REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 14452/2007

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

2018/2018
DATE

SIGNATURE

In the matter between:

MATILA, PAGIAL

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

TSHABALALA, J:

[1] The plaintiff has instituted the present proceedings against the defendant in terms of Act 56 of 1996 for damages, he allegedly suffered following a collision he was involved in on 6 November 2005 on the Old Potchefstroom Road in Soweto with a certain motor vehicle.

[2] Prior to leading evidence, the parties had reached an agreement on the following:

2.1 The defendant conceded liability in full for the plaintiff's proven damages in terms of a court order of 1 February 2011;

2.2 There are no past medical expenses;

2.3 The defendant will pay the plaintiff R500 000,00 for general damages;

2.4 The defendant will furnish the plaintiff with a section 17(4) certificate to cover future medical expenses;

2.5 An interim payment of R243 000,00 was made to the plaintiff, which should be deducted from the total judgment amount;

2.6 The plaintiff has suffered past and future loss of earnings;

2.7 The parties have also reached an agreement on the future loss of earnings pre- and post-morbid;

2.8 Past loss of earnings are R36 540,00.

[3] The only issue I am called upon to determine is that of the contingency applicable to the future loss of earnings.

[4] During argument, both parties argued for a pre-morbid contingency deduction of 15%. There was, however, a huge difference on the contingency deduction post-morbid.

[5] The plaintiff was referred to various experts by both parties for the assessment of the nature and extent of his injuries, their impact on his future employability and his ability to continue to be gainfully employed to earn an income and finally to enable the court to determine the contingency deduction/s to be made. The reports and joint minutes of the various experts were admitted as evidence without the need to call such experts.

[6] At the time of the collision, the plaintiff was almost 27 years old and is now 34 years of age. He was a pedestrian manning a refreshment station for an athletic event at the time when the collision occurred. The collision rendered him unconscious (momentarily), but he regained it whilst still at the scene of the accident. He confused immediately thereafter. An ambulance had arrived and he was conveyed to Chris Hani Baragwanath Hospital where he was treated. He was an athlete of note and won prizes and trophies as such. At the time of the collision, his career path was already mapped out.

[7] According to his clinical records and the statutory medical report completed by Dr J Nach the plaintiff was diagnosed with a severe fracture of sesamoid bone on the left ankle which was placed on a Plaster of Paris boot. He was supplied with crutches.

[8] According to the Neuro/Clinical Psychologists' joint minutes of Anne Gibson and Tess Preininger:

8.1 They defer to the opinions of Drs H Edeling, a neurosurgeon and Braude a psychiatrist.

8.2 The brain injury described by Drs Edeling and Braude, would be expected to result in the neuropsychological *sequelae* experienced by the plaintiff.

8.3 The deficits found by both psychologists were consistent with the brain injury described by Dr Edeling.

8.4 The deficits related to: mental tracking, orientation, visual attention, immediate and sustained attention, working memory, learning, susceptibility to cognitive overload, verbal memory, recent chronological memory, non-verbal (visual) memory, visuo-motor integration, visuo-spatial processing construction, conceptual and reasoning problems, self-monitoring,

organisation, planning, volition capacity, insight and verbal fluency.

8.5 The plaintiff demonstrated a profound impairment in his cognitive functioning, which included executive dysfunction.

8.6 The plaintiff's brain injury is probably the primary cause of his difficult ties and raised the risk for psychiatric disorders of various kinds.

8.7 The plaintiff's difficulties and disorders are likely to be permanent and that no further significant improvement is likely to occur.

8.8 From a psychological perspective it will be unlikely for the plaintiff to perform work as a fire fighter or ambulance driver efficiently or adequately.

8.9 He is not suited to work in a hazardous environment and will require supervision.

8.10 But for his sympathetic employer he would in all likelihood have been unemployed, and is still at risk of being unemployed.

8.11 They defer to the industrial psychologists on the issue of his loss of earnings.

8.12 The plaintiff was malingering and did not attempt to mislead the experts.

8.13 Dr Preininger for the defendant, also found the plaintiff to be rigid, demotivated and negative in his thought patterns and severely depressed and anxious.

[9] The Occupational Therapists M Doran and N September report that:

9.1 The plaintiff is a qualified fire fighter. His tasks, however, fall within the parameters of sedatory, light and moderate nature because of his sympathetic employer and understanding co-workers.

9.2 The occupation of a fire fighter requires exertion of a very physical nature.

9.3 He performs the work of an ambulance driver which job can be categorised as of moderate nature.

9.4 The execution of his tasks, produces increased pain and discomfort in the left knee, sole of the foot and lateral malleolus especially when driving.

9.5 He is struggling to meet the manual dexterity demands of heavy to very heavy nature of a fire fighter.

9.6 Is exempted from duties which require frequent movement from dynamic positions.

9.7 Is exempted from attending emergency calls.

9.8 During periods of awareness of symptoms and inclement weather he would experience decreased efficiency and productivity when required to drive the ambulance.

9.9 He can only hold on to his present job at the mercy of his sympathetic employer.

9.10 He is a vulnerable and compromised employee and would continue to experience pain and discomfort which could lead to demotion and even loss of employment.

9.11 Should the plaintiff undergo a foot fusion operation he will not be suited for the job he is performing presently and will be limited to doing sedentary/light duties.

9.12 These experts differ to Industrial Psychologists for an opinion in the event of the plaintiff undergoing a foot fusion as suggested by Dr Read.

[10] Dr H Edeling a neurosurgeon defers to the opinion of an orthopaedic surgeon, a psychiatrist, a neuropsychologist, an occupational therapist and an industrial psychologist for an assessment of a *sequelae* to the plaintiff's injuries and reports that:

10.1 The brain injury may have resulted in a small increased risk of late post-traumatic epilepsy of not more than 5%.

10.2 The neurological *sequelae* of his brain injury has resulted in a risk of late psychiatric complications and will hamper the treatment of his psychological problems.

10.3 His injuries have resulted in certain degrees of employment disabilities as well as losses of amenities and enjoyment of life.

10.4 Due to the limitation imposed by both his physical and mental impairment his ability to put to use his residual intellectual

capacity will be jeopardised the executive mental impairment and fatigue as well as by mood and personality factors.

10.5 The neuropsychological *sequelae* of his brain injury have stabilised and become permanent and his post-traumatic headaches have become chronic. They are expected to persist in variable degree in the long term albeit amenable to reasonable control.

[11] Dr J W Earle, a neurosurgeon reports that:

11.1 The plaintiff had indeed sustained a head injury, which, according to him was of a minor nature regard being had to a brief period of unconsciousness and post-traumatic amnesia.

11.2 He has headaches and pains on his left perineal region of his lower leg.

11.3 The degree of the plaintiff's brain injury cannot lead to any long term intellectual problems or ability to apply himself to his studies or to post-traumatic epilepsy.

[12] I was, however, not supplied with the joint minutes of Drs Edeling and Earle. I note that their opinions differ so much that they may have been reporting about different people. I note also that Dr J Earle was not supplied

with the clinical records from the ambulance service to enable him to make a proper and balanced report. His report was based on the information at his disposal which consisted of an EEG, an MMFI medical report of Dr Nach, clinical records from the hospital and Dr I Read's orthopaedic medico-legal report. Based on this fact alone I am inclined to believe that he was not in a position to state with any degree of certainty that the plaintiff's unconsciousness was for a brief period.

[13] Digby S Ormond-Brown a Clinical Neuropsychologist relying on the cognitive testing conducted by Dr B Braude a psychologist and his interview with the plaintiff which interview suggested the presence of post-traumatic amnesia concluded that the plaintiff had indeed suffered from a concussive head injury:

13.1 He also found that the plaintiff experienced and displayed the following symptoms which might be *sequelae* to brain injury:

13.1.1 forgetfulness and inability to concentrate for long periods;

13.1.2 reduced motivation;

13.1.3 headaches which he experiences approximately three times per week.

[14] According to Dr Braude, a psychiatrist, it is expected that the plaintiff did sustain a brain injury regard being had to: the uncertain period of unconsciousness, his dizziness, persistent headaches, hearing impairment, fatigue, auditory hallucinations, memory, concentration and learning impairment and an initial experience of confusion.

14.1 Dr B Braude further confirms that the plaintiff suffers from:

14.1.1 Post-Traumatic Organic Brain Syndrome ("*PTOBS*") as a result of gross cognitive impairment;

14.1.2 Adjustment Disorder ("*AD*") which he attributes to pain and limitation of movement of his ankle and reduced life span of his running career;

14.1.3 Post-Traumatic Stress Disorder ("*PTSD*") attributable to the serious injuries that he has sustained.

14.2 According to him (Dr Braude) the PSTD referred to above has resulted in the plaintiff experiencing/developing:

14.2.1 re-experiencing of the trauma by reason of being reminded of recollection of the accident;

14.2.2 avoidance of stimuli associated with the trauma by avoiding thoughts or conversation about the accident and staying away from running and traffic areas; and

14.2.3 symptoms of increased arousal in the form of insomnia, hypervigilance and an exaggerated startle response.

14.3 Dr Braude also defers to factual information from his employer and to an industrial psychologist to assess and evaluate his likely loss of future earnings.

[15] Dr G Read, an orthopaedic surgeon, reported that:

15.1 The plaintiff had a restricted/limited movement of the left ankle both dorsi and plantar flexion.

15.2 Plaintiff had a painful external rotation of the left ankle.

15.3 His subtalar joint is unstable.

15.4 He had experienced a significant degree of pain and faced a prospect of anthroscopy to the affected left ankle.

[16] The Industrial Psychologists E Rossouw and C Campbell agreed that:

16.1 The plaintiff would, but for the accident, have worked until the normal retirement age of 65 years as a fireman.

16.2 He would probably have progressed to the position of a Platoon Commander.

16.3 He would have additionally been eligible for overtime pay/benefits.

16.4 He suffered partial loss of earnings from January 2006 until his appointment as a fire fighter later that year. The claim for this head of damages has been settled.

16.5 He has not and cannot perform his duties as a fireman notwithstanding his qualification as such.

16.6 He has instead been accommodated as an ambulance driver by his employer.

16.7 The experts defer to the other experts on the impact of his injuries on his post-accident work ability.

16.8 The plaintiff is a vulnerable employee and has been placed at a disadvantage in relation to his uninjured peers.

16.9 He would remain at his present position and doing the same job for as long as his employer's sympathy lasts/persists.

16.10 He is unlikely to pass further courses.

16.11 It is likely that his employer may find him unfit to perform his work at the expected standard and would probably lose his employment.

16.12 These two experts had not had the benefit of the joint minutes of the other experts and consequently did not address the issues agreed upon between these other experts. I am in this regard advantaged by having had sight of those joint minutes, and the psychiatrist's and neuropsychologist's reports.

[17] The plaintiff was not referred to the following experts on behalf of the defendant viz a clinical neuropsychologist, a psychiatrist and an orthopaedic surgeon. Consequently the reports of the plaintiff's experts in these fields remain unchallenged. There is therefore no reason for me not to accept their reports as uncontroverted evidence.

[18] The overwhelming body of evidence in this case supports the view that the plaintiff's post-morbid condition and prospects have been compromised, and that he is unsuited for the career he was trained and qualified for. He remains employed in his current job as an ambulance driver at the mercy of his sympathetic employer and co-employees who for now are understanding and accommodative of his plight. Such understanding and sympathy is not guaranteed to persist indefinitely. With the change in his supervisor and his co-workers the plaintiff's fate may change for the worst to the extent of even losing his employment.

[19] According to the experts plaintiff is not even suited to drive an ambulance as he presents a high risk not only to himself and his crew and patients but also to other road users due to *inter alia* the following factors:

19.1 The risk of developing epilepsy has been increased to not more than 5%.

19.2 The risk of being reminded of or re-experiencing the trauma of the accident.

19.3 Hearing impairments, persistent headaches, dizziness, lack/shortcomings in concentration and working memory which results in him forgetting instructions.

19.4 Persistent affective disorders and behavioural difficulties which will be resistant to treatment.

19.5 Deficiency in immediate and sustained attention, profound impairment in his cognitive functioning including the injured is not over- or under-compensated regard being had to the circumstances of each case.

[20] As set out earlier in the body of this judgment, the parties had reached an agreement on the future pre- and –post morbid loss of earnings in the following amounts: R4 719 968 and R4 049 194 respectively.

[21] Both parties agree on a pre-morbid contingency deduction of 15% which will result in a total loss of R4 011 972.

[22] On post-morbid the plaintiff argues for a contingency deduction of 45% and the defendant argues for a difference of 5% between the pre- and post-morbid scenarios.

[23] On the facts of this case I am satisfied that a contingency deduction of 37% justified by the peculiar facts of this case. This deduction translates into a post-morbid income of R2 550 992.

[24] The difference between the pre- and post-morbid losses is an amount of R1 460 980 which in my view is the total amount of plaintiff's future loss of income.

[25] The total of plaintiff's monetary damages is therefore :

25.1	general damages :	R500 000
25.2	plus future loss of income :	R1 460 980
25.3	plus past loss of earnings	R36 540
25.4	Total	R1 997 520.

The plaintiff has already received R243 000 which must be deducted from the total capital.

[26] In the result I make the following order:

1. Payment of the amount of R1 997 520 (less R243 000 already paid to the plaintiff).

2. Payment will be made directly to the trust account of the plaintiff's attorneys, on or before 28 May 2013:

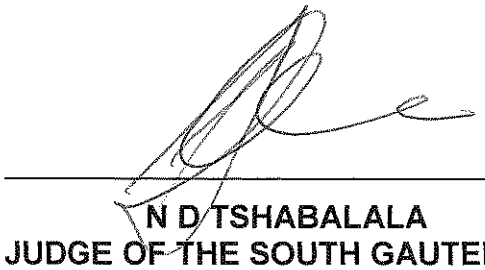
Holder:	De Broglio Inc
Account No:	1469 186 160
Bank and Branch:	Nedbank – Business Northrand
Code:	146 905
Ref:	M1323

3. The defendant is ordered in terms of section 17(4) of the Road Accident Fund Act 56 of 1996, to reimburse the plaintiff for the costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by plaintiff in the motor vehicle accident which occurred on 6 November 2005, after such costs have been incurred and upon proof thereof.

4. The defendant is to pay the plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the qualifying fees of the experts, consequent upon obtaining plaintiff's reports.

5. The plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the defendant's attorney of record.

6. The plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs.



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JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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