

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO. 2114/2018

Date heard: 13 April 2021

In the matter between:

S[...] W[...] G[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

REASONS FOR ORDER

RUGUNANAN, J

[1] This matter served before me on 13 April 2021. It involves an action for damages following a collision between a motor vehicle and a motor cycle on 25 November 2015 in Kurland Road, Port Elizabeth. The plaintiff, a machinist by occupation, was the driver of the motor cycle and as a result of the collision, he sustained multiple bodily injuries.¹

[2] In a report dated 5 July 2020, Actuary Wim Loots calculated the present value of the potential loss of earnings suffered by the plaintiff due to the injuries he sustained. The report incorporates calculations in respect of the

¹ These being in the nature of a comminuted fracture of the distal femur; a comminuted and compound tibial fracture; a fracture involving the base of the thumb of his left hand; and Psychiatric injuries in the form of a post-traumatic stress disorder and a major depressive disorder.

plaintiff's pre- and post-accident earnings scenarios. In the pre-accident (or uninjured) scenario the report reflects the plaintiff's past and future loss as respectively amounting to R457 539, 00 and R9 707 059, 00 after so-called "normal contingencies" of 5% and 15%, were applied.

- [3] Premised on the views adopted by its expert in a joint minute concluded between the industrial psychologists engaged by the parties, the defendant's stance is that higher than normal contingencies ought to have applied to the calculation of the plaintiff's past and future loss in the uninjured scenario.
- [4] In the circumstances, the issue I am required to determine is whether the calculation by actuary Loots ought to be accepted. I should mention at the outset that the report is not disputed insofar as it incorporates the calculation of the plaintiff's post-accident (or injured) earnings, the plaintiff's demographic information, the underlying assumptions made by the actuary and the agreed pre-accident career and earnings progression jointly charted by the parties' expert industrial psychologists, namely Dr Michelle Nobre for the plaintiff, and Dr Dirk Pretorius for the defendant.
- [5] When the matter was called for trial the defendant was in default of appearance for want of legal representation. In the course of his opening address counsel for the plaintiff, Mr Schubart SC, handed up a bundle of documents.² Among the items contained therein are court orders issued at various intervals since 1 June 2020 when the matter appeared on the trial roll and on which date the defendant conceded liability on the merits and settled the plaintiff's claim for general damages in the amount of R1 100 000 with provision being made for an undertaking in accordance with section 17(4)(a) of the Road Accident Fund Act³.
- [6] Apart from the contents of the exhibit indicating that the matter was at all times postponed and retained on the trial roll of cases, the relevance of the

² Exhibit "A"

³ Act 56 of 1996, as amended

court orders is that they provide a timeline – all indications from which are that officials of the defendant dealing with the matter (and at whose instance the postponements were requested), had knowledge of the issues affecting the matter and had known of the trial dates in the drift of events since June 2020 which culminated in the matter proceeding to trial on the aforementioned date.

[7] Before proceeding to address the issue, it is considered appropriate to recapitulate, only insofar as is necessary, the contents of an order issued out of this court on 8 December 2020, this with a view to lending substance to the timeline:

- “5. The matter was enrolled for hearing on 05 November 2020 in respect of claims for past hospital and medical expenses and past and future loss of earnings.
- 6. ... the matter is capable of settlement in that a joint minute was prepared between the industrial psychologists dated 22 June 2020.
- 8. That the matter stood down, from time to time, at the request of the Defendant.
- 9. The matter was postponed on 17 November 2020 at Defendant’s request until 2 December 2020, Defendant to pay the costs occasioned by the postponement.
- 10. The matter has again been postponed because no offer was forthcoming from the Defendant.
- 11. That the trial in respect of the aforesaid issues in dispute is postponed until 15 March 2021 for trial and for the hearing of evidence and the determination of the aforesaid issues in dispute between the parties.
- 15. That the plaintiff file a memorandum, summarising the issues in dispute and the evidence required to prove the quantum of the outstanding claims in dispute, including the issues which may affect the amount of such damages and contingencies on or before 22 February 2021.
- 18. That should the Defendant seek further postponement of the matter, it shall deliver a substantive application for such postponement by 12 February 2021”

[8] In a rule 37 minute concluded between the parties on 11 February 2021, the defendant *inter alia*, recorded the following:

- “4. Defendant admits the correctness of the contents and opinions expressed by experts, Dr Nobre and Dr Pretorius, industrial psychologists, as per their joint minute dated 22 June 2020 and agree (sic) that the joint minute can be received into evidence without the necessity of Dr Nobre and Dr Pretorius having to testify.
- 5. Defendant admits the correctness of the contents and opinion of the expert actuary, Wim Loots, as per his reports dated 4 February 2020 and 5 July 2020 and agree (sic) that the reports can be received into evidence without the necessity of Mr Loots having to testify.
- 6. The defendant admits the quantum of the claim in respect of past hospital expenses in the sum of R344 831,53.
- 7. The defendant admits the quantum of the claim in respect of past medical expenses in the sum of R166 941, 28.”

[9] On 22 February 2021, and in compliance with paragraph 15 of the order of 8 December 2020, the plaintiff filed a memorandum which summarised the remaining issues in dispute and incorporated material extrapolated from the pleadings and various expert reports. The defendant raised no issue with its contents, nor did the defendant indicate if it intended to supplement the memorandum in any material respect.

[10] Reverting to the conduct of the proceedings, Mr Schubart called one witness, Dr Nobre, an industrial psychologist. It is unnecessary to recapitulate her qualifications and professional experience. I am satisfied that she has been properly qualified to give expert testimony. Dr Nobre confirmed that a joint minute was concluded between herself and Dr Pretorius, this in relation to the plaintiff's pre-accident career and income progression, as well as his post-accident income earning potential.

[11] The essential aspects of the experts' joint minute has been summarised as follows in the memorandum by Mr Schubart:

- (i) 2015 to 2016 earning a total of R121 774,00;
- (ii) 2017 to 2020 similar earnings;
- (iii) 2021, earning R198 162,45 per annum plus overtime;

- (iv) From 2022 to 2040 earnings increases on a straight line; by age 45 earning R415 000,00 per annum together with overtime;
- (v) Retirement at age 65;
- (vi) There would be annual increases of CPI plus 1% per annum for actuarial purposes.

[12] As previously mentioned, Actuary Loots produced a calculation into which he factored the material contained in the joint minute. In oral evidence, Dr Nobre stated that the plaintiff's pre-accident earnings ought to attract normal contingencies only and not higher than normal contingencies. Her reasons are set out in a brief report read into the record, as follows:

"At the time of the MVA, the claimant was 20 years of age and had progressed well in a noticeably short period of time, showing a positive and upward career trajectory. This suggests high levels of motivation and a good work ethic. It is thus envisaged that this upward career trajectory would have continued.

The claimant was in the process of acquiring sought after skills. As a qualified artisan his skills would have been in high demand in the labour market.

He had positive career role models, which would have positively influenced his approach to work and career. His father was a business owner, one brother was a draughtsman (skilled occupation) and the other held a management position.

The claimant had achieved grade 12 with endorsement to further studies on a National Diploma or Higher Certificate level. His grade 12 marks are suggestive of at least average to above average intellectual functioning.⁴ Clinical Psychologist Annandale opines at least a high average intellect. The claimant is thus likely to have coped well with the demands of successfully completing a trade, would have enjoyed upward career mobility and would have been a highly regarded and desirable employee.

His experience at Welfit Oddy provided him with marketable job skills and valuable work experience within the practical and manufacturing environment. This would have enhanced his employability and competitiveness as well as training and development opportunities allowing him to increase his employability in the labour market."

⁴ On average 57%. His mathematical literacy mark was 73%

[13] I accept that the determination of an appropriate contingency deduction cannot be done with mathematical precision and is a matter of judicial discretion. So-called normal contingencies, however, usually entail deductions of 5% for past loss and 15% for future loss.⁵ For illustrative purposes, Mr Schubart referred to a judgment by Plasket J (as he then was) in the matter of *Michael Deyzel v Road Accident Fund*⁶ in which 15% was applied as a normal contingency deduction against a claim for future loss of earnings. Although the facts in *Deyzel* are distinguishable, the basis of comparison lies in the plaintiff being a dependable individual with a positive and upward career trajectory. Accordingly, on the information before me, and regard being had to the uncontested evidence by Dr Nobre, I find no reason to apply higher than normal contingencies and accept the report by actuary Loots in its entirety (incorporating, as does, the statutory limitation or “cap” as it is otherwise known).

[14] At the conclusion of the proceedings Mr Schubart handed up a draft order reflecting a total award of R 9 773 679, 81. This amount represents the sum of the admitted past hospital expenses of R344 831, 53; the admitted past medical expenses of R166 941, 28, and the contingency adjusted amounts of R457 539, 00 and R9 707 059, 00.

[15] Consequently, the draft order marked “X” which is attached to this judgment is made an order of this court.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

Reasons handed down electronically on 16 April 2021 at 10h30.

⁵ R J Koch Quantum Yearbook 2020 page 118

⁶ Unreported Case No 1886/2013 (EHCPE) delivered 14 August 2014

Appearances:

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No Appearance