

SOUTH AFRICA / JUDGMENT

Kareli v Road Accident Fund (5007/2017) [2021] ZAFSHC 55 (12 March 2021)

[2021] ZAFSHC 55**COURT**

Free State High Court, Bloemfontein

BEFORE

AS Boonzaaier

CASE / FILE NUMBER

5007/2017

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Reportable: NO****Of Interest to other****Judges: NO****Circulate to****Magistrates: NO****Appeal****number: 5007/2017****In**

the matter between:

PAKISO

KAIZER KARELI

Plaintiff

and

THE

ROAD ACCIDENT FUND

Defendant

CORAM: AS BOONZAAIER AJ
HEARD

ON: 10 MARCH 2021

JUDGMENT

BY: BOONZAAIER AJ

DELIVERED ON: 12 MARCH 2021

- [1] This is a claim for damages suffered as a result of injuries sustained by the Plaintiff, a 36 years old male, in a motor vehicle accident which occurred on the 29th of February 2016. The Plaintiff was a passenger in vehicle with registration number [...], when the insured driver of the vehicle lost control and the vehicle overturned. They were traveling at the gravel road between Dewetsdorp and Wasbank farm.
- [2] The merits have been conceded. Plaintiff requested the court to proceed with default judgment in terms of the Uniform Rules.[1] An e-mail was handed in by Defendant and accepted as Exhibit "A", informing the Plaintiff that they:
1. Accept the concession on merits.
 2. Accept the section 17(4)(a) undertaking with regards to the future hospital and medical expenses.
 3. Accept the general damages in the amount of R350 000.00.
 4. Reject the past and future loss of income of R508 111.50 as proposed, and that they hold instructions to argue this head before court if we they not receive and revised tender on this head.
 5. They have requested the amount of R717 393.00 as per their settlement proposal
- [3] The parties have reached an agreement with regards to future medical expenses and the general damages.
- [4] The issues which call for determination on quantum are:
- 4.1 Past loss of income;
 - 4.2 Future loss of earnings or earning capacity.
- [5] The minutes of all the experts were submitted to court with the request to accept it for what it purports to be. Which was admitted as Exhibit "B"
- [6] The report of Dr LF Oelofse the Orthopaedic Surgeon are specifically relevant and the following findings were placed on record:

6.1 Injuries sustained:

Head Injury.

Cervical and Thoraco-lumbar Spine Injury.

Bilateral Knee Injury.

Disfigurement.

6.2 Interim Symptoms and Treatment:

The patient developed headaches on a regular basis since the accident.

He states that his memory and concentration had also deteriorated over the year following the accident.

It is unclear if the patient received any further treatment with regards to this injury.

The abrasion on the forehead healed well without complications.

6.3 Current Symptoms and Complaints:

The patient claims to experience headaches every day.

He cannot stay focused for extended periods.

6.4 Interim Symptoms and Treatment:

The pain in his neck and back never really went away.

6.5 Current symptoms and complaints:

The pain increases during times of inclement weather conditions.

Sitting in the same position or working on low surfaces aggravates the pain and burning feeling he experiences.

According to the patient, he experiences muscular spasms throughout his entire neck and back.

6.6 Diagnosis

Soft tissue injury of the neck and back with:

6.6.1 Chronic pain and spasms of neck and back.

6.6.2 Headaches (I refer to chapter 7).

6.7 Current symptoms and complaints:

The patient continues to experience pain in his knees; he claims that the left knee is more painful.

Most physical activities exacerbate his pain.

During times of inclement weather, the pain is more pronounced.

Walking long distances has become increasingly more difficult.

He Struggles to go down on his haunches.

Both knees become swollen after a long day on his feet at work.

The pain medication offers moderate pain relief.

6.8 Diagnosis:

Soft tissue injury of both knees with chronic pain.

6.9 Sick Leave:

The patient will need sick leave for the above procedures.

I believe the patient must be accommodated in a permanent light duty / spinal friendly working environment (as determined by the

Occupational Therapist).

6.10 Productivity and retirement:

Dr Oelofse opined:

“from an orthopaedic perspective, I believe that the injuries had an impact on the patient’s amenities of life, productivity and working ability.

He returned to his pre-accident employment but struggles with the physical tasks required of him due to the impairments caused by the injuries. The patient must be accommodated in a permanent light duty / spinal friendly working environment (as determined by the Occupational Therapist). With successful treatment, it is likely that his productivity will improve. The injuries the patient sustained in the accident make him an UNFAIR COMPETITOR in the open labour market.”

[7] The Industrial Psychologist, Ben Moodie conducted the following report:

7.1” Present complaints

7.1.1 He stated that he suffers lower back pain since the accident, and that due to this is unable to sit and stand for prolonged periods, as well as lift carry heavy items.

7.1.2 He also struggles with pain in both his knees, and as a result cannot stand or walk long periods.

7.1.3 He noted that his pain is exacerbated by cold and inclement weather.

7.2 Family History

Mr Kareli was born on 18 March 1985; both of his parents are pensioners. He has two sisters of which one is unemployed and the other works as a general worker at the Abattoir.

7.3 Present Domestic circumstances

Mr Kareli is lives with his wife Ms Pulane Matsiye (28), she completed a Grade 9 level of education. She is employed as a packer. They have two children.

7.4 Educational Qualification

Mr Kareli is in possession of a Code 8 (2013) driver's license. He completed his schooling until Grade 6. He left school whilst in Grade 7.

7.5 Career History

7.5.1 He noted that carrying out these duties required him to stand and walk for prolonged periods of time, lifting and carrying heavy carcasses, working in cold environments, as well as working with sharp knives.

7.5.2 The accident occurred on the 29th of February 2016, and due to the severity of his injuries Mr Kareli was absent for a period of 2 months from work – he stated that he only received half his salary during this time. Mr Kareli noted that on his return to work he was accommodated into a lighter duty capacity for approximately a month, and that his duties entailed him having to put the rope around the feet of the carcass for hanging in the delivery trucks.

7.5.3 He stated that after this period he resumed his pre-accident duties; but added that due to the pain and physical difficulties he experienced in his lower back and knees while attempting to lift the heave carcasses onto the hook, his employer accommodated him into a lighter duty post which entailed him no longer having to hang the carcasses. His duties in this role entailed him having to lead the animals into the pen, tie their feet, and after they were slaughtered and hooked up, he would then skin the animal. Coupled with this he was also required to carry out various odd jobs. Mr Kareli stated that though he was better able to cope with this work, he still continued to struggle with pain in his knees and lower back. He further added that due to this, his productivity was a lot less in comparison to that of the other skimmers, and that they eventually started

complaining to his employer, which resulted in him being accommodated him into his current post.

7.5.4 Mr Kareli stated that he is able to cope in his current work. He noted that he still works the same hours as what he did prior to the accident, and currently receives a basic salary of R3 500.00 per month. “

7.6 Mr Moodie conducted separate telephonic consultation with both of Mr Kareli's employers – Ms Mentz and Mr Mentz. The following is noted:

§ She stated that prior to the accident Mr Kareli was a very good worker, who had not difficulty carrying out his duties and was able to meet his targets in terms of carcasses skinned. She rated his work performance 10/10. Whereas post-accident he struggled to lift heavy items, stand for prolonged periods to time, and working in the cold rooms and freezers seemed to worsen his pain. She further added that he is much slower than before the accident. Based on these factors she rated his performance as 5/10.

§ She noted that due to the physical difficulties and pain which Mr Kareli struggles with they have accommodated him into a lighter duty post. Ms Mentz further stated that though it would make more sense from a business perspective to employ someone who is able to do the work, they feel sorry for Mr Kareli as he has a family to support and if they were to let him go they know that he will struggle to find employment. She noted further that though Mr Kareli would not have progressed beyond his pre- accident

post as skinner, if he was still working in this capacity he would have been earning R5000.00 per month instead of

§ R 3500.00

§ Mr Mentz stated he attempted to accommodate Mr Kareli into various posts after the accident. He however added that due to the impact that his pain and difficulties have had on him he has had to eventually move him completely away from skinning, as he was not only too slow, but the other staff were complaining about him. He confirmed Mr Kareli's current duties. He noted that Mr Kareli would not progress beyond that of his current work role and would only receive inflationary increases.

7.7 Pre-Accident Income Potential

When considering Mr Kareli's pre-accident earning potential it can be concluded that based on his limited level of education as well as noting the nature of the work which he had carried out in his career life prior to the accident, it can be concluded that he would have always remained reliant on work of a manual/physical nature in order to earn an income. Though Mr Kareli had already reached his career ceiling at the time of the accident, based on the collateral information obtained from his employer, it can be concluded that he would have been earning R5 000.00 per month in today's terms.

- [8] After taking cognisance of the above expert opinion with regards to the severity of Mr Kareli's injuries and the physical restrictions which he now experiences as a result of this, the nature of work which he would now be suited to versus that of what he would have been restricted to but for the accident and the fact that Ms Kingsley noted that he would no longer be suited to working in his pre-accident occupational capacity, as well as the impact of these impairments on his competitiveness on the open labour market; it can be concluded that not only has Mr Kareli been left severely occupationally impaired in comparison to that of his pre-accident self, but his occupational choices have also been significantly curtailed. This impairment is further confirmed when considering the collateral information obtained

from his employer in which it is noted that not only was Mr Kareli moved into a lighter duty post after the accident, but that due to the continued impact of his pain and physical difficulties on his ability to even work in this accommodated capacity he had to be moved into an even lighter duty role.

8.1 Therefore in light of the above, it can be concluded that Mr Kareli's inability to work in his pre-accident occupational capacity, and the subsequent loss of income he has now incurred as a result of this, can be attributed directly to the accident under review. He would therefore need to be compensated for the loss of what he would have earned but for the accident, working as a skinner, which would have been R5 000.00 per month plus inflationary increases, as opposed to the R3 500.00 per month plus inflationary increases which he currently earns now.

8.2 His employer being sympathetic and accommodative towards him. Though it would appear that Mr Kareli is not in any danger of losing his employment at present, what does concern the writer is that if he was to lose his current post, regardless of the reason, due to his reliance on work of a manual/physical nature as a result of only being in possession of a Grade 6 level of education it can be concluded that he will find himself at a significant disadvantage against his more physically able peers when competing for employment.

8.3 The writer therefore recommends that the impact that this could have on Mr Kareli's future earning potential if he was to lose his current employment should be addressed by way of a higher than average post-accident contingency deduction “

[9] The Actuary Johan Saur made the following assumptions:

Earnings had the accident not happened (Pre-morbid)

According to the report of Ben Moodie (Industrial Psychologist), dated 2019/03/25, Mr PK Kareli earned an income, as a skinner at an abattoir, of R2 500 per month in 2016/02/29 monetary terms. Added to this is an assumed thirteenth cheque. Thus an annual income of R32 500 (2 500 *

13) in 2016/02/29 monetary terms. We project this income with linear increases until 2019/04/01. Thereafter he would have been able to earn an income of R5 000 per month in 2019/04/01 monetary terms. Added to this is an assumed thirteenth cheque. Thus an annual income of R65 000 (R5 000 * 13) in 2019/04/01 monetary terms. We project this income with inflationary increases until retirement at age 65.

Earnings now that the accident has happened (Post-morbid)

According to the report of Ben Moodie (Industrial Psychologist), dated 2019/03/25, we project no income for Mr PK Kareli for 2 months, therefore until 2019/04/29, to allow for full loss of sick leave. After that he earned an income, as a skinner at an abattoir, of R2 500 per month in 2016/04/29 monetary terms. Added to this is an assumed thirteenth cheque. Thus an annual income of R32 500 (R2 500 *

- 23) in 2016/04/29 monetary terms. We project this income with linear increases until 2019/04/01. Thereafter he earned an income of R3 500 per month in 2019/04/01 monetary terms. Added to this is an assumed thirteenth cheque. Thus an annual income of R45 500 ($R3\ 500 \times 13$) in 2019/04/01 monetary terms. We project this income with inflationary increases until retirement at age 65.

Contingencies

40% total deduction for future losses (post-morbid). We 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.”

[10] From the actuary report of Johan Saur it is clear that past loss of

income amounts to R69 300.00 and future loss of income is R648 092.00, which amounts to the total of R717 392.00.

ORDER

[11] Therefore I make the following order:

1.

1.1 The Defendant is liable to pay 100% of the Plaintiffs damages.

1.2 The Defendant shall pay the Plaintiff the sum of R717 393.00 in respect of loss of earning capacity.

1.3 The Defendant shall pay the sum of R350 000.00 in respect of general damages.

1.4 The Defendant shall pay the sum of R1 067 393.00 into the Plaintiff's attorneys trust account;

The Plaintiff's attorneys trust account details are as follows:

Account Holder : VZLR Inc

Branch : ABSA Business Bank Hillcrest

Branch Code : 632005

Type of Account : Trust Account

Account Number : 3014-7774

1.5 In the event of default on the above payment, interest shall accrue on such outstanding amount at 7% (at the mora rate of 3.5% above the repo rate on the date of this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment;

1.6 The Defendant is to request and load payment within 14 (fourteen) calendar days from date of this order, with proof of same to be sent to the Plaintiff's attorneys within 5 (five) calendar days of doing same.

2.

2.1 The Defendant shall furnish the Plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 29 February 2016.

2.2 The Defendant is to furnish the undertaking to the Plaintiff within 30 (thirty) days of date of this order, failing which the Defendant shall be held liable for the payment of the taxable party and party additional costs incurred to obtain the undertaking.

3.

The Defendant to pay the Plaintiff's taxed or agreed party and party costs, up to and including the trial dates of 9 and 10 March 2021 and the date when this order is made an order of court, for the instructing and correspondent attorneys, which costs shall include, but not be limited to the following:

3.1 All reserved costs to be unreserved;

3.2 The fees, of Senior Junior Counsel;

3.3 The costs of obtaining all expert medico legal- and any other reports of an expert nature which were furnished to the Defendant and/or its experts;

3.4 The costs of obtaining documentation / evidence, scan, considered by the expert(s) to finalise their reports;

3.5 The reasonable taxable qualifying, preparation fees of all experts whose report(s) were provided to the Defendant and/or its experts,

3.6 The reasonable costs of consultation fees between the Plaintiff's experts and the Plaintiff's the legal teams regarding the matter;

3.7 The reasonable cost of one consultation between the Plaintiff and the Plaintiff's legal team to consider the offer to settle;

3.8 The reasonable taxable reservation fees, of the following experts:

Dr Oelofse – Orthopaedic Surgeon;

Dr Hoffmann – Plastic & Reconstructive Surgeon;

Dr Mutyaba – Neurosurgeon;

E Kingsley – Occupational Therapist;

B Moodie – Industrial Psychologist;

J Sauer – Actuary.

3.9 The reasonable traveling- and accommodation costs, incurred in transporting the Plaintiff to all medico-legal appointments.

3.10 The reasonable costs for an interpreter's attendance at the medico legal appointments for translation of information;

3.11 The above-mentioned payment with regard to costs shall be subject to the following conditions:

3.11.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

3.11.2 The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs.

3.11.3 The Defendant is to request and load payment within 14 (fourteen) calendar days from date of settlement / taxation of the bill of cost, with proof of same to be sent to the Plaintiff's attorneys within 5 (five) calendar days of doing same;

3.12 In the event of default on the above payment, interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

AS BOONZAAIER AJ

On behalf of Plaintiff : Adv A. Sander

Instructed by : Du Plooy Attorneys

Bloemfontein

No appearance on behalf of Defendant

[1] R 31 of the Uniform Rules of Court

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