

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

CASE NO: 20976/2014

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DATE

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SIGNATURE

In the matter between:

O P

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOOSA AJ:

INTRODUCTION

[1] The Plaintiff herein is O P, an adult male with full legal capacity of [...] Zone [...], Pimville, Soweto who claims damages in terms of the Road Accident Fund Act 56 of 1996 for personal injuries sustained in a motor

vehicle collision on 13 June 2009 at approximately 01h10, at or near Mabalane Street, Senaone, Soweto.

[2] The merits have been conceded 75% (seventy five percent) in favour of the plaintiff and the only issue for determination is the quantum of the plaintiff's damages with specific reference to past and future loss of earnings.

[3] It is common cause that the plaintiff was born on 24 December 1984 and that at the time of the collision he was 24 years of age.

[4] Certain heads of damages have been agreed upon by the parties:

(a) Estimated future hospital, medical and related expenses:

The defendant will furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road accident Fund Act 56 of 1996.

(b) General damages for pain and suffering, loss of amenities of life, disablement and disfigurement:

The issue of serious injuries is referred for decision by the Health Professions Council of South Africa ("HSPCA").

[5] Accordingly, the only head of damages for determination is the plaintiff's past and future loss of income and the contingencies to be applied in respect of the injured and uninjured scenarios.

COMMON CAUSE

[6] The plaintiff was involved in a motor vehicle accident on 13 June 2009 and suffered the following injuries as a result of the collision:

- (a) A severe traumatic brain injury.
- (b) A fracture of the junction of the proximal and middle third of the left femur.
- (c) Fractures of the necks of the first, second, third and fourth metatarsals of the right foot.

[7] As a result of the injuries and the *sequelae* thereto the Plaintiff developed:

- (a) Valgus deformities of the right hallux of the second, third and fourth toes as a result of the malunions of his tarsal fractures.
- (b) Headaches.
- (c) Fatigue.
- (d) Severe anxiety and stress.
- (e) Neuropsychological deficits associated with a left frontal lobe injury, including deficits with:
 - (i) attention;
 - (ii) concentration;
 - (iii) mental tracking;
 - (iv) reduced psychomotor speed;
 - (v) information processing ability;
 - (vi) numerical and verbal reasoning;
 - (vii) planning.
- (f) Changes in mood exacerbated by pain, discomfort and reduced mobility;
- (g) Dizziness and loss of balance;
- (h) Difficulty walking and running;
- (i) Problems driving long distances;
- (j) Increased pain in inclement weather;
- (k) Difficulty performing sexually;
- (l) Epilepsy.

[8] The plaintiff managed to complete Grade 12 and an N6 level diploma/certificate in public business management. At the time of the collision the plaintiff was employed as a manager at Don't Waste Services, in a permanent position earning a basic salary of R 14 000.00 (fourteen thousand rand) per month.

[9] The injuries sustained by the plaintiff caused him to suffer a loss of earning capacity.

[10] The defendant is liable to compensate the plaintiff for 75% (seventy five percent) of the plaintiff's damages.

[11] The joint minutes between the opposing experts were admitted in so far as there was agreement therein.

[12] The unopposed reports of the plaintiff were admitted in respect of the facts and opinions contained therein.

EVIDENCE LED

[13] In addition to the expert reports that were handed in by agreement, the plaintiff called only one witness to testify. Dr L Badenhorst ("Badenhorst"), an Industrial psychologist testified that she has been practicing and preparing medico legal reports since 1992. She testified that she completed a psycho-legal evaluation in order to assess the effect of the accident and it's sequelae on current and future employability and earning potential of the plaintiff. Her report contained information obtained from an interview with the plaintiff, collateral information and all medical reports available.

[14] She confirmed the contents of her report and testified, inter alia, as follows:

- a). The plaintiff had obtained Grade 12, NQF5 and NQF6 qualifications. However, he could not produce the documentation regarding such qualifications and had difficulty in remembering dates.
- b). He was permanently employed at Don't Waste Services (DWS) as a manager and earned R 14 000,00 per month and had made good progress in terms of his career and was earning a good salary.
- c). The plaintiff would have progressed to a career ceiling with training at the Patterson C5/D1 level at age 45 and thereafter would receive only inflationary increases until his retirement at age 65.

d). As a result of the accident at the age of 24 years, the plaintiff lost his employment at DWS in 2010 and thereafter obtained sympathetic employment as a doctor's assistant earning R 63, 347.00 (sixty three thousand three hundred and forty seven rand) per annum, and will only receive inflationary increases up until retirement age of 65.

e). She confirmed that there was no agreement on the plaintiff's pre-morbid state as set out in the joint minute (Bundle A).

f). The plaintiff had to resign from his place of employment due to the injuries he suffered, as a result of the accident. Further, that he would have great difficulty in obtaining new employment in the event of him losing his current employment.

[15] It is noteworthy to mention that counsel for the defendant did not challenge the evidence and opinions expressed by this witness during her cross examination.

[16] The plaintiff closed his case and the matter was postponed in order to allow the defendant's counsel an opportunity to peruse the report, consult with it's own witness and to complete calculations.

[17] Upon resumption the defendant's counsel handed in the assessment of compensation as Exhibit E, the contents and calculations therein, which the plaintiff's counsel accepted.

[18] Save for the expert reports, the defendant had no witnesses to call and accordingly the case for the defendant was closed.

EVALUATION

[19] The general approach of assessing damages for loss of earnings have been restated in the matters of **Goldie v City Council of Johannesburg**¹ and **Southern Insurance Association v Bailie NO**².

[20] Nicholas JA in *Southern Insurance Association v Bailie* (supra) at 113 F – 114A stated as follows: *‘Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.*

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award...’.

[21] In the aforementioned matter, the court held that where it has before it material on which an actuarial calculation can be made, the actuarial approach is preferable, because the actuarial approach has the advantage of an attempt to ascertain the value of a loss of earnings on a logical and informed basis as opposed to a robust approach or an educated guess.

¹ 1948 (2) SA 913 (W)

² 1984 (1) SA 98 (A) at 112E – 114 F

[22] In the unreported case of ***Mashaba v Road Accident Fund***³, Prinsloo J, referring to the *Baillie* case above held among others that where career and income details are available, the actuarial calculation approach is more appropriate and a court must primarily be guided by the actuarial approach, which deals with loss of income or earnings before applying the robust approach, which normally caters for loss of earning capacity. This, so said the learned judge, would help the court to ensure that the compensation assessed and awarded to the plaintiff is as close as possible to the actual facts relied upon.

[23] For the plaintiff to succeed in a claim for loss of earnings, he is required to provide a factual basis that allows for an actuarial calculation. This is a process designed to assess actuarial/mathematical calculations on the basis of the evidence as well as over-all assumptions vesting or depending on such evidence. This approach is known as the actuarial approach.

[24] The actuarial approach seeks to determine the loss of earnings as realistically as possible to what may be the plaintiff's actual losses. This approach comprises of:

- (a) providing a factual basis upon which the loss of earnings is to be calculated and only then;
- (b) by applying appropriate contingency deductions.

[25] As a rule of practice a plaintiff need not be burdened with an undue load of providing such a basis strictly. A plaintiff merely needs to demonstrate that his preferred and given scenario is more probable than another. A 50 percent +1 (fifty percent plus one) likelihood constitutes a probability.

[26] It is well established practice that where the plaintiff suffers a permanent impairment of earning capacity, the proper and effective method of assessing past and future loss of earnings is as follows:

³ 2006 JOL 16926 (T)

- (a) To calculate the present value of the income which the plaintiff would have earned but for the injuries and consequent liability;
- (b) To calculate the present value of the plaintiff's estimated income, if any, having regard to the disability;
- (c) To adjust the figures obtained in the light of all the relevant factors and evidence obtained and by applying contingencies;
- (d) To subtract the figure contained under (b) from that obtained under (a).⁴

[27] The plaintiff's probable career progression "*but for*" the collision was chartered by the medico-legal report of Badenhorst, the plaintiff's industrial psychologist, who reported that at the time of the accident, the plaintiff was employed as a manager at DWS in a permanent position earning R 14 000,00 (fourteen thousand rand) and a total package of R 20 000,00 (twenty thousand rand) per month. His earnings at that stage fell around the median B3 on the Paterson job grade level (median basic salary). But for the accident, the plaintiff would have seen progression every four to six years to reach a career and earning ceiling at the Patterson C5/D1 level at age 45. Further, that it was likely that he would have remained earning at that level bar annual inflationary adjustments, until he would have reached expected retirement age of 65.

On the other hand the defendant's industrial psychologist, Dr M C Kgosana reported that the plaintiff would have probably stayed in the same level of work until normal retirement age. His earnings were likely to progress to Patterson level B4 by the age of 45 years. From the age of 46, his earnings would have stabilised and would have earned only additional inflationary increases until retirement age. He would have retired at the age of 60 – 65, depending on the policy of the employer and his health.

⁴ The Quantum of Damages, vol 1, 4th edition by Gauntlett at page 68; Southern Insurance Association Ltd v Bailey 1984 (1) SA 98 (A) at 113 F – 114E

[28] No evidence was led disputing the fact that the plaintiff was a healthy person prior to the accident and did not suffer from any pre-existing neurological, orthopedic or psychological conditions or pathology which could or would hinder him in his climb up the corporate ladder.

[29] On the other hand, the plaintiff's probable career progression "*having regard*" to the accident has been compromised, when regard is had to the expert reports filed and used by mutual consent and agreement. Having regard to the accident the plaintiff lost his employment at DWS in 2010 and thereafter obtained employment earning R 63 247.00 (sixty three thousand two hundred and forty seven rands only) as a doctors assistant and will only receive inflationary increases up until retirement age of 65.

[30] According to Dr C E Barlin the orthopaedic surgeon -

"Mr O suffered a fracture of the junction of the proximal and middle thirds of the left femur; and fractures of the necks of the 1st, 2nd, 3rd and 4th metatarsals of the right foot. The plaintiff has developed valgus deformities of the right hallux 2nd, 3rd and 4th toes as a result of mal-unions of his tarsal fractures and that these require surgical correction. He requires the removal of the femoral intra medullary-locking nail. His life expectancy has not been affected by his injuries. He is employable in a sedentary administrative post only".

Both Dr's Bardin and Bogatsu are in agreement regarding the injuries sustained and the fact that the plaintiff requires the removal of the femoral intra medullary-locking nail. However, Dr Bogatsu, the defendant's expert reports that he is of the opinion that the injuries sustained have not affected the plaintiff's employability. Further, that the *sequelae* of the plaintiff's orthopaedic injuries have not resulted in significant losses of learning capacity, employment capacity, amenities, independence and enjoyment of life.

[31] According to the Clinical Psychologist, Mr Chris Simpson –

“Mr O reported fluctuation in his level of alertness in the immediate aftermath of the accident with intermittent awareness of events, which would suggest the presence of a concussive head injury. The results of the neuropsychological assessment indicate a specific pattern of difficulties with left frontal lobe injury. These difficulties include deficits in attention, concentration and mental tracking; reduced psychomotor speed and information processing ability; and problems in memory, numerical and verbal reasoning, planning and in inhibiting behaviour. He also reported changes in mood and behaviour, which are exacerbated by pain, discomfort and reduced mobility. Based on the above indicators, Mr O may have sustained a mild to moderate traumatic brain injury. In light of the findings of the neuropsychological findings, it is evident that Mr O is suffering from disabling long term effects based on his involvement in the accident as confirmed on neuropsychological testing. He has numerous subjective neuro-cognitive, physical, vegetative and neuro-psychiatric complaints.

The writer is of the opinion that as a result of the mild to moderate traumatic brain injury with focal effects to the frontal lobe, he has subtle limitations and mild deficits, in intellect, daily life, decision making ability, interpersonal, social and occupational functioning. He also suffers from features of depression. The limitations may cause problems in ability to adequately fulfill his employment role and he will have problems in focusing and maintaining his attention, in recalling information, in planning and in reasoning adequately. He is likely to require some supervision and assistance in the workplace and will be experienced as significantly slowed, forgetful and unable to solve complex problems or react to sudden and unpredictable situations”.

It is noteworthy to mention that the Defendant did not file any report from a clinical psychologist and hence the evidence of Mr Simpson stands unchallenged.

[32] According to the General Practitioner, Dr D E Mashigo –

“ The impairment rating is 10% W.P.I (whole person impairment). The clinical assessment is consistent with serious injury as a result of a motor vehicle accident. Mr O is at maximum MMI (maximum medical improvement). These are limitations in activities of daily living and significant life changing *sequelae*. Final assessment is that Mr O has serious long term impairment as a result of injuries sustained in a motor vehicle accident of 13,2009”.

The evidence of this witness stands unchallenged, as there was no other evidence from the Defendant to counter the opinion and findings of Dr Mashigo.

[33] According to the Neurosurgeon, Prof S Mokgokong –

“No neurophysical disabilities were detected on examination. There were fairly serious neuropsychological problems on the day of the interview. He had memory problems, behaviour and emotional problems. Chris Sampson noted numerous neurocognitive and neuropsychiatric *sequelae*. He is getting epileptic convulsions particularly at night. They need to be treated. Treatment for epileptic attacks should resume. Other experts’ recommendations should be heeded as well. As it is now over 9 (nine) years since the accident occurred, it would be unrealistic to expect further spontaneous recovery. He has long reached maximum medical improvement (MMI). The accident and its effects have not directly altered his pre-morbid longevity. Amenities of normal living were lost during the hospitalization. Many will be lost permanently because of the *sequelae* of the accident, including the TBI effects”.

Prof Mokgogong in concluding his report submits that it would be fair to award adequate compensation for the damages incurred as a result of the injuries sustained in the accident. General damages will need to be awarded because of largely the effects of the fairly severe TBI. Epilepsy, which has as yet not been put on chronic treatment, continue to cause higher mental functions

deteriorations with each attack. It is noteworthy to mention that the opinion and findings of Prof Mokgokong have not been challenged by the defendant.

[34] According to the Occupational Therapist, Ms Melta Siweya –

“Residual Work Capacity: Now that the accident has occurred, Mr O demonstrated residual physical ability to perform work setting light physical demands with limited exposure to extensive mobility requirements such as prolonged standing, walking and climbing stairs and limited tolerance to assume dynamic positions such as crouching, squatting and kneeling. His occupation as a doctor’s assistant set light physical demands and requires long distance driving. Driving requires seated position, adequate upper limb and hand function for gear manipulation and control of steering wheel as well as functional ability of the lower limbs for pedal operation. The writer recommends that Mr O continue with his current job. However, note should be made that he is not able to drive long distances without aggravating pain in his left thigh and right foot, thus reduced efficiency can be expected. The writer recommends reasonable accommodations (sic) of taking rest breaks while driving. Due to the limited right ankle movement and the deformities in the right foot, Mr O is expected to experience pain when engaging the foot pedals. It is accepted that B.P.O prolonged time spent driving and on cold days has the potential to exacerbate the pain and fatigue in his right foot and left thigh and consequently reduce his level of comfort. This will influence his productivity and should it not be dealt with accordingly; it will negatively affect his vocational longevity”.

“Expected outcome: Should he successfully access the recommended treatment and rehabilitation, his prospects may improve in the future to the extent that his efficiency and comfort in driving tasks would be improved and that he may be able to perform work of medium demand. However, should he not be able to access to the treatment his vocational prospects are likely to remain unchanged. The writer is of the opinion that it is unlikely that he will be able to perform work of heavy or very heavy demand classification in the future. He demonstrated reduced psychomotor speed and circumstantially as

well as performed below the expected norm under the ability to follow verbal instruction. Mr Sampson noted that the limitations the claimant present with may cause problems in ability to adequately fulfill his employment role and he will have problems focusing and maintaining his attention, in recalling information, in planning and in reasoning adequately. He is likely to require some supervision and assistance in the workplace and will be experienced as significantly slowed, forgetful and unable to solve complex problems or react to sudden and unpredictable situations. Psychosocially, he noted that he is easily angered and he has become impatient since the accident. This will negatively affect Mr O's competence in employment and assuming normal relation at work, his behaviour will manifest as poor tolerate behaviours in the workplace. The reported emotional challenges will lead to personal and social interaction challenges that will cause more conflict at work. Such will result in problems sustain employment and escalate vulnerability for dismissals. This behaviour will limit his chances of sustain employment in his pre-accident occupation".

"Loss of Amenities": Approximately 8 years post-accident Mr O still experiences persistent pain on the lower back, left thigh and right foot and right ankle".

Both Ms Siweya and the defendant's occupational therapist, Ms M Magoele agree that the accident has had an adverse effect on the plaintiff's overall enjoyment of life and that he should be compensated accordingly. Both experts agree that the plaintiff is still suited to perform his job as a doctor's assistant, however with pain and discomfort on the left thigh and right foot and ankle due to the required prolonged driving and in cold weather.

[35] Having carefully appraised the testimony of Dr Badenhorst and the reports provided by the other experts and in light of the above when one looks at the *"having regard to"* scenario, the plaintiff is unlikely to realise his pre-morbid career and earning potential and is likely to factually lose or suffer loss of earnings over his entire career.

CONTINGENCIES

[36] Contingency deductions allow for the possibility that the plaintiff may have less than normal expectations of life and that he may experience periods of unemployment by reason of incapacity due to illness, accident or labour unrest or even general economic conditions.

Compare: *Van der Plaats v Southern African Mutual Fire & General Insurance Co* 1980 (3) SA 105 (A) 114 - 115

[37] The underlying rationale is that contingencies allow for general hazards of life such as periods of general unemployment, possible loss of earnings due to illness, savings in relation to travel to and from work now that the accident has somewhat incapacitated or impaired him as well as the risk of future retrenchment. The general vicissitudes of life are taken into consideration when contingencies are considered.

[38] Both favourable and adverse contingencies must be taken into account. Nicholas JA held among others in the Bailie case (*supra*) at 117 C – D, that: *“The generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse and all ‘vicissitudes’ are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the buffets and ignore the rewards of fortune.”*

[39] The assessment of contingencies is largely arbitrary and will depend on the trial judge’s impression of the case.

ACTUARIAL CALCULATIONS

[40] At the hearing of this matter the actuarial reports of Munro Forensic Consultants and Gerard Jacobson Consulting Actuaries were furnished, in order to estimate the capital value of the potential loss of income suffered by the plaintiff. Subsequently, further reports were requested by this court that were to accord with the fact that the defendant will be liable for 75% of all the claimant’s losses, as a consequence of the accident. The actuaries were

further instructed to apply the following contingencies based upon my findings:

- Uninjured: 5% and 30% on past and future incomes;
- Injured: 5 % and 20 % on past and future incomes.

[41] Upon a perusal of the updated reports received by this court it is clear that only Munro Consultants have given credence to the instructions of this court in it's calculations. In the circumstances, I am inclined to accept the actuarial report from Munro Consultants for the following reasons:

- (a) The viva voce evidence of Badenhorst in respect of the fact that the plaintiff would have reached his career ceiling of C5/D1 at age 45 and that he would receive only inflationary increases until age 65 stands unchallenged. There is absolutely no support for contention that the plaintiff would only reach Patterson Scale B4;
- (b) The report from Munro Consultants has duly taken into account that the defendant is liable for 75% of the plaintiff's losses as a result of the accident;
- (c) The correct contingencies have been applied as per the instructions of this court.

FINDINGS - PAST AND FUTURE LOSS OF EARNINGS

[42] I find that the plaintiff's pre-accident career would have developed and reached a career ceiling of C5/D1 at age 45 and that he would have received inflationary increases until the age of 65.

[43] In the circumstances, I believe that a 5 % contingency applied to the past loss is appropriate and a 30 % contingency in respect of the future loss of earnings.

[44] Now that the accident has happened, and based upon the evidence before me, it is fair and equitable to accept that the plaintiff suffered a reduction in his earning capacity and that his current earnings projected with

inflationary increases to age 65 would represent a fair projection of his residual earning capacity. In the circumstances, I believe that a contingency of 5 % in respect of past loss and 20% in respect of future loss would be appropriate.

[45] I have duly perused the updated actuarial report of Munro Forensic Actuaries based on my above finding and take cognisance of the calculations in respect of the capital value of loss of income which includes the application of the RAF cap; the contingencies and 75% apportionment and am inclined to award the following amounts to the plaintiff:

- (a) Past loss of income – R 1 226 600.00
- (b) Future loss of income – R 4 207 688.00
- (c) Total amount of award – R 5 434 288.00

ORDER

In light of what has been set out hereinabove, including the agreed upon aspects between the litigating parties herein, the following is the order of this Court:

[46] The defendant is held liable for 75% of the damages suffered by the plaintiff as a consequence of the motor vehicle collision on 13 June 2009 at approximately 01h10, at or near Mabalane Street, Senaone, Soweto.

[47] The defendant shall make payment to the plaintiff in delictual damages in respect of past and future loss of earnings the sum of R 5 434 288.00 (five million four hundred and thirty four thousand two hundred and eighty eight rands).

[48] Payment of interest on the aforesaid amount at the rate of 10% per annum, commencing 14 (fourteen days) from the date of this order to date of payment.

[49] 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 75% of the

costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the motor vehicle collision, after such costs have been incurred and upon proof thereof.

[50] The defendant is ordered to pay the plaintiff's agreed or taxed party and party costs on the High Court scale to date, such costs to include, but not limited to the following: -

(a) The costs of senior junior counsel, such cost to include preparation cost and cost on attending trial on 06 and 08 June 2017 and cost for preparing heads of argument;

(b) The qualifying and reservation fees of the following expert witnesses, together with the reasonable costs of obtaining their medico-legal reports: -

- (i) Dr C Barlin (orthopaedic surgeon);
- (ii) Prof S Mokgokong (neurosurgeon);
- (iii) Mr C Sampson (clinical psychologist);
- (iv) Dr L Badenhorst (industrial psychologist);
- (v) Ms M Siweya (occupational therapist);
- (vi) Dr E E Mashigo (general practitioner);
- (vii) Mr A Munro (actuary).

[51] The issue of general damages is postponed sine die, to be referred for finding to the HPCSA.

C I MOOSA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

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Dates of hearing

06 June 2017

08 June 2017

Date of Judgment

31 May 2018