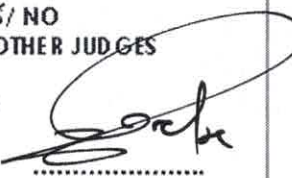


IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, GAUTENG

Case number : 16/04133

(1) REPORTABLE: YES/ NO	
(2) OF INTEREST TO OTHER JUDGES	
YES/NO	
(3) REVISED YES/NO	
15/12/017	
DATE	SIGNATURE

In the matter between:

Jan Frans Daniel Vermaak

Plaintiff

and

Road Accident Fund

Defendant

JUDGMENT

Carelse J:

[1] This is a claim for damages arising out of a motor vehicle collision that took place on 6 March 2011 along Christiaan De Wet Road.

[2] At issue are both merits and quantum. Mr Vermaak, the plaintiff testified and did not call any witnesses. The defendant did not call any witnesses.

[3] At the time of the collision the plaintiff was 54 years' old. The plaintiff's evidence as a whole is uncontroverted. On 6 March 2011 at about 002:15 the plaintiff's daughter's motor vehicle broke down. He received a call for help from his daughter. On arrival at the break down scene he parked his motor vehicle in front of his daughter's motor vehicle. Immediately prior to the collision he was standing between the two vehicles. He opened the bonnet of his daughter's motor vehicle to look at the engine. He noticed the lights of an oncoming motor vehicle. The oncoming vehicle was driving at high speed and headed straight towards them.

[4] The plaintiff pushed his daughter out of the way and he jumped out of the way to avoid the motor vehicle colliding into him but was unable to avoid the motor vehicle. The insured driver collided with the back of his daughter's motor vehicle. The plaintiff was flung on impact and sustained serious injuries. He was hospitalised.

[5] The plaintiff said that at the time of the collision he earned approximately R33 000, 00 per month. After the collision his salary was reduced to R25000, 00 per month. The plaintiff said that he was later retrenched because of the accident. He was not challenged on this during cross-examination even though it was raised during argument by counsel for the defendant.

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[5] The plaintiff said that at the time of the collision he earned approximately R33 000, 00 per month. After the collision his salary was reduced to R25000, 00 per month. The plaintiff said that he was later retrenched because of the accident. He was not challenged on this during cross-examination even though it was raised during argument by counsel for the defendant.

[6] He said that over and above his salary he earned a monthly allowance of R1000, 00 towards his cell phone of which 20% went towards his private use. He also received R2000, 00 per month towards petrol of which 25% was used for private purposes. In total he received R700.00 per month for private use (including both his cell phone and petrol allowance). He said that he received an annual bonus of 50% of his monthly salary which is equivalent to R16500.00. The bonus was discretionary and was paid out at the sole discretion of the company. During his working career he received a bonus every year. During cross examination the plaintiff's earnings were not seriously challenged.

[7] The plaintiff suffered the following injuries which are set out in the joint minutes of the experts: The clinical psychologists¹ agree that the plaintiff sustained the following injuries: an innocuous brain injury without any neuropsychological defects; minor cognitive difficulties caused by serious mood disorder; serious depression and post-traumatic stress. The orthopaedic surgeons² agree that the plaintiff sustained the following injuries: a fracture of the right lateral tibial plateau with the onset of a compartment syndrome and a soft tissue injury to the left shoulder. His current symptoms include constant knee pain with an almost constant left shoulder pain and he has moderate to severe laxity of the right posterior cruciate ligament. The orthopaedic surgeons further agree that the plaintiff *inter alia* requires a total knee replacement and his injuries can be regarded as having serious long term consequences. The orthopaedic surgeons further agree that the plaintiff would not be able to return to his previous occupation but may be employable in a sedentary post. He would almost certainly have great difficulty finding work at his age. The neurosurgeons³ agree that the plaintiff suffers from chronic headaches, chronic pain, a disability related to

¹ Plaintiff- DS Ormond; Defendant - PDIukulu

² Plaintiff- Drs - CE Barlin; Defendant SM Tladi

³ Plaintiff - Drs HJ Edeling ; Defendant - JW Edeling

his orthopaedic injuries and a disfigurement of his right lower limb. The industrial psychologists,⁴ agree that the possibility of the plaintiff obtaining sedentary work at his age (60) is poor.

[8] Turning to the merits. During argument the defendant conceded that the plaintiff's evidence is uncontroverted and there was nothing improbable in the plaintiff's evidence. The defendant correctly conceded that the defendant's insured driver was 100% negligent.

[9] Turning to the issue of quantum. At issue is the plaintiff's loss of earnings and general damages. What became common cause was the contingencies to be applied pre-morbid and post-morbid. The parties agreed that 5% contingency pre-morbid and 25% contingency post-morbid was applicable.

[10] I turn now to deal with the plaintiff's loss of earnings. The defendant submits that according to its actuarial calculation an amount of R 1518,777 is a fair and reasonable amount. The plaintiff disagrees and submits that an amount of R1809, 179 is a fair and reasonable amount. There are three issues that I am required to determine under this head of damages, firstly whether or not the plaintiff was entitled to claim petrol and a cell

⁴ Plaintiff Ms Lisa Roets- Defendant Dr T Gama

phone allowance; secondly whether or not he was entitled to claim an annual bonus and thirdly whether or not the plaintiff would have retired at age 62 or 65. The defendant's calculations exclude the plaintiff's petrol and cell phone allowance as well as the annual bonus.

[11] The plaintiff testified that he would have retired at age 65. This is supported by the fact that the person who took over from him is currently 63 years' old. Even though his retirement age is not reflected in his employment contract he was categorical that he would have retired at age 65.

[12] The defendant submits that I should rely on the industrial psychologist's report who opined that the plaintiff's retirement age is between 60- 65. I accept the *viva voce* evidence of the plaintiff which remains undisputed and unchallenged that he would have retired at age 65.

[13] Similarly the plaintiff's uncontroverted evidence of his earnings (bonus, petrol, and cell phone allowance) have not been challenged. I understood the defendant's opposition to these benefits was premised on the assertion that these allowances was not a right afforded to the plaintiff and should be disregarded. These submissions are misplaced. Where the allowances were part business and part private the contingencies agreed upon makes provision for the vicissitudes of life. In my view in all probability the plaintiff would have received an annual bonus every year since his employment and the contingencies agreed

upon make provisions for the likelihood that he may not have received a bonus for whatever reason.

[14] The plaintiff submits that I should consider an amount of R1000,00 per month towards his bonus which is equivalent to R12000,00 per annum. I am satisfied that an amount of R700,00 towards his fuel and cell phone allowance and a bonus of R12000,00 is fair and reasonable and should be included in his earnings

[15] I requested the parties to provide me with an actuarial calculation having regard to the foregoing figures. An actuarial report from both the plaintiff and the defendant was provided. There appeared to be some confusion on the part of the defendant to the extent that the defendant did not include the salary of the plaintiff in its calculations. The issue was resolved. According to the actuarial calculation the net loss of earnings of the plaintiff is R1 807 981.00.

[16] Turning to the question of general damages. Counsel for the plaintiff submits that in the exercise of my discretion I should make an award of R500, 000 for general damages having regard to the following case law relied upon by the plaintiff herein below. In the case of *Ncama v Road Accident Fund* 2015 ⁵, a female cleaner sustained a fracture of the femur, a fractured skull, a neck injury and soft tissue injuries. An open reduction and internal fixation of the femur was performed and a plaster cast was applied. The plaintiff received physiotherapy and required crutches to ambulate. The fracture of the skull was treated

⁵ (7E3 Quantum of damages year book 7)

conservatively and she experiences severe headaches, has mild short term memory, in addition she exhibits mild behavioural disturbances of aggressiveness, depression and anxiety. The neck injury was treated with a neck brace. She received pain medication and anti-inflammatories. She has a 30% chance of an anti- rear fusion. The injuries sustained in Ncama and this case are similar, so the plaintiff submits In Ncama an award of R500,000 for general damages was made in 2015. Having regard to inflation the amount of R500, 000 is equivalent to R590 000, 00.

[17] In *Mgudlwa v Road Accident Fund* 2010⁶, an award of R300,000 was made to a 34-year-old teacher who suffered fractures to the femur and the tibia. He was in traction for three and a half months. There was a deformity at the end of the femur with a leg shortening of five centimetres. He has a diminished range of motion of the leg, hip and knee. He also has scoliosis of the spine. He was compelled to use a crutch. He was no longer able to play soccer. In the *Mgudlwa* matter the plaintiff did not have a shoulder injury or a hip injury and an award of R300, 000, 00 for general damages in 2010 was made. This amount is equivalent to R412000,00.

[18] The defendant on the other hand submits that an amount between R260, 000 and R300, 000 is appropriate. In my view having regard to the submissions and the relevant case law an amount of R350, 000 is a fair and reasonable amount for general damages.

[19] The defendant submits that I should not allow the fees for the urologist, the plaintiff's expert to the extent that the report was not necessary. Post-accident, the plaintiff complained of incontinence and sexual dysfunction. As a result hereof the plaintiff was sent to a urologist to investigate this complaint. It was prudent to investigate the complaint

⁶ *Mgudlwa v RAF* 2010 6 QOD E3-1 (ECM)

by the plaintiff, so the plaintiff submits. The matter stood down for 3 days before a court was allocated to hear the matter. The urologist had to board a flight and became unavailable. Because the urologist became unavailable the plaintiff elected not to lead his evidence. In my view the urologist's fees should be allowed under the circumstances.

[20] In the result I make the following order

20.1 The Defendant shall pay the sum of R2 157 981.00 (R 1 807 981.00 & R350 000.00) to the plaintiff's attorneys, Erasmus de Klerk, in settlement of the plaintiff's claim which amount shall be payable by direct transfer into their trust account, details of which are as follows:

ERASMUS DE KLERK INC

ABSA Bank

Account number: 406 383 9468

Branch number: 632 005

Rosebank

Ref.: J Erasmus/JFD VERMAAK

20.2 The amounts referred to above will not bear interest unless the Defendant fails to effect payment thereof within 14 (fourteen) calendar days of the date of this Order, in

which event the capital amount will bear interest at the rate of 10,25% per annum calculated from and including the 15 (fifteenth) calendar day after the date of this Order to and including the date of payment thereof.

20.3 The Defendant shall provide the Plaintiff with an Undertaking as envisaged in Section 17 (4) (a) of Act 56 of 1996, 100% for the costs of the future accommodation of the Plaintiff in a hospital or nursing home and such treatment, services or goods as the Plaintiff may require as a result of the injuries that the Plaintiff sustained as a result of the accident which occurred on 6 March 2011, as set out in the medico legal reports obtained on behalf of the Plaintiff, after such costs have been incurred and upon proof thereof.

20.4 The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs include (but not limited to):

20.4.1 The costs of senior-junior counsel (which is to include, *inter alia*, preparation, perusal, and counsel's day fees for 28 August 2017, 29 August 2017 and 30 August 2017, preparation and attendance fee on 14 December 2017 as well as costs of noting judgement on 15 December 2017);

20.4.2 The costs of Attorney, which is to include, but not limited to, the Attorneys costs in preparation of the Plaintiff's claim and trial and the attorney's day fees in attending to

trial on 28 August 2017, 29 August 2017 and 30 August 2017, attendance fee on 14 December 2017 and costs of noting judgment on 15 December 2017;

20.4.3 All the costs in obtaining all medico legal/expert and actuarial reports as well as the Plaintiff's travelling and lodging costs in attending the Plaintiff's experts. The Plaintiff filed the medico legal/expert reports referred to in sub-paragraph 20.5 below.

20.5 The reasonable taxable preparation, reservation and attendance fees, if any, of the following experts of whom notice have been given, being:-

20.5.1 Dr Barlin (Orthopaedic Surgeon);

20.5.2 Dr Edeling (Neurosurgeon);

20.5.3 Dr Fine (Psychiatrist);

20.5.4 Dr. D.S. Brown (Clinical Psychologist);

20.5.5 Dr P.A.G. Botha (Urologist);

20.5.6 Dr L. Berkowitz (Plastic Surgeon);

20.5.7 Alison Crosbie Inc – Kirsten du Toit (Occupational Therapist);

20.5.8 Lisa Roets (Industrial Psychologist);

20.5.9 G.A. Wittaker (Actuary).

20.6 The above costs will also be paid into the aforementioned trust account.

20.7 The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

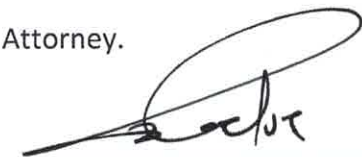
20.8 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

20.9 The Plaintiff shall allow the Defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

20.10 Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10,25% on the taxed or agreed costs from date of allocation to date of final payment.

20.11 No contingency fee agreement was concluded between the Plaintiff and his

Attorney.

A handwritten signature in black ink, appearing to be 'Carelse J', is written over a horizontal line.

Carelse J

Judge of the South Gauteng High Court

Appearances

For the plaintiff : Mr Danie Kombrink

Instructed by : Erasmus De Klerk Inc.

For the defendant : Mr Magano

Instructed by : Kekana Hlatshwayo Radebe Attorneys