

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

CASE NUMBER: 14590/20

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

DATE: 27 May 2024

In the matter between: -

DE VILLIERS, DAVID

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 11h30 on 27 May 2024.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] This is a personal injuries action. Merits of liability were conceded by the defendant on the morning of the hearing. This court was called upon to determine the issue of past and future loss of income and/or income earning capacity. The dispute regarding past medical expenses was postponed *sine die*. The plaintiff's claim for an undertaking in terms of 17(4)(a) of the Road Accident Fund Act, 56 of 1996 was however not contested.

[2] Two experts were called on behalf of the plaintiff, namely Mr Lewis Rosen, an industrial psychologist, and Ms Michelle Doran, an occupational therapist. It deserves mentioning that no rebutting expert reports were filed on behalf of the defendant. The expertise and qualifications of the experts were conceded by the defendant.

EXPERT EVIDENCE

Mr Lewis Rosen

[3] Mr Rosen rendered a written report on the 19th of January 2022. He recorded the following case history: -

[3.1] The plaintiff was born in Johannesburg on 27 November 1979 and he matriculated at the end of 1998. The following year he joined AB Civils as a junior supervisor, where he remained for about two years.

[3.2] The plaintiff was then employed at Samco Security as a technician, wiring and programming security systems. Specifically, these included installing IT cameras and configuring networks.

[3.3] Then, in approximately 2000, the plaintiff joined Incity Security as a technician. He continued there for about 18 months before finding employment at Chubb Security as a senior technician.

- [3.4] After working at Chubb Security for a further three years, the plaintiff began his own company, styled as Securit. He relocated to the Free State and then to Richard's Bay.
- [3.5] The plaintiff's stepfather then suffered a stroke and the plaintiff assisted in the family business, styled as Samco. After a period he started his own company, Sec-Q-Safe.
- [3.6] The plaintiff started Zinto Safety and Security, a technical, guarding and armed reaction firm. He was approached by a property company and his business was merged to form ZSS Security. He continued in the business as a tactical reaction manager from 2013 and he filled this post successfully until 20 August 2019 when he was involved in a motor vehicle accident.
- [3.7] Whilst driving an Escort vehicle, another car skipped a red traffic light and collided with the plaintiff's vehicle. The plaintiff was taken by ambulance to Busamed Hospital where he was admitted and treated as an in-patient for approximately nine days.
- [3.8] The plaintiff was discharged to recuperate at home, but was rushed back to hospital owing to debilitating headaches.
- [3.9] After a further week, the plaintiff was referred to Arwyp Hospital where he was treated conservatively. In total, the plaintiff reported spending approximately a month in hospital from the time of the accident until being discharged.
- [3.10] The plaintiff was able to return to work only in late January 2020, but needed to be accommodated in a more sedentary post owing to his constraints.
- [3.11] As a result, another party was hired to carry out the plaintiff's job. The plaintiff has become frustrated at his loss of capacity and fears for his future.
- [3.12] The plaintiff is plagued by pain daily, specifically the plaintiff reports headaches, neck spasms and pain in his left shoulder.
- [3.13] The plaintiff also has challenges with his memory and is markedly depressed. His vision is also challenged and he experiences photo sensitivity.

[4] Mr Rosen prepared an addendum to his report on the 9th of October 2023. The following additional information was provided in the addendum: -

- [4.1] Payslips from 2023 show that the plaintiff earned a salary of R49 500.00 and received an allowance of R5 000.00 per month. His earnings on a monthly basis are therefore R54 500.00 per month or R654 000.00 per annum.
- [4.2] The plaintiff currently holds the title of Head of Section and he works within office management.
- [4.3] The plaintiff is paid significantly higher than he was at the time of writing the original report.
- [4.4] As a result, the plaintiff's income has exceeded expectations as he reinvented himself as a manager rather than being hands-on.
- [4.5] The plaintiff is now no longer losing out on potential increases.
- [4.6] However, the plaintiff remains a vulnerable employee and according to Dr Volkersz, the orthopaedic surgeon, the plaintiff is still likely to retire altogether at around the age of 60.
- [4.7] Similarly, the plaintiff's manager was of the view that there is only so much pain that one can live with and that he doubted whether the plaintiff would make it to retirement age.

[5] As a consequence, Mr Rosen recommended additional contingencies to account for the plaintiff's vulnerability. He noted the plaintiff's likelihood of having to retire early by the age of 60, which is some five years earlier than normal retirement age. It is for these reasons that Mr Rosen opined that the plaintiff should be compensated accordingly.

[6] Under cross-examination, Mr Rosen was questioned about the improvement of the plaintiff in his current employment position. The defendant suggested that the plaintiff had been promoted. Mr Rosen emphasised that the plaintiff had to undergo a career change and that that would not constitute a promotion. Mr Rosen emphasised that the plaintiff has reached the employment ceiling in his new position and that one must not lose sight of the fact that his position is an accommodated one.

Furthermore, Mr Rosen testified that notwithstanding the plaintiff's improvement in his current position and his increase in income, his constraints have not changed and that he is still regarded as vulnerable.

Michelle Doran

[7] Ms Doran rendered a medico-legal occupational therapy report on the plaintiff on the 29th of November 2021 and prepared an addendum to her report on the 25th of August 2023.

[8] Ms Doran noted from the report of Dr Volkersz, the orthopaedic surgeon, that the plaintiff would need to retire altogether at around the age of 60 due to the combined effects of all of his injuries. Ms Doran confirmed that during her assessment of the plaintiff, she did not find anything to contradict Dr Volkersz's opinion regarding the early retirement age. She confirmed that the plaintiff struggled to obtain employment without accommodation when considering all of his injuries.

[9] Ms Doran listed a number of complaints reported by the plaintiff: -

- [9.1] He experiences extreme leg tension and spasms on average three to four times per day;
- [9.2] He finds it difficult to pick up heavy items weighing more than 50 kg;
- [9.3] He has a weak left arm on occasion, which is very painful;
- [9.4] He suffers from low energy and tiredness, but cannot sleep;
- [9.5] He has blurry vision on occasions, once or twice a week;
- [9.6] He lives in pain;
- [9.7] He has picked up weight, indicating 15 to 18 kg.

[10] Ms Doran during the assessment had the opportunity of having a discussion with the plaintiff's fiancé who highlighted the following: -

- [10.1] The plaintiff is not physically capable of doing things. He cannot go off riding with his bike every weekend, go jetskiing or camping. He is fearful of reinjuring the neck and he feels like he cannot take the risk of falling;

- [10.2] He is frustrated;
- [10.3] He cannot turn his neck and this is an issue and a challenge for him;
- [10.4] He has not been sleeping for the last few months. His brain is in overdrive, he gets frustrated in dreams and would wake her up as he does not like to deal with things on his own;
- [10.5] There has been a decline in his memory as he cannot recall what he said and tends to repeat himself and this ends up in an argument;
- [10.6] He is no longer part of the tactical team as he cannot move. This is something that he used to love doing;
- [10.7] He snaps quickly at the smallest things. He would express his anger by picking up objects, for example a pen and throw it;
- [10.8] He does not get motivated to get fit;
- [10.9] He thinks about his neck;
- [10.10] He is moody and he is always sleeping;
- [10.11] He is unsure about the future and petrified about what will happen.

[11] Ms Doran assessed the plaintiff's general cognitive ability as part of executive functioning. Her assessment revealed the following: -

- [11.1] The plaintiff underscored below the industry norm compared to workers in professional occupations;
- [11.2] They plaintiff may perform below the industry norm on tasks requiring clear thinking, reasoning skills and problem solving skills which may hinder him to form meaning out of confusion and problems occurring in the work setting.

[12] Ms Doran assessed the plaintiff's persistence, concentration and pace. The assessment revealed the following: -

- [12.1] The plaintiff measured 49.56 % slower than the rate set for the open labour market;
- [12.2] He made one error which was allowed for in this activity;
- [12.3] He was noted to be overwhelmed, agitated and frustrated;
- [12.4] He demonstrated decreased energy levels and fluctuating concentration which led to inattention to detail;

[12.5] He also had picked up his mistake and thus had repacked the cards;

[12.6] He demonstrated increased anxiety when Ms Doran came and stood behind him.

[13] Ms Doran arrived at the following findings: -

[13.1] The plaintiff sustained serious injuries to the cervical spine, which has subsequently resulted in a cervical fusion;

[13.2] Injury to the cervical spine has restricted the plaintiff's mobility with reduced muscle strength/endurance, as well as restricted movement thereof;

[13.3] It is accepted that a job match could not be secured especially for the plaintiff to continue holding occupation as a tactical reaction officer in the field;

[13.4] Considering the plaintiff has already undergone a cervical fusion, as well as risks for an extension to this fusion, he would now be regarded as being optimally suited for tasks of a sedentary to light nature when neither of these is exerted on a constant basis;

[13.5] His overall functioning is further compromised by the confirmed diffuse axonal brain injury, with moderately serious consequences, impacting his neurocognitive, neuropsychological and neurobehavioural functioning;

[13.6] It is accepted that the plaintiff can no longer function at the same level as what he did prior to the accident in question, with the need to be accommodated within his work environment;

[13.7] It is also accepted that accident injuries and related *sequelae* have reduced the scope of employment that the plaintiff can enter into post-accident, especially considering that his passion had always been to work in the field as a tactical reaction officer which he no longer retains suitability for;

[13.8] Should the plaintiff not be accommodated in a sedentary to light environment as to what he currently holds, he would probably find it difficult to retain employment, especially until indicated retirement age;

[13.9] It was accepted by Ms Doran that should the plaintiff need to undergo

extension of the cervical fusion, he would still be optimally suited for sedentary to light work, falling within the stated parameters;

[13.10] It was accepted that should this not be a viable option, then early retirement would become indicated, being in line with the report by Dr Volkersz.

[14] Ms Doran concluded that it is accepted that considering the permanency of the plaintiff's pathology, compounded by the organic origin of his difficulties, he would always suffer a severe and permanent loss and probably would always need to work in an accommodated environment.

[15] Ms Doran recommended several therapeutic interventions which *inter alia* included the intervention at an institute such as Documentation Based Care Back, Neck, Shoulder Treatment Centre considering the symptomatic pathology in the spine which has already necessitated a spinal fusion. It was also recommended that the plaintiff would benefit from attending a cognitive behavioural program which would aid in alleviating his psychological ailments.

[16] Under cross-examination, Ms Doran was questioned on the fact that she did not consult with the plaintiff again when she prepared her addendum and that she therefore would not have been aware of his new position. Ms Doran maintained that notwithstanding his new position, the fact remained that the plaintiff was accommodated in his new position and if not, he would suffer loss of five years due to early retirement.

[17] Ms Doran's evidence was further supported by the fact that in her addendum she recorded that she accepted that the plaintiff is in a fortunate position that allowance has been made for his post-accident and that he is working in a somewhat sympathetic environment. It was also accepted by her that without these allowances, and the degree of sympathy, and should he lose his current position, the plaintiff would probably find it difficult to secure and probably more so to retain occupation, especially for long periods of time.

[18] Accordingly, Ms Doran opined that considering the permanency of his pathology, compounded by the organic origin of his difficulties, the plaintiff would always suffer severe and permanent loss and probably would always need to work in an accommodated environment with some sympathetic mechanisms in place.

ANALYSIS OF THE EVIDENCE

[19] The plaintiff sustained the following injuries with resultant *sequelae*: -

[19.1] Head injury;

[19.2] Psychological and psychiatric *sequelae* as a result of the injuries sustained in the accident and the event;

[19.3] Cervical spine fracture;

[19.4] Left clavicle fracture;

[19.5] Blunt abdominal trauma;

[19.6] Multiple soft tissue injuries and abrasions.

[20] Both experts who gave *viva voce* evidence, as well as the expert reports that were not contested, are *ad idem* on one critical fact and that is that the plaintiff cannot continue holding occupation as a tactical reaction officer and that his retirement age has been reduced by five years as a result of his injuries sustained during the accident and the resultant *sequelae*.

[21] In my view, the issues that the two expert witnesses were cross-examined on did not detract in any way from the expert opinions expressed by them and their evidence is therefore accepted.

[22] It is trite that the plaintiff bears the onus to prove on a balance of probabilities that the injuries he sustained have reduced his earning capacity, which will result in actual loss.¹ The court in *Kerridge* said at para 25: “*Indeed, a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income...*”.

¹ See *Rudman v Road Accident Fund* 2003(2) SA 234 (SCA); *Road Accident Fund v Kerridge* 2019(2) SA 233 (SCA)].

[23] I am satisfied that the plaintiff has proven that his injuries have given rise to patrimonial loss. The plaintiff's earning capacity does appear to have been affected, as he has to be accommodated in a sedentary position. Had the accident not occurred, he would presumably have continued working until the retirement age of 65.

[24] The plaintiff presented an actuarial calculation of loss of income prepared by SNG Actuaries, which loss has been calculated as amounting to R1 750 966.00. A 22% post-morbid and 11% pre-morbid contingency for future loss of income was suggested.

[25] Regarding the issue of general damages, Mr Serfontein appearing for the plaintiff referred the court to *Mohlaphuli N.O.*² where an amount of R1 646 000.00³ was awarded for spine and brain injuries. I was also referred to *Myhill N.O.*⁴ where the patient was suffering from headaches, irritability, fatigue, disorientation and gross cognitive malfunction stemming from a brain injury. The patient was awarded R1 615 000.00.⁵ I was also referred to *MM*⁶ and *Jancovich N.O.*⁷ where the plaintiff were awarded R1 032 000.00⁸ and R874 000.00,⁹ respectively.

[26] In the circumstances, Mr Serfontein argued that the plaintiff would be reasonably and justly compensated with an award of R1.2 million in respect of general damages.

[27] Mr Mdlovu appearing for the defendant referred me to the unreported

² *Mohlaphuli N.O. v The South African National Road Agency Ltd and Another* 2013 (6A4) QOD 146 WCC.

³ The amount awarded was R1 million and the amount reflected in this judgment is the adjusted figure.

⁴ *Myhill N.O. v Road Accident Fund* 2008 (5B4) QOD 271 (T).

⁵ The amount awarded was R750 000.00 and the amount reflected in this judgment is the adjusted figure.

⁶ *MM v Road Accident Fund* 2019 (7B4) QOD 92 (FB).

⁷ *Jancovich N.O. v Road Accident Fund* 2021 (8A4) QOD 20 (FB).

⁸ The amount awarded was R850 000.00 and the amount reflected in this judgment is the adjusted figure.

⁹ The amount awarded was R750 000.00 and the amount reflected in this judgment is the adjusted figure.

judgment of *Malaza*¹⁰ and *Scheepers*¹¹ where the court applied a 20 % contingency deduction. Mr Mdlovu argued further that as far as loss of income is concerned, the actual loss should be limited to five years only and that accordingly the appropriate figure for loss of income would be R954 525.60.

[28] Regarding the issue of general damages, Mr Mdlovu referred me to the unreported decision of *Hawando*¹² where a head injury was sustained and used this authority in support of his argument that an amount of R800,000.00 would be appropriate in the circumstances.

[29] Contingencies protect the individual from consequences that come as a result of motor vehicle collisions. The locus classicus with regard to contingencies is the judgment of Nicholas JA at 116-117 of the decision in *Southern Insurance*¹³ the court said *“where the method of actuarial calculations is adopted, it does not mean that the trial Judge is tied: down by inexorable actuarial calculations. He has a large discretion to award what he considers right”*.

[30] Zulman JA, with reference to various authorities including *Southern Insurance*, said the following in *Guedes*¹⁴:

“The calculation of the quantum of the future amount, such as loss of earning capacity, is not as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO) courts have adopted the approach that, in order to assist in such calculation, amount to be awarded as compensation and the figure arrived at depends on the Judge’s view of what is fair”.

¹⁰ Malaza v Road Accident Fund (92060/16) [2019] ZAGPPHC 1079 (29 May 2019).

¹¹ Scheepers v Road Accident Fund (893/2021) [2023] ZAFSHC 248 (20 June 2023).

¹² Hawando v Road Accident Fund (70224/2019)[2022] ZAGPPHC 159 (11 March 2022).

¹³ *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A).

¹⁴ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA).

[31] Having considered the actuarial calculation and the authorities referred to by both parties, the amounts claimed by the Plaintiff and the contingencies applied, are in my view fair. In the result I award R1 750 966.00 in respect of loss of earnings and R1 200 000.00 in respect of general damages.

COSTS

[32] On the issue of costs, Mr Serfontein argued that the plaintiff would be entitled to costs on an attorney and client scale in light of the fact that the defendant failed to make out a compelling argument regarding the plaintiff's promotion and disregarded the fact that the correct approach would be to consider the plaintiff in the position that he would have been in had he not been injured at all. Mr Serfontein argued further that the defendant should have settled the matter, yet no offer on loss of income was made. Mr Serfontein therefore asked for an attorney and client costs order in favour of the plaintiff.

[33] Mr Mdlovu on behalf of the defendant did not dispute the fact that costs should follow the result, but argued for a party and party costs order.

[34] It is trite that the determination of costs is discretionary. Although the conduct of the defendant leaves much to be desired, I find no compelling reason to grant a punitive costs order.

ORDER

I accordingly grant an order in the following terms: -

1. The defendant is liable for 100 % of the plaintiff's damages.
2. The defendant shall pay to the plaintiff the capital amount of R2 950 966.00 (two million nine hundred and fifty thousand nine hundred and sixty six Rand): -
 - 2.1. R1 750 966.00 (one million seven hundred and fifty thousand nine hundred and sixty six Rand) is in respect of loss of earnings;
 - 2.2. R1 200 000.00 (one million two hundred thousand Rand) is in

respect of general damages,
together with interest *a tempore morae* calculated in accordance with
the Prescribed Rate of Interest Act, 55 of 1975, read with section
17(3)(a) of the Road Accident Fund Act, 56 of 1996.

3. Payment will be made directly to the trust account of the plaintiff's
attorneys within 180 (one hundred and eighty) days from the granting of this
order, the trust account details whereof are as follows: -

Holder: De Broglio Attorneys Inc

Account number: 1[.]

Bank and branch: Nedbank – N[.] G[...]

Code: 1[...]

Reference: D[...]

4. The defendant is ordered in terms of section 17(4)(a) of the Road
Accident Fund Act, 56 of 1996 to reimburse 100 % of 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 the plaintiff in a motor vehicle accident on which the
cause of action is based, after such costs have been incurred and upon proof
thereof.

5. The defendant is to pay the plaintiff's agreed or taxed High Court costs
as between party and party, such costs to include the preparation and
qualifying and reservation fees of the experts, consequent upon obtaining the
plaintiff's reports, the plaintiff's reasonable travel and accommodation costs to
attend the plaintiff's experts, the costs of all the plaintiff's expert reports,
addendum reports, and confirmatory affidavits and costs of counsel (subject
to the discretion of the taxing master).

6. The defendant is to pay the the reasonable and qualifying fees of the
following experts:

6.1 Mr L Rosen – industrial psychologist.

6.2 Ms M Doran – occupational therapist.

6.3 Dr Volkersz – orthopaedic surgeon.

6.4 SNG Argen – actuaries.

6.5 Dr Stoler – ophthalmic surgeon.

- 6.6 Dr Naidoo – psychiatrist.
- 6.7 Dr Lewer-Allen – neurosurgeon.
- 6.7 Ms Gibson – neuro-psychologist.
- 7. The plaintiff shall, in the event that the costs are not agreed: -
 - 7.1. serve the notice of taxation on the defendant; and
 - 7.2. allow the defendant 14 (fourteen) days to make payment of the taxed costs.
- 8. The issue of past hospital and medical expenses is postponed *sine die*.
- 9. There is no contingency fee agreement in existence between the plaintiff and his attorneys.

F BEZUIDENHOUT
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 16 & 17 November 2023

DATE OF JUDGMENT: 27 May 2024

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