

SOUTH AFRICA / JUDGMENT

Jancovich N.O v Road Accident Fund (652/2014) [2020]

ZAFSHC 39 (2 March 2020)

[2020] ZAFSHC 39

COURT

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

652/2014

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE STATE

DIVISION, BLOEMFONTEIN

Case number:

652/2014

In

the matter between:

ADV

DIEDERICK JANCOVICH N.O.

(Appointed

as curator-ad-litem on behalf

of

the patient, MARKUS PHILLANO MILES,

Identity

number: [...])

PLAINTIFF

and

ROAD

ACCIDENT FUND

DEFENDANT

JUDGMENT

BY: C REINDERS, J

HEARD ON: 27 NOVEMBER 2019

DELIVERED ON: 2 MARCH 2020

- [1] On 25 February 2009 on the M10 Road in the vicinity of Heidedal, Bloemfontein the plaintiff was a front seat passenger in a truck when the driver thereof lost control and overturned the truck ("the incident"). Plaintiff was seriously injured and instituted action against the defendant wherein various damages are claimed.
- [2] Adv Diederick Jancovich of the Kimberley Bar was appointed as curator ad litem by way of an order of this court dated 25 January 2018. At the commencement of the trial I was informed by Mr Nortier, appearing on behalf of the plaintiff, that defendant had already conceded merits as recorded by the court order dated 31 August 2018.
- [3] Mr Nortier stated that defendant abandoned his claim for past medical expenses. In respect of future medical expenses plaintiff was furnished by the defendant with an undertaking in terms of Sec 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the Act"). Accordingly I had to adjudicate plaintiff's claim for general damages, past loss of earnings and future loss of earnings. The parties agreed that the expert reports would serve as evidence, and the parties would rely on the report of the plaintiff's actuary, Mr Charl du Plessis of Munro Actuaries, dated 26 November

2019 (Exhibit "E"). All of the aforementioned was confirmed by Mr De la Rey who represented the defendant.

- [4] Plaintiff's bundle containing reports of both plaintiff and defendant's expert witnesses was handed in as Exhibit "A". Joint minutes in respect of the industrial psychologists Dr EJ Jacobs and Ms M Kheswa (Exhibit "B"); clinical psychologists Ms M Coetzee and Dr T Rapapali (Exhibit "C")

and occupational therapists Mrs N Potgieter and Ms S Moagi (Exhibit "D"), were handed in by agreement.

- [5] To prove his damages plaintiff testified and called his brother Mr Deon de Wee and Dr EJ Jacobs as witnesses. Defendant did not lead any viva voce evidence. I do not intend to repeat the evidence tendered by these witnesses except where applicable to adjudicate the matter. I have been satisfied that Dr Jacobs is a qualified and experienced expert in his field. All three witnesses were good witnesses and I do not have any reason not to accept their testimonies.
- [6] The extent of the injuries that the Plaintiff suffered are set out in his second amended particulars of claim (and confirmed by expert witnesses) as:

A moderately severe head injury; rib cage fractures with a haemothorax; blunt abdominal trauma with a laceration of the spleen; multiple right hand metacarpal fractures; a thoracic spine back sprain with unrecognized mid thoracic vertebral body compression fractures.

The sequelae of these injuries was not disputed and include mental slowing, fatigue, poor concentration, impaired memory; speech

disturbance, depression, chronic pain, loss amenities and of enjoyment of life.

- [7] Plaintiff testified that he was 26 years of age at the time of the incident and gainfully employed by Express Model Training as a general work and truck assistant earning R 2 159-00 monthly and occasionally overtime of R 16-00 per hour. After the collision he was unable to work for 5 months where after he resumed employment at his erstwhile employer until 2011. Since 2011 he had been temporarily employed at three employers.
- [8] The industrial psychologists in their joint minute were of the view that plaintiff's past loss of income was for a period of 5 months after the accident. They agreed that his competitiveness was affected by the accident and that he was not an equal competitor when he had to search for a new job. In terms of the joint minute of the clinical psychologists both recommended that a curator ad litem and a curator bonis be appointed for plaintiff.
- [9] Dr Jacobs in his testimony was of the view that plaintiff in the temporary jobs that he occupied did so above his real capabilities and reiterated that he was not an equal competitor then or in a search for a new job, due to his physical and mental impairments. The occupational therapists in their joint minute agreed that the physical requirements of plaintiff's pre-accident occupation as a truck assistant and storeman falls within the category of medium to heavy types of work.
- [10] According to the joint minute of Dr Jacobs and Ms Kheswa plaintiff is regarded as an unskilled worker in the non-corporate sector with earnings in the category R 20 700-R 36 300-R82 000 per annum in 2019. Both industrial psychologists agreed that plaintiff would have reached his career ceiling at age 45 years. Dr Jacobs was of the view that plaintiff would reach retirement age at 65 years, whilst Ms Kheswa according to the report thought he might not have worked to 65. Dr Jacobs testified that he saw the severe challenges for plaintiff therein that he is an unskilled labourer whose physical abilities had been seriously impaired. His last two employments were of a medium physical nature.
- [11] As mentioned the actuarial report by Mr Charl du Plessis was handed in by agreement. For purposes of compiling the report it was accepted that plaintiff was unable to return to work for 5 months following the incident, only managed to secure intermittent and lower paying jobs since the accident and that contingencies should address losses that might have been suffered which are not directly quantifiable. In calculating the past and future loss of earnings the cap as per the Road Accident Fund Amendment Act 19 of 2005 has no impact. Past losses are calculated at R 390 335-00 applying a 5% contingency. Future loss of earnings is calculated in the amount of R 1 081 500-00 applying a 15% and 85% contingency

respectively to uninjured and injured earnings.

[12] In the second amended particulars of claim plaintiff requires compensation for general damages that are inclusive of pain, suffering, disfigurement and loss of amenities of life in the amount of R 800 000-00. Rightly so, Mr De la Rey conceded that plaintiff suffered a serious head injury and a number of orthopaedic and psychological injuries, and submitted a fair amount to be R 650 000-00. Plaintiff referred me to various authorities. In *De Jong v Du Pisanie* N.O. 2005(5) SA 457 (A) a 35 year old male suffered brain damage which caused amongst others, intellectual impairment, lack of drive, lack of judgment and insight, rage and outbursts. He suffered a dislocation of the right shoulder and soft tissue injuries to the

neck. The current value of the award is approximately R 625 000-00. Having considered the injuries suffered by plaintiff and the authorities, I am of the view that a fair amount to award is R 750 000-00.

[13] The evidence reveals that on plaintiff's return after the incident to his employment he was accommodated in a light physical capacity until he lost his employment. This corresponds with the evidence of the findings in the industrial psychologists' joint minute that the sequelae of the incident impacted negatively on his ability to maintain stable employment, and plaintiff would only be able to work in a sedentary to midrange light capacity. Pre-accident he was employed in a heavy duty capacity.

[14] Based on these facts I am of the view that plaintiff would not have been able to return to his original pre-accident employment. The period in which his employer accommodated him in sedentary work was not his original employment but in sympathy and amounts paid to plaintiff was to the advantage of the defendant who is legally compelled to compensate him for all his damage. I am inclined to find therefore that defendant is compelled to compensate plaintiff for past loss of earnings notwithstanding the reason for his dismissal. I find no reason to deviate from the contingencies applied by the actuary in his calculation of plaintiff's losses.

[15] In cross examination it was suggested that plaintiff should have mitigated his damages with reference to past losses. The pleadings do not reveal such a defence, nor did defendant prove that plaintiff failed to take reasonable steps to mitigate his losses.

See: *Everett and Another v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201G-202B.

[16] In view of my findings in paras [11] and [12] above, I am satisfied that plaintiff has proven on a balance of probabilities damages to the total amount of R 2 221 835-00. There is no reason why costs should not follow the event.

[17] The industrial psychologists were in agreement that a curator ad litem and curator bonis be appointed for plaintiff. In the order of this court dated 25 January 2018 and appointing Mr Jancovich as curator ad litem, leave was granted to the applicant to supplement those papers, if necessary, for the appointment of a curator bonis to administer the plaintiff's estate or in the alternative setting up of a trust on plaintiff's behalf. The evidence

reveals that a curator bonis should be appointed alternatively a trust should be set up. No evidence served before me whether a curator bonis should be appointed, or whether a trust should be registered on behalf of plaintiff. Although a curator is cost wise probably preferable, there is no evidence who such a curator should be. The curator ad litem has not filed any report in this regard. I cannot therefore make a final determination about such an appointment, and in any event when a curator bonis is appointed, the Master of the High Court should also be afforded the opportunity to comment. I therefore intend to order the curator ad litem to file a report advising court before or on 27 March 2020 in this regard.

[18] After conclusion of arguments herein I received a proposed draft order to which the respondent, save for the amounts mentioned therein, had no objection. The proposed draft order however does not provide for the appointment of a curator bonis or the setting up of a trust. It only provides that the defendant will pay the costs of such a curator or the costs of the creation and administration of a trust depending on my order. It makes provision for certain cost orders. I do not intend to make the draft an order of court but have signed the order and dated it the 2nd of March 2020 for subsequent identification purposes. The mentioned order was placed back in the court file.

[19] I therefore make the following orders:

1. The defendant to pay the plaintiff the amount of R

2 221 835-00 as set out hereunder:

1.1 R 390 335-00 in respect of past loss of earnings/earning capacity;

1.2 R 1 081 500-00 in respect of future loss of earnings/earning capacity;

1.3 R 750 000-00 in respect of general damages

resulting from a motor vehicle collision that occurred on 25 February 2009.

2. Payment of the total capital amount as set out in prayer 1 above shall be made on or before the 1st May 2020, failure whereof interest will accrue calculated as per the statutory rate a tempora morae.

3. The defendant is ordered to furnish to the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund 56 of 1996, for 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by him in the motor vehicle collision as aforementioned, in terms of which

undertaking the defendant will be obliged to compensate him in respect of the said costs after the costs have been incurred and on proof thereof.

4. The final determination as to whether a curator bonis should be appointed or a trust be registered, as well as the costs related thereto, is postponed sine die.

4.1 The curator ad litem, Adv Diederick Christoffel Jankovich to file a report before or on 27 March 2020 on whether the appointment of a curator bonis is required, the suitability of any proposed curator bonis or alternatively the setting up and/or registering of a trust on behalf of plaintiff.

4.2 The report must be filed with the registrar of this court on notice to the Master of the High Court Bloemfontein and the defendant.

5. Defendant is ordered to pay plaintiff's taxed or agreed costs, such costs to include (but not limited to) the costs set out hereunder:

5.1 The wasted costs of the postponement of the trial as set down for 7, 8 and 10 November 2017 (as per agreement by the parties).

5.2 Cost orders made by this court on 2 February 2018 and 31 August 2018.

5.3 The reasonable preparation/qualifying/accommodation/ travelling and full reservation fees and expenses (if any) of the following experts:

5.3.1 Dr M Scher (orthopaedic surgeon);

5.3.2 Drs Morton & Partners Inc (radiologists);

5.3.3 Ms N Potgieter (occupational therapist);

5.3.4 Prof Zabow (psychiatrist);

5.3.5 Dr SA Parker (neurosurgeon);

5.3.6 Ms M Coetzee (clinical- and neuropsychologist);

5.3.7 Dr D Ogilvy (speech- and language pathologist);

5.3.8 Dr E Jacobs (industrial psychologist)

5.3.9 Munro Actuaries (actuaries)

5.4 The costs relating to the plaintiff attending the above medico legal examinations.

6. In the event that costs are not agreed the plaintiff shall:

6.1 Serve a notice of taxation on the defendant's attorney of record; and

6.2 allow the defendant fourteen (14) court days to make payment after taxation and allocation.

C REINDERS, J

On behalf of plaintiff: Adv LR Nortier

Instructed by:

P Joubert Inc

c/o Rosendorf Reitz Barry

Bloemfontein

On behalf of defendant : Adv H de la Rey

Instructed by:

Maduba Attorneys

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Prepared on 11 October 2026 · Esheria