


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

23/5/2016

CASE NO: 70534/2013

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	23/05/2016
	DATE
	
	SIGNATURE

In the matter between:

**FOTHERINGHAM, CHRISTOPHER THOMAS**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**J U D G M E N T**

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**NONYANE, AJ:**

- [1] This is an action for damages arising out of the injuries sustained by the plaintiff in a motor vehicle accident which occurred on 16 December 2010.

- [2] The defendant has previously conceded the merits in full and the plaintiff is entitled to 100% of his proven damages.
- [3] At the commencement of the trial the parties informed me that they have reached agreement in respect of general damages, future loss of earnings and future medical expenses.
- [4] The amounts agreed upon is R750 000.00 for general damages and R249 585.00 for past medical expenses. It was also agreed between the parties that the defendant will also furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act of 1996, as amended (hereinafter referred to as "the RAF Act") for future medical expenses.
- [5] The issues that I was to determine at the beginning of the trial were past and future loss of income.
- [6] The plaintiff claims an amount of R887 791 for past loss of income and an amount of R807 400.00 for future loss of income.
- [7] The defendant counsel in his opening address stated that he was contesting the amount the plaintiff was earning at the time of the accident and the age at which he would have retired.
- [8] The plaintiff procured medico-legal reports from the following experts:

- Dr Marus, the neurosurgeon
- Mr Mallinson, the neuropsychologist
- Ms Murcott, the occupational therapist
- Mr Whittaker, the actuary
- Mrs B Donaldson, the industrial psychologist.

[9] The defendant did not procure any medical report but admitted the plaintiff's medico-legal report except the report of the industrial psychologist.

[10] The reports that were admitted by the defendants were admitted into evidence without the need to call the individual experts.

[11] Evidence was led on behalf of the plaintiff only and the following witnesses were called:

- Mrs Fotheringham, the plaintiff's wife
- Mrs B Donaldson, the industrial psychologist
- Mr Christopher Thomas Fotheringham, the plaintiff

[12] Mrs Donaldson testified that he consulted and assessed the plaintiff on 26 August 2015 for purposes of evaluating the plaintiff's work potential prior and post the accident.

- [13] He testified that Mr Fortheringham would probably have continued working to the age of 75 years. This testimony was corroborated by both the plaintiff and his wife.
- [14] The defendants counsel in argument conceded to the evidence led on behalf of the plaintiff that he would have worked to an age well beyond the normal retirement age.
- [15] He also conceded to an amount of R807 420.00 reflected in the actuarial report as the figure which represents the plaintiff's future loss of earning calculated to the age of 75 years.
- [16] I agree with the plaintiff's counsel that the aforementioned concession and admission by the defendant's counsel resolves the issue of the plaintiff's earnings at the time of the accident and the issue of the age at which the he would have retired.
- [17] The defendant's counsel after having made those concessions disputed whether the plaintiff suffered any past loss.
- [18] This issue was raised after evidence had been led that the plaintiff has, after the accident, merged his business with that of his competitor, Mr Dudley Palmer, who paid him 70% of the commission stemming from his clients in the first year, 60% of the commission in the second year

and 50% in the third year. This information is contained in the Industrial Psychologist's report.

- [19] The industrial psychologist's testimony in relation to the payment was that these payments were made in respect of the sale of the plaintiff's business to Mr Dudley Palmer because he could not work anymore. The plaintiff also confirmed in his testimony that such payments were made in lieu of the sale of his business.
- [20] Counsel for the defendant placed in dispute whether the commission that the plaintiff received in lieu of the sale of his business is a benefit which is deductible from the damages recoverable from the defendant.
- [21] The defendant's counsel argued that the income that the plaintiff received from the sale of the business is a deductible benefit and as such should be deducted from the plaintiff's recoverable damages.
- [22] She further argued that since there was no evidence as to the precise amount that the plaintiff received as such benefit; the court had to conclude that the plaintiff has not proved his past loss of earnings
- [23] Counsel for the plaintiff contended that the sale of the business cannot possibly be equated with income or a benefit gained as a result of the accident. The plaintiff would have benefitted from such income even if the accident had not occurred.

- [24] The plaintiff's counsel further contended that the monies received were not simply as a consequence of the injuries sustained but were as a result of the sale of his business, inclusive of (amongst others) his clients, the goodwill, and liabilities that he had built up over the years and as a result cannot be equated with monthly salary which is earned as income.
- [25] In this matter it is important to distinguish the sale of the plaintiff's business from the loss of income sustained by the plaintiff. It is clear from the evidence that the payments received by the plaintiff were in respect of the sale of the business and are accordingly not to be taken into account as commission. This can be deduced from the simple fact that the plaintiff did not have to do any work to earn the payments, which would have been the case had it been intended to be a commission.
- [26] The question I now have to determine is whether the proceeds of the sale of a business is a benefit that has to be deducted from the plaintiff's past loss of income and or earning capacity.
- [27] In determining whether accrual of benefits resulting from a motor vehicle accident is a deductible or non-deductible benefit, the following broad principles apply:

[27.1] A benefit which accrued purely as a result of the injury or death and for no other reason falls to be deducted from the recoverable damage.

[27.2] If the accrued benefit is inappropriate according to public policy and reasonableness it should be ignored when assessing damages.

[27.3] In determining whether the benefit accrued as a direct consequence of the accident and falls to be deducted from the damages recoverable, the court must distinguish between the duty of the claimant to mitigate his damage from the accrual and deriving of benefits resulting from the accident.

(See *HB Klopper* "The Law of Third-Party Compensation" Third Edition at page 142)

[28] The plaintiff in mitigation of damage is required to attempt to limit his own losses resulting from the breach of another party. The principle of mitigation of damages operates as follows:

[28.1] The plaintiff must take all steps to mitigate his losses. Losses that the plaintiff should have mitigated, but failed to do so will not be recovered from the defendant and the onus to prove that mitigation has not taken place rests with the defendant.

[28.2] The plaintiff may recover any loss incurred as a result of his reasonable attempt to mitigation.

[28.3] The plaintiff cannot claim for losses that have been successfully mitigated.

[29] The question that need to be asked is what is the loss that the plaintiff has actually suffered as a result of the accident. In the present case, the plaintiff's loss is the loss of income in the form of his monthly salary that he would have earned but for the accident.

[30] The plaintiff in this instance did attempt to mitigate his damages by going back to work but could not cope with the work load and had to leave. This is not in dispute as the defendant has already conceded to the plaintiff's unemployability.

[31] In *Everett and Another v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) the court held that the rental received after 31 January was a deductible benefit flowing from the breach of contract which the respondent would not have received had the contract been performed.

[32] In the present case the sale of the plaintiff's business would have taken place even if the plaintiff had not been involved in the accident and therefore this benefit did not accrue as a direct consequence of the accident.



[33] The proceeds of the sale of the plaintiff's business did not increase his patrimony and cannot be considered as a double benefit which he obtained as a direct result of the accident. Pre-accident, the plaintiff was earning a monthly salary whilst at the same time owning the business. Had the accident not occurred, he would have continued to earn his monthly salary and grow his business which he might have sold, when he retires, at a much higher price than he sold it for.

[34] I am of the view that deducting the proceeds of the sale of the business or holding the benefit derived therefrom as deductible benefit will have the effect of unduly reducing the plaintiff's patrimony. It will be unreasonable and not equitable to the plaintiff and not serve the purpose of compensation, which is to put a plaintiff in a position in which he would have been had the accident not occurred.

[35] Having heard arguments from both counsel for the plaintiff and the defendant, considered the cases cited by both plaintiff's and defendant's counsel and taking all relevant factors in assessing the quantum of both past and future loss of income, I deem the following amount as adequate compensation:

- |    |                         |              |
|----|-------------------------|--------------|
| a. | Past loss of income     | R 887 791.00 |
| b. | Future loss of earnings | R807 420.00  |

[36] The defendant admitted to the liability of the following heads of damages and their respective quantum in addition to an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 1996 (as amended):

- |    |                                    |             |
|----|------------------------------------|-------------|
| a. | Past hospital and medical expenses | R249 585.00 |
| b. | General damages                    | R750 000.00 |

[37] It is trite that costs should follow the cause. In this case the costs of suit are awarded to the plaintiff including the costs of counsel and costs of attending to the examination and obtaining expert reports.

[38] In the result the following order is made:

1. Judgment is granted in favour of the plaintiff for payment of the sum of R2 694 776.00 within 30 days from the date of this order.
2. The defendant is ordered to pay interest on the sum of R2 694 776.00 at the rate of 9% from 31 days after the date of this order to date of payment.
3. An undertaking in terms of Section 17(4)(a) the Road Accident Fund Act 1996 (as amended) to be furnished by the defendant for the plaintiff's future medical expenses.
4. The defendant is ordered to pay the plaintiff's costs of suit including the costs of the following experts:
  - a. Dr Marus, the neurosurgeon
  - b. Mr Mallinson, the neuropsychologist

- c. Ms Murcott, the occupational therapist
- d. Mr Whittaker, the actuary
- e. Mrs B Donaldson, the industrial psychologist.



**NONYANE AJ  
ACTING JUDGE OF THE  
HIGH COURT OF SOUTH  
AFRICA, GAUTENG  
DIVISION, PRETORIA**

Counsel for the Plaintiff : Adv C Vallaro

Instructed by : Munro Flowers & Vermaak  
C/O Friedman Hart Solomon & Nicolson

Counsel for the Defendant : Adv L Coetzee

Instructed by : TM Chauke Inc.

Date of trial : 26 October 2015

Date of Judgement : 23 May 2016