
SOUTH AFRICA / JUDGMENT

Diale v Road Accident Fund (RAF72/2014) [2017] ZANWHC 120 (9 November 2017)

[2017] ZANWHC 120

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

RAF72/2014

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“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: RAF72/2014

REPORTABLE

In the matter between:-

SEKETE JOHANNES DIALE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] Sekete Johannes Diale (plaintiff) instituted an action against the Road Accident Fund (RAF) for damages suffered in a motor vehicle collision which occurred on the 12 May 2013 when the driver of a motor vehicle with registration numbers HSY 205 NW collided into plaintiff.

[2] As a result of the aforesaid collision, plaintiff sustained the following injuries:

2.1 Right fracture clavicle;

2.2 Right fracture tibia and fibula; and

2.3 Left fracture of the knee.

[3] Plaintiff claimed damages in the amount of R1 600 000.00 (ONE MILLION SIX HUNDRED THOUSAND RANDS) which amount is made up as follows:

3.1 Past and future medical expenses

- R100 000.00

3.2 Loss of earnings

- R1 000 000.00

3.3 General damages

- R500 000.00

[4] On the 23 June 2016, this Court granted an order by agreement between the parties wherein defendant conceded merits 100% in favour of plaintiff. Defendant further agreed to pay plaintiff general damages in the amount of R450 000.00 and furnished an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act.

[5] The only issue for consideration is loss of earning and earning capacity. The parties from the onset agreed not to call experts and to rely on the experts' reports that were discovered.

B. EVIDENCE

[6] Plaintiff's industrial psychologist, Patricia Gaongalelwe Baloyi (Ms Baloyi) in her report, said inter alia the following about plaintiff:

6.1 His highest education qualification was grade 10;

6.2 He was generally fit and healthy before the accident;

6.3 He was 30 years old at the time of the accident and 32 years old at the time of the assessment;

6.4 His employment history commenced in 2003 as a casual worker for Foschini. He held various positions as a driver, 'pipes, tracks and ventilation assistant', cleaner, SME operator and his last employment before the accident was in 2011 where he was employed as a general worker for 'Gustav Spray, painting and panel betears'.

[7] Under the heading, ‘pre and post-accident ability and potential’, Ms Baloyi opined that:

Pre-accident (two scenarios)

7.1 Plaintiff would do casual jobs for at least 2 – 3 years before securing a permanent job. He would enter the open labour market at Paterson A1 and would progress to a Paterson B1 towards the age of

45. From age 45 to 65 his career would have stabilised and he would work until retirement age.

7.2 As a general worker at ‘Gustav Spray painting and panel beaters’ he earned around R1500 to R1700.00 per week. His income falls between the medium and upper quartile earnings of semi-skilled labourers. He would at age 45 develop towards the upper quartile. From age 46 to 65 years his career would have stabilised and he would work until retirement.

Post-accident

7.3 Ms Baloyi defers to the occupational therapist Mr Sekati whose opinion is set out later in this judgment.

[8] Under the heading, past and future loss of income. Ms Baloyi said the following:

Past loss of income

8.1 Mr Diale managed to resume his pre-accident duties a year after the accident and he was not paid at all. He tried to work and he was released after a month as he was struggling to execute his duties.

Future loss of income

8.2 Based on Mr Diale’s educational qualification and his work history, he would qualify for jobs that fall under the unskilled labour category. He would with some experience and exposure qualify for jobs that falls under semi-skilled labour. His employer had to release him due to the limitations he had that hindered him from executing his duties as expected. He will need to excuse himself from work, if employed, to attend to treatments as suggested by Dr Bila. He will therefore suffer loss of income and this might further impact on his productivity and his relations at work with fellow workers who might feel overworked and employers who expect work to be done.

[9] Ms Baloyi concluded that plaintiff’s

“employability and future earning capacity has been negatively impacted as a result of the injuries he sustained in the accident. Mr Diale is compromised and will struggle to gain entry back into the labour market. He will no longer be a fair competitor in the open labour market with his peer who are uninjured”

[10] Plaintiff’s occupational therapist, Mr Thabo Paul Sekati (Mr Sekati) opined that:

“The evaluator is of the view that weight bearing on the right leg as well as lifting and carrying of heavy items will further exacerbate his symptoms. The claimant will need to avoid any occupation which will further worsen pain.

Considering the above mentioned difficulties, the evaluator is further of the view that the claimant will be vulnerable and disadvantaged in a competitive work place in terms of efficiency, effectiveness and productivity in comparison to a healthy individual of the same age in occupations requiring optimum bilateral upper and lower limb function and strength.

Considering the above difficulties, the claimant will have difficulties in performing a job where prolonged standing and walking as well lifting and carrying of heavy objects is required. He will battle to cope with most manual labour occupations that demand physical abilities mentioned above”.

[11] Counsel for plaintiff, Mr Davis submitted that plaintiff was vulnerable and disadvantaged in a competitive work place and that he would not be able to compete in the work place with a healthy and abled persons.

[12] Plaintiff’s actuary, Johan Sauer, projected post morbid, no further income potential, based on the plaintiff’s experts’ reports. He calculated the quantum for total loss of earnings in the amount of R2 493 954.00 made up as follows:

Post loss - R 200 531 .00

Future loss - R 2 293 423 .00

[13] Defendant’s industrial psychologist, Moipone Kheswa (Ms Kheswa) in her report states that plaintiff was diagnosed with arthritis in

2010. Ms Kheswa took the pre-existing condition into consideration when discussing plaintiff’s pre-accident potential. She said “he entered the open labour market as a General Worker. His employment history also reflects working as such in which capacity he worked at the time of the reported accident. Writer is however sceptical if he was going to work successfully up until normal retirement to 60-65 years because of his pre-existing ailment. He even left a job as a Machine Operator because of this ailment. He further reported that since he had this ailment he experiences cramps in his whole body. The writer defers to medical opinion regarding his pre-existing ailment and its likely effects on his ability to work up to normal retirement age”.

[14] Under post-accident potential, Ms Kheswa opined that:

“...from the physical perspective, based on the available information and experts opinions, it is evident to the writer that post-accident Mr Diale’s scope of employment had been reduced by the sequelae of this accident under review. He currently won’t be able to compete fairly for a job in the open labour market for occupations that require heavy physical exertion.

One wonders whether his pain symptoms will increase in future and to what extent. The intensity of his pain will directly correlate with the percentage of impairment on his work capacity, meaning the greater the pain, the greater negative influence on his work output.

The writer notes from the findings of the appointed experts that Mr Diale will likely not be able to execute the full range of his pre-accident roles and that he will remain compromised in the open labour market and remains an unequal competitor. This accident however whilst it resulted in functional truncation and reduced job options, it did not make him unemployable in the open labour market. Success Moagi, occupational therapist made it quite clear that Mr Diale's physical capacity presently meets the physical requirements of sedentary with some aspects of light type of work category.

The expert went on to indicate that further improvement can also be promoted by optimal pain management and rehabilitation to improve the affected occupational performance and education on methods of task approach and task execution will also likely promote desirable results in terms of lowering discomfort, maintaining integrity of affected joints.

Dr H L Moloto, orthopaedic surgeon also buttressed the above by reporting that the injuries he sustained have not affected his ability to work, the injuries have left him with 5% whole person impairment and that his pain should improve with treatment.

The writer however want to bring to the fore that fact that the current periods of unemployment Mr Diale is suffering can however not be solely attributed to this accident in question but partly to his poor education and skills set as well as high unemployment rate in the country which is also flooded with unskilled youths (supply of unskilled labour over exceeds demand) who would also have caused a serious challenge to him even in the absence of this accident.

Further the writer also want to bring to attention that Mr Diale reported that he was diagnosed with Arthritis sometimes in 2010 and he is currently experiencing cramps in his whole body. This accident in question may only have exacerbated the effects of his pre-existing ailment.

Even in the unlikely event that the recommended treatment and occupational therapy interventions did not yield the desired results,

alternatively employment for him would be to work in a self-employed capacity, (as a Spaza shop owner) with a home based tuck-shop selling bread, airtime, cigarettes, sweets, fruit and vegetables etc. assisted by someone who would help his carry or lift heavy loads.

His profit will however lie between the median and upper quartile band when he reached 45 years, taking his injuries into consideration

since he will be competing with his uninjured counterparts. Any increases to his revenue will be as a result of inflationary pressure.

A deduction can be made that Mr Diale can continue to execute majority of manual light jobs like light gardening, office cleaning,

shoes repair, Vendor utilizing a trolley just to mention but a few. He will just earn comparable income to his pre-accident earnings.

This accident did not render him unemployable but reduced his functionality and job options. What seems to worsen his situation is the high unemployment rate which South Africa along with other nations is currently battling with mainly as a result of the after effects of the 2008/9 global economic recession which are still nagging the world over. His pre-existing ailment also adds to his predicament”.

[15] Under loss of earnings and compensation Ms Kheswa said:

“The accident did not render him unemployable, but has compromised his functional capacity because of pain. He retains the residual capacity for sedentary with some aspects of light type of work category as per occupational therapist Success Moagi’s findings. The effects of his pre-existing ailment can however not be taken lightly. This could be serious since he had already left a job sometimes in 2011 because of this. This accident may only have exacerbated his situation”.

[16] Defendant’s occupational therapist, S Moagi said the following:

“During assessment, it was noted that currently Mr Diale’s current rate of work, work qualification profile as well as physical capacity could not meet the physical requirements for occupations that fall within full range of light, medium, heavy to very heavy type of work category. He will also struggle with activities that require a person to frequently bilaterally work above shoulder level and requires constant use of right upper limb (dominant) and put constant strain on right upper limb. His injuries to his right clavicle and right scapula have resulted in poor manual dexterity and endurance, as well as reduced grip strength and he experiences difficulty in performing tasks that require frequent bilateral upper limb function, lifting.

It was also evident that his right lower limb pain has a negative effect on his ability to frequently work below hip/knee level inclusive of squatting position. He has reduced static standing endurance and reduced walking endurance due to right knee and left toes pain.

Mr Diale physical capacity presently meets the physical requirements of sedentary with some aspects of light type’s type of work category.

The physical strength required of his pre-accident occupations as a general worker and welder falls within medium strength and require

optimal, pain free upper and lower limb functions. Therefore, from a physical perspective, Mr Diale’s physical capacity for his pre-accident occupation is compromised.

The injuries he sustained will limit his choice of occupation as some jobs will aggravate his symptoms. He will not be able to execute any hard labour and that will make it difficult for him to compete in the open labour market within his vocational skills and vocational

exposure given his physical presentation, his limited level of education, and limited experience within the open labour market.

It has been over two years since the accident happened and Mr Diale has not been employed and has not received optimum treatment and rehabilitation. The writer is of the opinion that his vocational prospects have been affected by injuries sustained in the accident.

Given the limitation in the right dominant hand (reduced grip strength and restricted range of movement) as well as “non-union of the right clavicle’ as noted by Dr Moloto (orthopaedic surgeon), the writer is of the opinion that, Mr Diale has been rendered vulnerable and he will be disadvantaged in a competitive work place in terms of efficiency, effectiveness and productivity in comparison to a healthy individual of the same age. He will always be unable to cope with most manual occupations.

Further improvement can also be promoted by optimal pain management and rehabilitation to improve the affected occupational performance.

Education on methods of task approach and task execution will also likely promote desirable results in terms of lowering discomfort,

maintaining integrity of affected joints.

The writer takes note of a statement by Dr Moloto (orthopaedic surgeon) stating that “The injuries he sustained have not affected his ability to work”.

Mr Diale’s work ability has being negatively affected by injuries sustained in the accident under discussion, he will be best suited for sedentary to static light work. Considering his age (31 years) and highest level of education (grade 10) as well as vocational exposure (welding, panel beating and drainage) whether he can be trainable in sedentary to static light work deference is made to educational psychologist and as to whether he can secure employment within sedentary to light work deference is also made to an industrial psychologist.

With reference to the above the writer is of the opinion that Mr Diale needs support and counselling and education in order for him to be aware of opportunities available to him with regards to alternative options for employment within his residual physical capacity if any”.

[17] Defendants’ actuary, Gerard Jacobson in calculating plaintiff’s future loss of income relied on plaintiff’s industrial psychologist’s report that plaintiff will fall under the unskilled labour category and would with some experience and exposure qualify for jobs that fall under semi-skilled labour. He said “Ms Baloyi further suggests that Mr Diale will struggle to re-enter the labour market and has been rendered and unfair competitor. Ms Baloyi does not specify a post-morbid earnings progression. Based on Ms Baloyi’s opinion, I have assumed that Mr Diale will progress in

future in line with Basis B above. Furthermore, I have allowed for a higher than normal post-morbid contingency deduction in order to account for the issues outlined by Ms Baloyi. Please refer to paragraph 5.2 in this regard”.

[18] Defendant's net future loss of income was compiled by defendant's actuary, Mr Jacobson to be an amount of R669 334.00 which amount is made up as follows:

Net post loss - R229 337.00

Net future loss -

R389 997.00

C. EVALUATION

[19] Counsel for defendant, Mr Sona conceded that there was no evidence, of a pre-existing condition of arthritis save for Ms Kheswa's report. Mr Sono submitting that defendant was accordingly not persisting with same. This concession was in my view correctly made.

[20] Both Mr Davis and Mr Sono were ad idem that as their respective experts were poles apart on the issue of whether post-accident, plaintiff was unemployable or not, that this court should add both plaintiff and defendant's actuarial calculations together and divide it by 50%. Courts generally rely on experts opinions when arriving at a reasonable quantum of damages. Having read the experts reports, I am of the view that the aforesaid proposition would result in a fair, just and equitable calculation for future loss of income.

[21] In respect of plaintiff's past loss of income, I accept plaintiff's actuarial calculation of R200 531.00 and a fair and reasonable quantum for future loss of income is the amount of R1 341 700.00. The total net loss is the amount of R1 542 231.00 which is computed as follows:

Past Loss of Income -

R 200 531.00

Future Loss of Income -

R1 341 700.00

Total Net Loss R1542231.00

D. ORDER

[22] In the result,

22.1 The defendant shall pay the plaintiff an amount of R1 542 231.00 on or before the 15 December 2017 into the plaintiff's Attorneys account, in full and final settlement of the plaintiff's loss of earnings claim, which amount shall be payable by direct transfer to Modzuka Incorporated, Trust account, the details are as follows:

Account holder name: Modzuka Inc

Type of Account: Trust Account

Account Number: 6...

Branch code:

2...

Branch name:

Gezina, Pretoria

Bank name:

FNB

22.2 The capital amount referred to in paragraph 22.1 will not bear interest unless the defendant fails to effect payment thereof on or before the 15 December 2017, in which event the capital amount will bear interest at the rate of 10.25% per annum calculated from and including the date of payment thereof.

22.3 Defendant shall make payment of the plaintiff's taxed or agreed party and party costs, on High Court scale.

22.3.1 The party and party costs are payable within 7 days after receipt of the stamped allocator by the defendant's attorneys where after interest will be charged at 10.25% per annum from the due date to date of payment.

22.3.2 Contingency fee is applicable.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 01 NOVEMBER 2017

DATE OF JUDGMENT

: 09 NOVEMBER 2017

ADVOCATE FOR PLAINTIFF : ADV N DAVIS (SC)

ADVOCATE FOR DEFENDANT : ADV H T SONO

ATTORNEYS FOR APPLICANT : GURA TLALETSI & PARTNERS

(Instructed by: Modzuka Incorporated)

ATTORNEYS FOR RESPONDENT : MAPONYA INCORPORATED

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