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**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

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

Case number: 897/2015

In the matter between:

**T L**

**PLAINTIFF**

and

**THE ROAD ACCIDENT FUND**

**DEFENDANT**

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**HEARD ON:** 14 JUNE 2019

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**JUDGMENT BY:** MOLITSOANE, J

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**DELIVERED ON:** 14 SEPTEMBER 2019

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- [1] This is a claim for damages arising out of a motor vehicle collision which occurred on the 4<sup>th</sup> May 2013. The merits were settled on the basis that the defendant was liable for 80 % of the Plaintiff's proven or agreed damages. On the 20<sup>th</sup> November 2018 the defendant agreed to pay an amount of R6 222 349.99 to the plaintiff being in respect of past hospital and medical expenses.
- [2] The only issue outstanding is the Plaintiff's past and future loss of earnings. This matter was enrolled on the 12<sup>th</sup> March 2019 for the adjudication of this outstanding issue. On the said date the Plaintiff was ready to proceed. The defendant was not ready and requested a remand. The defendant further tendered costs as well as interim payment of R400 000 in respect of loss of earnings. It was submitted on behalf of the defendant that the claim for loss of earnings was competent and that it was unlikely to be less than two million rands. I granted a postponement of this matter and further ordered the defendant to make an interim payment in the amount of R800 000 being for loss of earnings.
- [3] Several reports were filed by the parties. These reports included the joint minutes of the orthopaedic surgeons, Drs LF Oelofse and TS Bogatsu; the joint minutes of the occupational therapist, Mesdames Weyer and S Moagi as well as the joint minute of the Industrial Psychologists, Dr E Jacobs and Ms M Kheswa.
- [4] The plaintiff testified that he did matric in 2012 but did not pass it. He was, however, forced to write a supplementary examination in

2013. In 2014 he enrolled for a three year Business Management Course at Jeppe College. It was during this time in his life that he was involved in an accident on the 4<sup>th</sup> May 2014. He further did a one year internship with another entity.

[5] Brian Mallinson opined that the plaintiff's performance on neuropsychological testing was variable. He further opined that the plaintiff's ability in problem solving tasks was poor and he had particular difficulty with tests involving auditory attention and numerical reasoning. According to him the difficulties aforementioned were consistent with those commonly seen following diffuse brain injury, including a frontal lobe component.

[6] Dr Shevell, a psychiatrist diagnosed the plaintiff with mood disorder secondary to general medical condition. According to him the plaintiff requires psychiatric treatment. He opines that the plaintiff's entry into the open labour market has been delayed by a period of two to three years.

[7] In their joint minute, Drs Bogatsu and Oelofse, orthopaedic surgeons, agree that the plaintiff sustained a right upper leg amputation and left leg injury. Both agree that the plaintiff is now an unfair competitor in the open labour market and that he must be accommodated in a sedentary position. They further agree that he now has significant loss of employment capacity and provision ought to be made for his retirement five years earlier.

- [8] Dr Jacobs and Me Kheswa, Industrial Psychologists, compiled joint minutes with regard to past and future loss of earnings. There is a dispute between the two experts on the employability of the plaintiff. Dr Jacobs is of the opinion that the plaintiff is left with a very slight earning capacity and may be said to be unemployable in the open labour market having regard to his severe orthopaedic and brain injuries. On the other hand, Ms Kheswa is of the opinion that plaintiff was able to secure employment for one year internship in his field of study after the accident. According to her, plaintiff did manage to work for the full internship for a year. According to her plaintiff might be able to secure sedentary work in the open labour market considering his educational background.
- [9] At the time when the cause of action arose the Plaintiff was unemployed and was still a student at Jeppe College pursuing studies in Business Management. It has to be borne in mind that the opinions of the experts must be based on sound logical reasoning-**Michael and Ano v Linksfield Park Clinic (Pty) Ltd and Ano** 2001 (3) SA 1188(SCA) [36]-[40]. It is clear that the witness for the defendant, Ms Kheswa, based her opinion on the fact that the plaintiff secured a one year internship notwithstanding the injuries. In my view the foundation for the opinion is wrong. Internship may be described as being more of a practical training than the actual employment. The requirements for acceptance into internship may differ with the requirements for admission into employment. The injuries and their *sequelae*

thereof have resulted in mood swings as diagnosed by the psychiatrist Dr Shevell. The opinion of Mr Mallinson that the plaintiff's employment potential has been significantly blighted remains undisputed. His opinion that the plaintiff would at best be able to work in a highly structured, well supervised environment performing menial tasks also remains uncontested. Mallinson says even in this situation, his personality difficulties may impact negatively on his job performance. The opinion of the only witness for the defendant is in my view not based on a sound foundation backed by any evidence and probabilities go against it.

[10] The plaintiff's claim, as he was unemployed, is founded on his loss of earning capacity as opposed to his loss of income. The evidence led on his behalf indicate that he suffers from loss of income and ought to be compensated accordingly. It is not the case for the defendant that the plaintiff did not suffer any loss of earning capacity. In my view the evidence of Dr Jacobs regarding the plaintiff's uninjured and injured earning capacity may safely be relied upon.

[11] The evidence of Mr Boshoff, an actuary, remains undisputed. His calculations based on the information supplied to him was not challenged. He opines that in the circumstances of this case plaintiff suffered past loss of earnings in the amount of R410 100.00 and a future loss of earnings in the amount of R4 288 780.00. I have no reason to reject his evidence. However, in arriving at the appropriate compensation, regard must be had

to the contingencies, the interim order in the amount of R800 000 made on the 12<sup>th</sup> March 2019 and the apportionment.

[12] The only aspect left is the issue of costs. It is trite that the award of costs lies in the discretion of the court. A disconcerting concern in this matter is the fact that at the start of the proceedings Counsel for the defendant disclosed to the court contrary to the Rules the offer made to the Plaintiff. In argument he insisted that he acted on instructions of a client when he so made the disclosure. The disclosure aforesaid flew in the face of the peremptory provisions of Rule 34(10). This conduct ought to be deprecated and Counsel cannot hide behind the veil of 'acting on instructions of client'. He is an officer of the Court and is both legally and ethically obliged to advise client accordingly. I cannot, however, find merit in the submission by Counsel for plaintiff to order costs against the defendant on attorney and client scale. I accordingly make the following order:

[13] **ORDER**

1. The Defendant is liable for payment to the Plaintiff, in addition to the interim payment in the amount of R800 000.00 as ordered in court dated 12 March 2019, a further amount of R3 898 880.00 (Which amount already includes the contingencies and apportionment), in full and final settlement of the Plaintiff's claims in respect of past and future loss of income, resulting from a motor vehicle collision that occurred on 5 May 2013.

2. The Defendant is ordered to pay the plaintiff's taxed or agreed costs on the scale as between attorney-and-client, until date of this order, including but limited to the costs set out hereunder:
  - 2.1 The costs attendant upon the obtaining of payment of the amounts referred to in this order;
  - 2.2 The reasonable preparation / qualifying/ accommodation/ travelling and full reservation fees and expenses ( if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:
    - 2.2.1 Dr Oelofse ( Orthopaedic Surgeon);
    - 2.2.2 Dr DA Shevell (Psychiatrist);
    - 2.2.3 Hanri Meyer (Occupational Therapist);
    - 2.2.4 Brian Mallinson (Psychologist)
    - 2.2.5 Dr Evert Jacobs (Industrial Psychologist)
    - 2.2.6 Munro Actuaries.
  - 2.3 The counsels' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's witnesses and the plaintiff's experts;
  - 2.4 The attorneys' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultation with the plaintiff, the plaintiff's witnesses and the plaintiff's experts;

- 2.5 The travelling costs occasioned by the plaintiff, and the plaintiff's witnesses to attend to necessary consultation with his attorney and expert witnesses.
3. The payment provisions in respect of the foregoing are ordered as follows:
- 3.1 Payment of the capital amount shall be made without set-off or deduction, within 30 (thirty) calendar days from date of the granting of this order, directly into the trust account of the of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:
- |                 |   |                               |
|-----------------|---|-------------------------------|
| Honey Attorneys | – | Trust Account                 |
| Bank            | - | Nedbank, Maitland Street, Bfn |
| Branch Code     | - | 11023400                      |
| Account No.     | - | 1102475912                    |
| Reference       | - | HL Buchner/J03080             |
- 3.2 Payment of the taxed or agreed costs shall be made within 14 days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.
- 3.3 No interest will accrue in respect of any of the aforesaid amounts on or before the stipulated dates.
- 3.4 Should payment not be made in respect of any of the aforesaid on or before the stipulated date, interest will accrue at 10, 25% compounded.
4. In the event that costs are not agreed:



- i. The plaintiff shall serve a notice of taxation on the defendant's attorney of record, and
- ii. The plaintiff shall allow the defendant fourteen court days to make payment of the taxed costs.

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**P.E. MOLITSOANE, J**

On behalf of the applicant:      Adv. L LR Pohl SC  
Instructed by:  
Honey Attorneys  
BLOEMFONTEIN

On behalf of the respondent:      Adv. RJ Nkhahle  
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