

SOUTH AFRICA / JUDGMENT

Van Der Merwe v Road Accident Fund (7407/2022) [2025]

ZAWCHC 158 (3 April 2025)

[2025] ZAWCHC 158

COURT

Western Cape High Court, Cape Town

BEFORE

Bhoopchand

CASE / FILE NUMBER

7407/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case Number: 7407/2022

In the matter between

BRUCE NICHOLAS VAN DER MERWE PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Date of hearing: 19 March 2025

Date of judgment: 3 April 2025

BHOOPCHAND AJ:

1. The Plaintiff is a 49-year-old male. He was a passenger in one of the two vehicles involved in an accident on 28 July 2019. The Defendant is the statutory body established under the Road Accident Fund Act, 56 of 1996 ('the RAF Act') to pay compensation for loss or damages

wrongfully caused by driving motor vehicles. The Plaintiff's claim for general damages and medical expenses was resolved. The Court is asked to determine the claim for loss of earnings. The Plaintiff and his appointed Industrial Psychologist testified. Affidavits confirming the remaining expert reports under Rule 38(2) were accepted in place of their evidence. The parties provided written and oral arguments. The trial was truncated under Rule 39(20).

2. The Plaintiff sustained injuries to his neck, pelvis and ribs. The superior facet of his seventh cervical vertebra was fractured but not displaced. He had multiple rib fractures resulting in a flail left hemithorax. The left sacral ala and his pubic rami were fractured. The fractures of the pelvis involved the acetabulum bilaterally.[1] The Plaintiff also sustained a laceration of his scalp. The Plaintiff suffers neck and pelvic pains. He is unable to walk more than 500 meters and stand for longer than 30 minutes. He has difficulty climbing stairs and is unable to crouch or kneel. The Plaintiff walks with a pronounced limp that was evident when he approached the witness box to testify.

3. The plaintiff's testimony included an overview of his

employment history spanning the construction industry, followed by his transition into the security sector in 2009. He obtained the E, D, and C grades of training. There are two grades above C, namely B and A. The Plaintiff was unemployed for one year, commencing in 2018. His job before the accident required him to be on his feet the whole day. He was promoted to shift supervisor before the accident. He received one month's sick pay. The Plaintiff returned to work in October 2019 and was accommodated in his workplace till 31 December 2019. He resigned for reasons unrelated to the accident. He could not return to security work as he felt constant pain throughout his body. He struggles to use his hands as they cramp in the flexed position. He uses a neck warmer.

4. Under cross-examination, the Plaintiff testified that his job as shift supervisor was on a contract basis. He was confused about whether the job was temporary or permanent, finally conceding that he held a permanent position. He returned after the accident at the same salary he received as a shift supervisor. The Plaintiff applied for one job as a security officer after he resigned. He has occasionally done painting and cleaning jobs.

5. The Orthopaedic Surgeon found restriction of the Plaintiff's

neck movement and predicted that the Plaintiff would suffer moderate to severe pain, which is unlikely to improve. The pelvic injuries

caused significant pain and severely affected the Plaintiff's mobility. The Orthopod did not expect the Plaintiff to return to work as a security officer or to any other type of work that required him to be on his feet because of his mobility restrictions.

The radiological studies conducted at the surgeon's request on 10 May 2022 revealed the fractures sustained in the accident. They were all healed. In particular, the standard and stress views of the hip joint were normal.

6. The Occupational Therapist assessed the Plaintiff on 19 July 2022. The sequelae of the Plaintiff's neck injury would impair him from working with his arms elevated or his neck extended. She expected him to experience pain with all neck movements. The sequelae did not exclude the Plaintiff from sedentary or active work. The pelvic injury and its sequelae, which seemed to affect the Plaintiff the most, did cause functional impairment and was considered unlikely to improve. The Therapist noted that the range of movement in the lower limbs remained functional. However, the major limitation was pain associated with prolonged sitting, standing, walking, performing low-level postures, repetitive step climbing, and load handling, which exceeded the limits of light physical strength. The expert expressed the view that the Plaintiff was still capable of performing tasks that required these modalities. The therapist suggested that the Plaintiff was best suited to semi-sedentary or light work with accommodations to enable him to change his posture regularly.
7. The Plaintiff's appointed Industrial Psychologist considered that the Plaintiff was working in a semi-skilled position and had been promoted to a supervisory position before the accident. The Plaintiff planned to continue in the security industry, and he may have gained some career advancement through experience, skills courses, and by obtaining a driver's license. Significant earnings progression was not expected, considering his age. The expert recommended using R7,864.50 per month as uninjured earnings. The salary range of a grade C security officer is between R4786 and R5036 per month. The Plaintiff earned more than that amount.
8. Despite stating that the Plaintiff planned to continue employment in the security industry, the expert suggested that if he left his job, he could have sought alternative work in the same industry. This opinion was raised in the context of the Plaintiff resigning from the post he held, which was unrelated to the accident. The expert then suggested that the Plaintiff "may have considered alternative employment options in semi-skilled positions in the construction sector where he worked" before securing security work. The Plaintiff last worked in the construction sector in 2009.
9. As for 'possible' employment in the construction

industry, and if the Plaintiff had to leave his security job for whatever reason, the expert suggested that he may have earned between R7 818.47 and R8511.75 in a full-time capacity as a general worker or unqualified artisan. The expert suggested that an additional 20% could be added to the basic wage rates to account for extra benefits. The Plaintiff's attorney interpreted this to mean that there was a 50% chance that the Plaintiff would leave the security industry, for which he had obtained qualifications, and return to the construction industry. There is no discernible basis on which the attorney could have interpreted the 'possibility'

of reverting to the construction industry to mean a 50% chance of securing work there in the uninjured scenario.

10. The Plaintiff's legal team submitted actuarial calculations based on the premise referred to in the preceding paragraph. The Court directed that a further calculation be done, ignoring the 50% chance of securing work in the construction industry from the date of the accident. As it turns out, and surprisingly so, the calculation of loss was less if the split career projection was applied.

11. For the injured state, the Industrial Psychologist was guided by the Orthoped and Occupational Therapist, who indicated that the Plaintiff's ability to work had been severely restricted. Physical agility is an inherent requirement in the work of a security officer, even though it may not be part of a regular workday. The Plaintiff worked in a standing position, which would pose problems for him. He would be unable to compete for alternate jobs in the security industry. He planned to continue with casual jobs, including painting and other similar opportunities. Considering his physical

restrictions, the expert anticipated that the Plaintiff's residual earnings would remain limited.

12. The expert testified that positions could be created to accommodate Grade C security officers in seated positions. The expert considered that the Plaintiff was highly motivated as he had initially sought

work in the construction industry and then moved to the security sector. When asked about the Plaintiff's single attempt to secure security work post-accident, the expert stated that it was not due to a lack of effort, as there were challenges in securing

interviews. The expert's responses made no sense.

13. The Defendant also appointed an Industrial Psychologist to assess Plaintiff on 16 August 2024. She considered that the Plaintiff would have been able to perform work within his scope of education, experience, and skills until the normal retirement age of 65 years. His earnings of R8,500 per month, or R102,000 per annum, fell between the earnings range of the median and upper quartile of semi-skilled workers. She considered it reasonable to assume that the Plaintiff

would have been able to maintain these earnings, as adjusted for inflation, until the normal retirement age.

14. For the injured state, the expert noted that when the accident occurred, the Plaintiff had been promoted to Shift Supervisor, earning R8,500 per month, plus any overtime worked, as well as incentive bonuses. He received paid sick leave for one month. He returned to work two months after the accident whilst still on crutches. He was assigned to a lighter role in the office, where he was responsible for supervising the arrival and dispatch of goods. The Plaintiff resigned as he was blamed for items that went missing, and he felt that the trust relationship with the client had been broken. He has not been formally employed since. The

Plaintiff-appointed Industrial Psychologist obtained collateral information from the Plaintiff's shift manager. The shift manager expressed the view that the Plaintiff's resignation was not surprising as security work is based on a trust relationship. Once it is broken, it is difficult for an employee to regain that trust.

15. The Plaintiff has done occasional work for friends, such as painting, cleaning gutters, pressure washing walls or roofs, and fixing paving or flooring. The Industrial Psychologist also agreed with the Orthoped and Occupational Therapist that the Plaintiff would be limited in both active and semi-sedentary work. Due to his low educational level and age, Plaintiff would find it difficult to secure semi-sedentary work and was consequently limited to employment that relied on his physical abilities. He would be at a disadvantage when trying to compete in the open labour market with uninjured

people. It is unlikely that he will be able to compete in the open labour market in the future at the same level as before the accident. The expert did not suggest the Plaintiff's earnings potential in the injured state.

16. The Defendant argued that Plaintiff had not suffered a loss of earnings, as he returned to work and was accommodated but resigned for reasons unrelated to the accident. The Defendant suggested that if the Court is persuaded to award a claim, a higher contingency should apply to uninjured earnings to determine the loss. Defendant

suggested that a 5% deduction apply to past injured earnings and a 40% deduction to future uninjured earnings to determine the loss if the Court considered the Plaintiff unemployable.

EVALUATION

17. The analysis of the Orthopaedic report completed in June 2022 does not explain the source of the ongoing pain experienced by the Plaintiff. In particular, the radiological studies and the examination do not address why the Plaintiff is particularly limited by his hip, which manifests as an exaggerated limitation of lower limb movements and a pronounced limp. The Orthoped and the Occupational Therapist considered the Plaintiff to be unemployable as a security officer because of his mobility restrictions. Yet, he did go back to work and was accommodated in his workplace. The employer would have had to have good reason to retrench the Plaintiff from his job. Once the Plaintiff resigned, he did do occasional work, including flooring and high-pressure washing of roofs. This raises the question of how the Court should address this set of circumstances. The Defendant suggested applying higher deductions to the calculated earnings. The experts did not suggest a time frame within which the Plaintiff would have become unemployable as a security officer who was accommodated in his workplace.

18. The Actuary did four calculations altogether. The first actuarial calculation was based on the career projections of the Plaintiff-appointed Industrial Psychologist as of March 2023, and the second on the Defendant's expert. The third calculation was an adjusted calculation based on the Plaintiff-appointed expert's trajectory. The fourth calculation was directed by the Court, which requested a calculation based on the Plaintiff-appointed expert's predictions while disregarding the 50% chance of acquiring work in the construction sector for uninjured earnings. The Court will use the fourth set of calculations as the basis for determining the Plaintiff's claim under this head of damages. These calculations accord with the second set of calculations based on the Defendant-appointed expert's career projections.
19. The Actuary included R26 700 as injured earnings to cater for the earnings and fringe benefits that the Applicant would have received in the months he worked after the accident. The Plaintiff argued for applying 5% to past earnings and 15% to future earnings to calculate the loss of earnings in the injured state. The Court accepts that the Plaintiff left his work for unrelated reasons and would have continued to earn in the injured state for some time before his employer would have been forced to retrench him. There was no suggestion from the collateral information sourced by the Industrial Psychologists that the employer would not have accommodated him for a further period. The Court is not persuaded that the Plaintiff would not have been able to work for some time in the accommodated position that was created for him. The experts did not commit themselves to a specific time when the Plaintiff would have been rendered incapable of performing an accommodated job.
20. As the determination of the Plaintiff's loss of earnings and the incorporation of contingencies falls within the ambit of judicial discretion, the Court has decided to approach the peculiar facts of this case in the manner that follows. The Orthopaedic Surgeon considered the Plaintiff incapable of performing his work as a security officer three years after the accident occurred. The Occupational Therapist considered that the Plaintiff was less suited to standing, sitting, and walking three years after the accident occurred. The Occupational Therapist deferred to the Industrial Psychologists to comment on whether the Plaintiff could continue in his field of work. Had the Plaintiff not resigned, it is speculative as to when he would have left his employment as an accommodated security officer who was earning his pre-accident salary.
21. The Industrial Psychologists considered the opinions of the Orthopaedic Surgeon and the Occupational Therapist. They suggested that the Plaintiff's employment prospects had been severely affected as a result of the accident-related injuries, but neither suggested that the Plaintiff was unemployable. In the circumstances, the Court will award the Plaintiff 50% of his past uninjured earnings and apply a 30% deduction (double the deduction contended for by the Plaintiff and less than that contended for by the Defendant) to future uninjured earnings to account for these variables. The past uninjured earnings amount to R616 000 (R642 700-R26 700). The past loss of earnings is, therefore, R308 000. The future loss of earnings is $(R1\ 546\ 200 \times 70\%) = R1\ 082\ 340$. The Court awards $R308\ 000 + R1\ 082\ 340$.

340, totalling R1 390 340, for the Plaintiff's claim for loss of earnings. Although there is a deviation from the recognised

methods of calculating loss where actuarial calculations have been provided, the approach provides a reasoned method of dealing with the peculiar circumstances of this case, directed at yielding a fair and just award.

22. The Court has already granted an order by agreement that addresses the Plaintiff's claims for general damages, future medical expenses, general costs, and the costs of experts and Counsel. The Court understands that there is no claim for past medical expenses. The Defendant conceded liability for Plaintiff's proven claims. The Court has considered that the Plaintiff has incurred further costs since the previous order. In the premises, the Court makes the order that follows.

ORDER

1. The Defendant shall pay the Plaintiff the sum of R1 390 340 (one million, three hundred and ninety thousand, and three hundred and forty rands) ('the capital') in settlement of the Plaintiff's claim for loss of earnings and final settlement of the Plaintiff's claims arising from the accident involving the Plaintiff on 28 July 2019 by way of electronic transfer to the Plaintiff's attorneys' trust account.

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

Bank:

First National Bank

Account Holder: De Vries Shields Chiat Inc.

Branch:

Portside

Account Number: 6[...]

Branch Code: 21065

3. The Defendant shall pay the capital within 180 days and interest on the capital from 30 (thirty) days after this order, as well as any costs incurred in collecting the capital.
4. Defendant shall pay Plaintiff's taxed or agreed-upon party and party costs incurred over and above the costs ordered by this Court in settlement of Plaintiff's other claims as they pertain strictly to the claim for loss of earnings within 180 days of the finalisation or agreement of those costs and interest at the prescribed legal rate from thirty days thereafter.

Bhoopchand AJ

Acting Judge

High Court

Western Cape Division

Judgment

was handed down and delivered to the parties by e-mail on 3 April 2025

- [1] The acetabulum is like a "socket" in the hip bone. It's the part of the pelvis that holds the "ball" at the top of the thigh bone or femur. Together, they make the ball-and-socket joint of the hip, which allows the leg to move in all different directions—like when walking, or running.

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