FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No. : 5897/2017

In the matter between:-

MESA FRANCIS HALE Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM:	DAFFUE, J
HEARD:	29 MAY 2018
JUDGMENT BY	J P DAFFUE
DELIVERED:	5 JULY 2018

I INTRODUCTION

[1] On 28 February 2015 Mr Mesa Francis Hale, a 51 year old security officer residing in Botshabelo, was knocked down by a motor vehicle in Bloemfontein.

[2] He instituted action against the Road Accident Fund ("RAF") and after closure of pleadings the matter was set down for hearing of both the merits and *quantum.*

II THE PARTIES

[3] Adv Strydom appeared for the plaintiff, Mr Hale.

[4] Mr Gcasamba appeared for the defendant, the RAF.

III STATED CASE

[6] No evidence was led at the trial and the parties' legal representatives handed in a written stated case, requesting me to adjudicate the matter without hearing of further arguments. Defendant conceded the merits 100% and offered to provide the customary certificate in terms of s 17(4) of Act 56 of 1996. I attach the stated case hereto as annexure "A" in order to prevent unnecessary repetition.

IV THE OUTSTANDING DISPUTES

[7] The only issues in dispute are the award of general damages and the contingencies to be applied to the agreed loss of income as calculated by Mr R J Koch.

[8] Plaintiff insists on an award of R950 000.00 in respect of general damages whilst defendant submits that an amount of R750 000.00 shall be awarded. The parties are therefore R200 000.00 apart which is a substantial figure.

[9] Plaintiff submits that contingencies in the usual percentages of 5% in respect of past loss and 15% in respect of future loss of income should be applied and therefore payment in the amount of R1 574 781.30 should be ordered in respect of total loss of income. Defendant submits that the percentages should be 5% and 20% respectively. The difference is a mere R68 364.60.

V EVALUATION

[10] I have carefully considered the agreement in respect of the severity of plaintiff's injuries and the consequences thereof pertaining to future employment. I have also considered the joint minutes of the experts as well as the expert summary of Robert J Koch. It is not my intention to repeat any of the evidence and/or to evaluate the evidence in any detail.

[11] Plaintiff relies on Smit v Padongelukkefonds 2003 (5) QOD E3-11 (T), Ncama v RAF 2015 (7E3) QOD 7 (ECP) and RAF v Marunga 2003 (5) SA 164 (SCA) in support of the amount claimed in respect of general damages. Mr Strydom did not try to compare the injuries in these three cases with the injuries *in casu* or tried to distinguish those injuries from the injuries of the present plaintiff. I studied all three judgments and although differences were detected, the respective injuries are reasonable similar to those *in casu.* Defendant has not referred me to any judgments.

[12] As said, the injuries sustained by the plaintiffs in the above three judgments are reasonably similar to the plaintiff's injuries *in casu* and therefore the awards may be regarded as guides in determining general damages *in casu*. In *Smit* R320 000.00 was awarded and the present value of the award is R719 000.00. In *Ncama* R500 000.00 was awarded which is equal to R621 000.00 today. In *Marunga* R175 000.00 was awarded on appeal and the present value is about R520 000.00.

[13] I do not for one moment wish to be accused of underestimating the seriousness of plaintiff's injuries. However, I am of the view that an award of R750 000.00 for general damages is more than generous and fair towards plaintiff and I consider it to be at the supreme upper limit of awards for injuries in the broadest terms close to those suffered by plaintiff. Such an order shall be made. The amount suggested by plaintiff is not realistic.

[14] The "sliding scale" principle relating to contingency calculations in terms whereof a 1/2 % is allocated for each year till retirement was mentioned and explained in RAF v Guedes 2006 (5) SA 583 (A) 588B – C, but although it may be accepted as a guide, it can never be the alpha and omega. The same court approached the matter totally different as is apparent from paragraphs [16] – [19].

[15] *In casu* an expert such as Mr B Mendelowitz accepted the hearsay evidence of a person at the Human Resources Department of plaintiff's former employer that he would have been promoted to a more senior position the year after the collision in 2015. Plaintiff worked as security guard for the same firm from 2003 and when his employment terminated he earned approximately R39 000.00 *per annum* together with other benefits. On the hearsay version plaintiff's salary would increase from 2016 to about R132 000.00 *per annum* plus benefits, an increase of far in excess of 200%. It is so easy to feed an actuary with certain information and request him to calculate loss of income on such facts. Koch assumed, based on Mendelowitz report – hearsay upon hearsay - that plaintiff would be promoted at the beginning of 2016. The question to be asked is how reliable was that information. If plaintiff was indeed interested to improve himself in order to get a promotion, why did he not do anything about this in the previous 12 years? Based on the manner in which this case was conducted and the RAF's approach to litigation in general,

the parties expect the court to accept their agreement on the facts unconditionally.

[16] The Supreme Court of Appeal mentioned in *Glenn Marc Bee v RAF* (093/2017) [2018] ZASCA 52 (29 March 2018) para [30] that a court is entitled to test the reliability of the joint opinion of experts. Such agreed opinion may be rejected if it is based on incorrect facts. I have no issue with the joint minutes in this regard, but the principle remains. Mendelowitz, an expert and industrial psychologist, received information about plaintiff's career prospects during a telephonic conversation with a person of the Human Resources Department of plaintiff's previous employer. That information became the basis for calculation of the claim for loss of income. There was no consultation with plaintiff's direct head or the person in charge of security to establish whether plaintiff was indeed capable of being promoted.

[17] However, in light of the agreement by the parties, I decided not to refer the matter back to Koch to do calculations on the income that would have been received, but for promotion. I shall rather try to see to it that justice is done by refusing to allow the "normal" 15% contingency deduction as suggested by plaintiff.

[18] The application of contingencies is largely arbitrary and depends on the trial judge's impression of the case. See: Bonesse v RAF 2014 (7A3) QOD 1 (ECP) at A3-17, a judgment by Pickering J, relying on the well-known *Bayley*

judgment. We all know how difficult it is to predict the future. The court would have been in a much better position to consider the issue of contingencies if *viva voce* evidence was presented and witnesses properly cross-examined.

[19] Having said this, I am satisfied that a 20% contingency deduction in respect of future income is generous towards plaintiff. I am not convinced that Koch's assumption of a promotion and an increase in salary of in excess of 200% was realistic. Therefore even a higher percentage than 20% might have been justified. In light of the agreement set out in the stated case it would be unfair to go beyond the suggestion of the defendant.

VI CONCLUSION

[20] Consequently plaintiff is entitled to the relief agreed upon as well as payment in his favour as indicated *supra.* The total amount of the monetary claim is R2 256 417.60, to wit R750 000.00 for general damages and R1 506 417.60 for loss of income. There is also no reason why a costs order as requested shall not be granted.

VII ORDERS

[21] It is ordered that

1. The Defendant shall pay damges to the plaintiff in the sum of R2 256 417.60 (Two million two hundred and fifty six thousand

four hundred and seventeen Rand sixty cent) together with interest thereon at the rate of 10% *per annum*, calculated from the day following the lapse of a period of 14 days from the date of the grant of this order to date of final payment;

2. The payment referred to in paragraph 1, *supra,* and the costs referred to in paragraph 4 *infra*, shall be made into the trust account of the Plaintiff's attorneys, being SSH Mehlomakulu & Co, with account 53760023945 held at the Sterkspruit Branch of the First National Bank;

3. The Defendant shall furnish the Plaintiff with an undertaking, as contemplated in Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to compensate the Plaintiff for the costs of the Plaintiff's future accommodation in a hospital or nursing home, or for the treatment of, or rendering of a service or supply of goods to the Plaintiff, arising from injuries sustained by Plaintiff in a motor collision which occurred on the 28th day of February 2015, after such costs have been incurred and on proof thereof;

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, such costs to include the costs occasioned by the employment of the following expert witnesses, including their reservation and qualifying fees, fees for attending court, if any, and the costs of such expert witnesses attendant upon the consultations between such expert witnesses and the Plaintiff's legal representatives,

inclusive of the travelling and accommodation costs of such legal representatives to attend such consultations:-

4.1 Dr Olivier (orthopaedic surgeon);

4.2 Mrs Basson (occupational therapist);

4.3 Mr Mendelowitz (industrial psychologist);

4.4 Dr R Koch (actuary).

J. P. DAFFUE, J

On behalf of applicants: Adv S Strydom
Instructed by:
SSH Mehlomakulu& CO
BLOEMFONTEIN

On behalf of respondents: Mr Gcasamba
Instructed by:
Maduba Attorneys
BLOEMFONTEIN