifty-seven years old and will probably be unable to find work. He will not be considered an equal competitor in the open labour market for work that requires high ambulatory demands, high standing tolerance, and repetitive use of the affected joints. When pain is present, he will require rest breaks to manage his pain and fatigue. This could indeed impact on his productivity.

[21] The Industrial Psychologist, Mrs. M Beytel reported the following of the plaintiff's injuries regarding his pre- and post-accident earning potential: Mr Bezuidenhout had very good employment, until he was retrenched due to Affirmative Action. Mr Bezuidenhout reported working as an All-rounder at Hill and Atlantis Auto when the accident intervened on 12 February 2019.¹¹ Mr Bezuidenhout had already reached his career ceiling at the time of the accident, and normal inflationary increases would have sufficed until the normal retirement age of 65 years.

[22] Mr Bezuidenhout returned to his pre-accident employment two months following the accident but was not able to perform his duties as expected, and he had to leave his job. Mr Bezuidenhout reported that the company has since closed down.

[23] Loss of Earnings

Mrs. Beytel said the following: "Having regarded the accident, and considering the available medical expert opinions on hand, Mr Bezuidenhout is no longer able to perform the same duties as prior to the accident in question, and he is left to only perform light type physical work of a sedentary nature as noted by Ms I. Kleynhans."

[24] Expert opines, that even with optimal treatment for his orthopaedic injuries, and considering his age (57 years), as well as pre-accident medical history of a brain injury with ongoing sequelae (inclusive of cognitive and emotional changes and epilepsy); it is unlikely that he will succeed in working as a Mechanic on a full-time basis. He is considered a vulnerable employee and he will find it difficult to physically compete with healthier individuals in the open labour market and will be at a disadvantage in terms of seeking future employment in the open labour market. (This was though partly probably already the case pre-accident from a head and brain injury perspective).

[25] Me. Ingrid Kleynhans, the Occupational Therapist (through Me. Carike Fourie), examined and tested the plaintiff and concluded the following: "Outcomes of this assessment show that Mr Bezuidenhout in his current capacity demonstrates the maximum ability to cope with work of light physical nature. From a physical perspective, factors underlying his performance included self-reported pain in his left shoulder, lower back and left lower leg; decreased range of movement in his left ankle and left shoulder, and generalised deconditioning."

[26] This expert recommends conservative treatment only, without future surgical intervention. Expert further submits that he is suited to tasks of a light physical nature to lessen the strain on his affected joints. Mr Bezuidenhout would benefit from use of a built-up shoe or shoe insert to accommodate the leg length discrepancy and to provide alignment of the anatomical body segments. A raised shoe and innersoles could further improve tolerance for sustained postures.

[27] When pain is present, he will require rest breaks to manage his pain and fatigue. This could indeed impact on his productivity. Even with optimal treatment for his orthopaedic injuries, and considering his age (57 years), as well as pre-accident medical history of a brain injury with ongoing sequelae (inclusive of cognitive and emotional changes and epilepsy), it is unlikely that he will succeed in working as a Mechanic on a full-time basis.

[28] Ms I. Kleynhans opines in summary the following:

- He is considered a vulnerable employee and he will find it difficult to physically compete with healthier individuals in the open labour market; he will be at a disadvantage in terms of seeking future employment in the open labour market (This was though partly probably already the case pre-accident from a head and brain injury perspective).

- Furthermore, Mr Bezuidenhout has a documented and reported pre-existing history of epilepsy (Unrelated to the accident in question).
- These difficulties are expected to result in sub-optimal performances in the competitive open labour market (Epilepsy related, pre-accident).
- From a physical perspective, and taking into consideration the expert opinions on hand, counsel opines that Mr Bezuidenhout will remain symptomatic with regards to his left arm. It is evident that Mr Bezuidenhout has been left with serious long-term musculoskeletal impairment."

[29] It is however essential to apply apportionment to his non-pecuniary damages. 70 % Apportionment should be applied to the accident on 12.02.2019 and 30 % to the fracture of his tibia when he accidentally shot himself in 2000. Clinical and radiological examinations on 19.08.2020 confirm satisfactory bony healing of the left distal tibia/fibula with severe motion deficits in the left ankle and a 2 cm leg length discrepancy, with the left leg shorter than the right leg. He has been left with serious long-term musculoskeletal impairment as a result of the injuries sustained.

[30] Furthermore, Mr Bezuidenhout has a documented and reported pre-existing history of epilepsy (Unrelated to the accident in question). This was kept in mind during his engagement in physical assessment tasks. Epilepsy: Epilepsy can affect employment for a variety of reasons. Many employers are reluctant to hire a person they know has epilepsy, even if the seizures are controlled by medication. If the employee suffers a seizure while at work, they could harm themselves depending on the nature of the work. Many people whose seizures are successfully controlled by medication suffer from a variety of side effects, most notably drowsiness, which may affect job performance. Many companies prohibit or restrict people with epilepsy from performing certain duties, most notably driving or operating dangerous machinery, thereby lowering the pool of jobs available to people with epilepsy.

There are many hazards that people with epilepsy, including those whose seizures are fully controlled by medication, face in the workplace.

Past employment possibilities/opportunities

[31] According to Stats-SA survey earnings, at just below level B4 (R96,000.00 per annum) in the lower quartile. Mr Bezuidenhout would have received normal inflationary increases for the remainder of his employment career until the age of 65 years, after which he would have opted to go on pension.

Future employment possibilities/opportunities

[32] Following the accident, counsel submits that at best, Mr Bezuidenhout will have to try his hand at self-employment, where he will have to rely on an assistant to do the physical work, such as gardening services or rubble removing services. This will put Mr Bezuidenhout in the informal labour market, where he will not be able to earn on par with his pre-accident earnings.

*He will struggle with the stiff competition that are present in the labour market due to the extremely high unemployment rate in South Africa, the detrimental effect of the COVID-19 pandemic on the economy, and the number of job losses since March 2020 as a direct result of the pandemic.

*But for the accident and considering Mr Bezuidenhout's level of education and employment at the time of the accident, Mr Bezuidenhout would have remained employed with his pre-accident company for as long as his health would have permitted.

*Mr Bezuidenhout would also have continued to seek alternative employment with another company in order to earn a better income, until he was successful, after which he would have remained employed for the remainder of his employment career.

* Mr Bezuidenhout had already reached his career ceiling at the time of the accident, and normal inflationary increases would have sufficed until the normal retirement age of 65 years.

[33] It is submitted that the plaintiff has suffered severe and serious injuries that led to a change in his daily livelihood and especially his working ability all of those to the extent that it warrants an amount for general damages and the past and future loss of income. Contingencies for future loss of Income and other factors considered by the Actuary.

Pre-accident Earnings

[34] He would thus remain unemployed for 70 % of the remainder of his career, which should be seen as a 70 % partial loss of income up until the normal retirement age of 65 years. Normal inflationary increases should suffice in this regard, and Mr Bezuidenhout's actual earnings utilized for calculation purposes. In the case of Mr Bezuidenhout the writer suggests that normal contingencies suffice for any further eventualities.

[35] The actuary, Mr. Johan Sauer, calculated the plaintiff's loss of past and future earnings: Past loss of earnings: R221,885-00 Future loss of earnings: R453,184-00 Total loss of earnings: R675,069-00. The Actuary took into account that the experts concluded the plaintiff would not be able to continue his previous employment on a full time basis and commented on the assumptions as basis for his calculations as follows: "According to the report of Marissa Beytell (Industrial Psychologist), dated 2021/03/23, paragraph 9.1, 10.1 and 11, we project no income for Mr. L. Bezuidenhout, to allow for two months loss of sick leave following the accident and due to unemployment as he had to leave his job upon returning to work. In the future, should he manage to obtain employment, he will be able to earn on par with his pre-accident income but will suffer periods of unemployment between jobs, being unemployed approximately 70 % of the time.

- [36] We therefore assume 30 % (100 % - 70 %) of the same post-morbid earnings as in the pre-morbid scenario, but illustrate a higher future post-morbid contingency deduction to allow for increased employment vulnerability, labour incapacity, uncertainty, possible long periods of unemployment and early retirement."
- [37] The Actuary used the future post-morbid contingency for this scenario of 20 % based on the WPI of 17 % as well as more vulnerability with regard to future employment. The reasons for the instruction for the higher future post-morbid contingency deduction are to allow for increased employment vulnerability, labour incapacity, uncertainty and possible long periods of unemployment.

Analysis

- [38] It is trite that the plaintiff always bears the onus of proving negligence on the part of the defendant on a balance of probabilities.[1] Eksteen AJP[2] said

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

- [39] Having regard to the versions before me and considering the evidence tendered, I am of the view that the version of the plaintiff is more probable. I hold the view that the plaintiff has discharged the onus resting on him to prove on a balance of probabilities that the insured driver was negligent.
- [40] Consequently, I find that the defendant solely caused the motor collision and that the degree of negligence is 100 % against the defendant.

- [41] "The generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse and all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the buffets and ignore the rewards of fortune." [3] The pre-existing conditions have been taken into account and contingencies have been applied.
- [42] The plaintiff is at the afternoon of his life and was about to retire. The income that he was earning has been taken into account against the type of work that he was doing. The actuary's calculations took into account the pre-existing conditions. I am inclined to agree that the percentages that have been alluded to with regard to his injury and the epilepsy. I am satisfied that the plaintiff must be compensated at the sum of R 675 069.00 for both past and future loss of earnings.
- [43] General damages are decided upon by the tribunal which decision is governed by PAJA. [4] In *Road Accident Fund v Duma and Three Similar Cases* 2013
- (6) SA 9 (SCA) at paragraph [19] the Supreme Court of Appeal decided:
- "... Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious. Appreciation of this basic principle, I think, leads one to the following conclusions:
- (a) Since the Fund is an organ of state as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regs 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as 'serious' constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A 'decision' is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA.
- (b) If the Fund should fail to take a decision within reasonable time, the plaintiff's remedy is under PAJA.
- (c) If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within a reasonable time or because no legal or medical basis is provided for the decision, or because the court does not agree with the reasons given.
- (d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.
- (e) Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to the court. The court's control over these decisions is by means of the review proceedings under PAJA."
- [44] In the result:

44.1 The Defendant is liable to pay 100% (ONE HUNDRED PERCENT) of the proven or agreed damages of the Plaintiff with regards to the merits of the matter.

44.2 The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on 12 February 2019. The aforesaid undertaking is limited to 100%.

44.3 The plaintiff is awarded Past and Future Loss of earnings at R 675 069.00.

44.4 The general damages be postponed sine die.

44.5 The defendant to pay proven or agreed costs on a party and party scale.

[45] The following order is made:

The draft order marked "X" is made an order of Court.

E.N.B. KHWINANA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Case No.: 47566/2020

On 28 September 2021

Before the Honourable Justice Khwinana AJ

Electronically via Video-conferencing (MS Teams)

Order granted electronically in accordance with the Directives regarding special arrangements during the National State of Disaster (Covid-19)

In the matter of:

L BEZUIDENHOUT Plaintiff

ROAD ACCIDENT FUND Defendant

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her Secretary. The date of this Order is deemed to be 10 August 2021.

DRAFT ORDER

AFTER READING THE PAPERS AND HEARING COUNSEL THE FOLLOWING ORDER IS MADE:

1. The Defendant is liable to pay 100% (ONE HUNDRED PERCENT) of the proven or agreed damages of the Plaintiff with regards to the merits of the matter.

2. The defendant is ordered to pay the plaintiff an amount of R 675 069.00 (SIX HUNDRED AND SEVENTY- FIVE THOUSAND AND SIXTY-NINE RAND AND ZERO CENT) as a full and final settlement on the plaintiff's claim within 180 (one hundred and eighty) days and no interest will be charged unless payment has not been effected within 180(days).
3. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on 12 February 2019. The aforesaid undertaking is limited to 100%.
4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale for 07 June 2021.

4.1 In the event that the costs are not agreed:

4.1.1 the Plaintiff shall serve a notice of taxation on the Defendant's attorneys on record.

4.1.2 The Plaintiff shall allow the Defendant 14 (fourteen) Court days from date of allocatur to make payment of the taxed costs.

4.1.3 should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 7% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

5. The amounts referred to in paragraphs 2 and 4 above will be paid to the Plaintiff's attorneys, Slabbert & Slabbert Attorneys, by direct transfer into their trust account, the details of which are as follows:

Account holder: SLABBERT ATTORNEYS INC

Bank: FNB

Branch Code: 250655

Account no: 62676744181

Ref: TPC/0182

6. The contingency fee agreement entered into between the Plaintiff and the attorney complies with Contingency Fee Agreement Act. It is recorded that the total fees are inclusive of VAT recoverable in terms of the "CFA" Act and shall not exceed 25% of the total capital amount set out in paragraph 2 supra.
7. General Damages are postponed sine die.

BY ORDER OF THE COURT:

REGISTRAR

On behalf of Plaintiff: Slabbert & Slabbert Attorneys

Adv. P. Van Der Schyf

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Ref: F SLABBERT/TPC/0182

On behalf of Defendant: No appearance

RAF Ref: 560/128803959/326/0

Link Number: 4968720

CASE NUMBER: 47566/2020

HEARD ON: 02

June 2021

FOR THE PLAINTIFF: ADV. P. VAN DER SCHYF

INSTRUCTED BY: Slabbert

& Slabbert Attorneys

FOR THE DEFENDANT: NO APPEARANCE

DATE OF JUDGMENT: 28 September 2021

[1] Bester v Sivakumar (15542/2013)

[2015] ZAGPPHC 597 (23 July 2015)

[2] National Employers General Insurance Co Ltd v Jagers 1984

(4) SA 437 (E) at 440E-441A

[3] NL obo M v Road Accident Fund (38339/2014)

[2018] ZAGPJHC 590 (17 September 2018)

[4] Mphahla v Road Accident Fund (698/16)

[2017] ZASCA 76 (1 June 2017) Mathopo JA writing on behalf of the majority stated at paragraph 11: "If the Fund is not satisfied that the injury is serious, the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection on appeal in terms of regulation 3(4)."

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