

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

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: **4124/2017**

In the matter between:

M[...] M[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **23 AUGUST 2023**

DELIVERED ON: **3 NOVEMBER 2023**

[1] The Plaintiff, thirteen years old at the time of the accident, instituted an action against the Defendant against the Defendant arising out of the injuries he sustained as a passenger in a motor vehicle accident. The Defendant has rejected the right to claim general damages and thus on this aspect, the jurisdiction of this court was ousted. The issue regarding the future medical expenses was conceded. This court is only called upon to adjudicate the contingencies to be applied on loss of earnings.

[2] The parties agreed that the experts report filed with the accompanying affidavits shall serve as evidence before court.

[3] Dr Schutte, a general practitioner diagnosed Plaintiff with mal-united right femoral shaft fracture, with residual symptoms, excessive internal rotation, tendonitis and post traumatic osteoarthritis of the right hip. According to Dr Schutte the Plaintiff was treated for occipital abrasions.

[4] Dr Oelofse, an orthopaedic surgeon confirmed the diagnosis of Dr Schutte that the Plaintiff sustained the following injuries; occipital abrasions and right femur fracture with a deformity. According to the report of Dr Oelofse, an open reduction and internal fixation of the right femur was performed on the Plaintiff. Dr Oelofse opines that it was not possible to prognosticate at such young age what the patient's productivity will be in the future. He opines, however, that the right hip/upper leg injury will have an impact on his productivity or retirement age, regardless of the type of employment he chooses. He is of the opinion that the accident and accompanying injuries did not have a detrimental effect on the claimant's life expectancy.

[5] Dr Oelofse hold the view that the Plaintiff is an unfair competitor in the open labour market due to the injuries he sustained in the accident. He opines that it will be difficult to compete with other healthy abled individuals to secure employment.

[6] Dr Van Aswegen, a neurosurgeon, summarised the Plaintiff's injuries, as being a traumatic brain injury, occipital abrasions and right femur fracture with deformity. According to him the *"long term cognitive and emotional consequences of mild traumatic injury include somatic symptoms such as chronic headaches, cognitive symptoms such as attentional deficits, reduced working memory and impaired executive functions, and psychiatric symptoms such as depressed mood, insomnia, anxiety, poor motivation, social withdrawal and interpersonal difficulties (Konrad et al., 2011), (Bazarian et al., 2009)."*

[7] Dr Shevel a Psychiatrist opines that the Plaintiff suffers from a chemically held form of post-traumatic organic brain syndrome. Dr Shevel opines that children who

have sustained a traumatic brain injury often exhibit what is called the “sleeper effect”. This according to Dr Shevel implies that such children can do well in the lower grades where concrete thought and rote learning is required. He however holds the view that with progression to the higher grades, where abstract thought and conceptual thinking is required, academic school performance tends to drop off. This according to him, seems to be the situation with the plaintiff. According to him the plaintiff remains educable but was unlikely to achieve his pre-accident educational potential.

[8] Mr Mallinson, a psychologist, also assessed the plaintiff. He assessed the neuropsychological functioning of the claimant. The assessment revealed that the plaintiff had poor auditory attention; difficulty with working memory and double conceptual tracking, significant psychomotor showing; poor visual attention, difficulty with numerical reasoning; poor planning on an unstructured problem-solving task. He opines that given the above-mentioned factors noted in the assessment, it is unlikely that the plaintiff’s scholastic performance would reach the level it was before the accident.

[9] On the pre-accident scenario, Ms Elmarie Prinsloo, an educational psychologist opines that the Plaintiff would have been able to complete Grade 12(NQF4) with a degree endorsement before the accident. With reference to his technical/ practical cognitive skills base considered, Me Prinsloo opines that the plaintiff would probably have been better suited to follow diploma studies.

[10] On the post-accident scenario, she refers to the factual information which indicates that the plaintiff passed grade 12 with degree endorsement. He enrolled at TVET College the following year and completed a three month N1 qualification.

[11] Dr Jacobs, an industrial psychologist indicates with reference to the uninjured career of the plaintiff, that he was a scholar of the time of the accident. That his educational level could most likely be seen as NQF6 (Grade 12 + Diploma) as postulated by Me Prinsloo. That he would have had some opportunity as any healthy person to study, work and complete for better paid position in the labour market.

[12] On the injured scenario, Dr Jacobs opines that it is highly unlikely that contrary to the aspiration of the plaintiff, that he would have become a lawyer. he notes that the plaintiff would have been able to perform secretarial work with reasonable accommodation. He noted with deference to the opinions of Dr Oelofse and Deacon, that the plaintiff would have retired 5 years earlier than his retirement age. According to him, the accident has changed his capacity to learn and earn.

[13] Munro Actuaries, calculated the plaintiff's loss of income. According to the information provided to them, it is indicated that the claimant is not expected to reach the suggested pre-accident career potential and was expected to retire early. The actuaries were also instructed to apply a 20% deduction on the uninjured future earnings and 50% on the injured future earnings

[14] The report on the calculations by the actuary is based on the information supplied by the plaintiff's attorney as well as the report of the industrial psychologist Dr Jacobs in order to quantify the future uninjured and injured earnings. The actuaries took into account that the Plaintiff is not expected to reach the suggested pre-accident career potential and might suffer losses that are not directly quantifiable and should be addressed via contingencies.

[15] I requested the parties to file the Heads of argument in respect of the contingencies to be applied. Adv. Zietsman SC, obliged for which I am thankful. Ms Booysen, on the other hand, only filed two judgments as well as a document styled "*Loss of earnings Calculator*". In this document, 25% contingencies were applied on the pre-morbid earnings scenario while 30% was applied on the post morbid earnings. I take it that Counsel for the Defendant handed in the judgments for this court to consider them in the adjudication of this dispute. In the unreported matter handed to Court of *ZWZ obo SLN v Road Accident Fund*¹, the Plaintiff had sustained a minor head injury and a laceration and abrasion over the forehead. On the pre-morbid scenario, the claimant in that case was considered to be of above average intelligence and that he could have progressed through the main stream school system, matriculated and proceeded to obtain a tertiary university degree. The

¹ (10925/2017)[2013] ZAKZDHC 28(26 May 2023).

experts in that case agreed that for “the purpose of settlement (my emphasis) the average earning of a diploma and degree be utilised with a contingency of 25% pre-morbid and 35% post-morbid².”

[16] The second case of *Dlamini Nonhlahla v Road Accident Fund* (Gauteng Case number 21375/2019) also need consideration. In this case the Plaintiff also suffered a traumatic head injury. An educational psychologist and neurologist opined that, but for the accident, the Plaintiff would have been expected to pass Grade 12 and obtain a degree. The court in that case said:

“It is appropriate that 5% contingency be applied to the Plaintiff’s claim for past loss of earnings, a 20% contingency to be applied to the value of the plaintiff’s income, but for the accident, and a 25% contingency to the value of the Plaintiff’s income, regard being had to the accident.”

[17] If anything, the two cases relied upon by the Defendant illustrate and fortify the settled principles of our law. First, that contingencies are in the discretion of the court. Such discretion will be eroded if the court will apply the percentage of contingency applied in another case without looking into the merits of the case before it. Each case must be adjudicated on its own merits. Secondly, past awards only give guidance and do not become precedents for future awards. Their impotence lies in guidance and persuasiveness. It is important to note that in *ZWZ*(above), unlike in this case, the contingencies to be applied emanated from the parties’ intent to settle. They were applied by agreement between the parties and that helps little the adjudication of this case.

[18] I am in agreement with the suggested contingency deductions by the plaintiff’s actuary in discounting the loss of income of the child that in the uninjured scenario a contingency deduction of 20% should be applied and in the injured scenario a 40% deduction should be made. The actuary had applied 50% deduction in the report as instructed. I accordingly make this order:

² Para 14 of *ZWZ* supra.

ORDER

1. The defendant is liable for payment to the plaintiff in the amount of **R1 677 620.00 (One million six hundred and seventy-seven thousand six hundred and twenty rand) [hereafter “the capital”]** in respect of plaintiff's claim for future loss of income resulting from a motor vehicle collision that occurred on **4 September 2015**.

2. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the minor child in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by her in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate her in respect of the said costs after the costs have been incurred and on proof thereof.

3. The defendant to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

3.1 The reasonable qualifying and reservation fees of the following experts:

- 3.1.1 Dr JJ Schutte (general practitioner)
- 3.1.2 Dr LF Oelofse and Dr MB Deacon (orthopedic surgeons)
- 3.1.3 Van Dyk & Partners (diagnostic radiologists)
- 3.1.4 Sandton Radiology (diagnostic radiologists)
- 3.1.5 Dr A van Aswegen (neurosurgeon)
- 3.1.6 Dr A Shevel (psychiatrist)
- 3.1.7 B Mallinson (neuropsychologist)
- 3.1.8 E Prinsloo (educational psychologist)
- 3.1.9 Dr K Truter (clinical psychologist)

- 3.1.10 M Joubert (occupational therapist)
- 3.1.11 A Jansen (occupational therapist)
- 3.1.12 Dr EJ Jacobs (industrial psychologist)
- 3.1.13 Munro Forensic Actuaries

3.2 The cost of Senior Counsel.

3. The payment provisions in respect of a foregoing are ordered as follows:

3.1 Payment of the capital amounts shall be made without set-off or deduction, within 180 (hundred and eighty) calendar days from date of the granting of this order, directly into the trust account 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	110 234 00
Account No.	1[...]
Reference	HL Buchner/vch/J03683

3.2 Payment of the taxed or agreed costs shall be made within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

4 Interest shall accrue at 11.75% (the statutory rate per annum), compounded, in respect of:

4.1 the capital of the claim, calculated from 14 (fourteen) days from date of this order.

4.2 the taxed or agreed costs, calculated from 14 (fourteen) days

from date of taxation, alternatively date of settlement of such costs.

5. The plaintiff's claim for general damages is separated in terms of Rule 33(4) and is postponed to the pre-trial roll of 27 November 2023.

P. E. MOLITSOANE, J

On behalf of the Plaintiff:	Adv. PJJ ZietsmanSC
Instructed by	Honey Attorneys BLOEMFONTEIN
Ref	HL BUCHNER/Idm/ J03683

On behalf of the Defendant:	Ms M. Booysen
Instructed by	State Attorney BLOEMFONTEIN
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