



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

CASE NO: 15432/2021

DELETE WHICHEVER IS NOT APPLICABLE

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

1 February 2024

DATE

SIGNATURE

In the matter between:

BERNING KEAGAN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Summary: Without Prejudice offers to settle claims for General Damages by the Road Accident Fund do not constitute an admission of liability of same unless the Fund waives privilege in respect of such offers, or there is a clear indication that it conceded such liability elsewhere. Chetty v RAF¹ and Mertz v RAF² distinguished.

CAJEE AJ:

1. This is a quantum trial in which I am asked to determine three issues:
 - 1.1. The amount the Plaintiff is entitled to in respect of his claim for loss of earnings;
 - 1.2. Whether or not the I can order that the Defendant is liable to compensate the Plaintiff for his claim for non pecuniary General Damages;
 - 1.3. If so, for what amount.
2. At the hearing of the matter, which was held in open court, Mr. Uys appeared for the Plaintiff and Mr. Sondlani appeared for the Defendant. The matter was heard on the 6th of October 2023. Mr. Uys emailed his heads of argument and updated actuarial report on the 31st of October 2023. Mr. Sondlani uploaded his heads of argument on the 29th of November 2023.
3. The Plaintiff delivered a number of expert reports in support of his claim while the Defendant delivered none. The reports delivered on behalf of the Plaintiff were the following:

¹ (A91/21) [2021] ZAGPPHC 848 (7 December 2021)

² (A96/2021) [2022] ZAGPPHC 961(2 December 2022)

- 3.1. Dr. J. P. Martin (orthopedic surgeon) dated the 4th of December 2020.
He also completed an RAF serious injury assessment.
- 3.2. Mr. D. Hoffman (plastic surgeon) dated the 27th of January 2021. He
also completed an RAF serious injury assessment;
- 3.3. Dr. J. J. Labuschagne (neurosurgeon) dated the 11th of January 2021.
He also completed an RAF serious injury assessment;
- 3.4. Ms L Grootboom (clinical psychologist) dated 7th December 2020;
- 3.5. Dr. M. Naidoo (psychiatrist) dated the 24th of November 2020 and an
addendum dated the 24th of February 2021;
- 3.6. Dr. R. Berger (ophthalmologist) dated the 11th of March 2021;
- 3.7. Ms. Kerswill (orthotist) dated the 9th of March 2021;
- 3.8. Dr. P. J. Viviers (pulmonologist) dated the 22nd of March 2021;
- 3.9. Dr. J. J. Schutte (general practitioner) who compiled an RAF serious
injury assessment dated the 16th of March 2021.
- 3.10. Ms. K. Du Buisson (social work practitioner) dated the 23rd of
December 2020);
- 3.11. Ms. S. Tudor (occupational therapist) dated the 21st of April 2021);
- 3.12. Mr. M. Peverett (industrial psychologist) dated the 21st of April 2021.
He also compiled an addendum report dated the 23rd of July 2023 and
testified at the hearing of this matter in court;

3.13. Mr. Jacobson (actuary) dated the 14th of May 2021. He further compiled an updated report after the hearing of this matter dated the dated the 23rd of October 2023, based on the submissions of Mr. Uys.

4. Except for the reports of Mr. Peverett and the opinions expressed therein, the other reports, findings and opinions expressed therein were accepted by the Defendant. At the hearing of this matter Mr. Uys referred me to an exhibit uploaded to caselines at pages AA61 to AA120 wherein these findings and opinions are summarised.
5. It was common cause that during the collision, the plaintiff sustained the following bodily injuries in a motor vehicle collision on the 9th of March 2020 in while he was a passenger:-

- 5.1. A base of skull fracture;
- 5.2. A subdural haemorrhage on the left occipital;
- 5.3. Multiple rib fractures;
- 5.4. A pulmonary contusion;
- 5.5. A left 5th metacarpal base fracture;
- 5.6. A lumbar spine fracture;
- 5.7. A pelvic fracture;
- 5.8. A right closed femur fracture;
- 5.9. A right patella fracture.

6. After the accident the Plaintiff was airlifted to the Netcare Milpark Hospital. He was intubated and ventilated en route to the hospital. He was assessed and stabilised in the emergency room and thereafter a CT-scan and X-rays were taken. A debridement and muscle fascia was performed on 10th March 2020 and a debridement and suturing of the lacerations on his chin and hands was

performed on 11th March 2020. An intramedullary nailing of the right femur was performed on the 13th of March 2020 and an open reduction and internal fixation of the right patella was performed on the 16th of March 2020. He was further management in the intensive care unit whereafter he was discharged the Netcare Milpark Hospital to the Netcare Rehabilitation Hospital on the 30th of March 2020 from which he was discharged on the 9th of April 2020.

7. To the orthopedic surgeon, Dr. Martin, the plaintiff presented with a number of subjective complaints. These included back pain when performing physical activities, lying on his back, bending forward or stooping low, lifting and carrying heavy-weight objects, standing or walking for extended periods. He also complained of right thigh and knee pain when standing or walking for prolonged periods or during inclement weather. He further complained of occasional swelling and stiffness of his knee, weakness of the right knee and inability to bear weight thereon. Other complaints included increased irritability, forgetfulness, inability to participate in physical activities, concentration deficits, headaches, aggressive behavior, depressed mood and mood swings.
8. Dr Marin, based on X-Rays obtained from Sandton Radiology confirmed degenerative changes of the L5/S1 paravertebral joints and mild narrowing of the L5/S1 intervertebral disc space. The transverse fracture of the mid third of the right femur had been fixed in good position by means of a trans-medullary nail and locking screw and that there was bony remodelling as well as post-traumatic heterotopic calcification detected in relation to the medial and lateral femur. In respect of the right knee he found that the fracture of the patella had been fixed with a cerclage wire, however there was a non-

union present with displacement and fragmentation of the inferior pole of the patella. He found evidence of post traumatic osteoarthritis of the knee joint. As a result of the collision, the plaintiff has experienced acute pain in his head, chest and left hand, as well as pain in his lower back, pelvis, right thigh and knee immediately after the accident. The pain remained acute for approximately 4 (four) weeks after which he experienced moderate pain for another 2 (two) weeks. The pain medication he received in the hospital offered sufficient pain relief at the time. He continued to suffer from pain in his head, chest and left hand as well as pain in his lower back, pelvis, right thigh and knee which eventually subsided with the treatment rendered. The pain in his head, lower back, right thigh and knee gradually increased again as he became active and the pain in his chest, pelvis and left hand completely dissipated.

9. According to Dr. Marin the plaintiff will require future medical treatment. The lumbar spine injury should be conservative treated with non steroidal anti inflammatory drugs (NSAIDS), analgesics, physiotherapy and biokinetics. Should this treatment fail to alleviate the plaintiff's back pain, provision must be made for facet joint blocks in theatre. There however remained a possibility that the above treatment will not help alleviate the plaintiff's pain or that the plaintiff's symptoms will intensify in future. Should this happen it will require the plaintiff to be admitted to hospital for 5 days for intensive conservative treatment and a Rhizotomy in theatre. The plaintiff remains at risk to experience chronic back pain and a possibility for the spondylosis to progress to end-stage spondylosis. Provision must, therefore, be made for an MRI scan,

a possible lumbar spine fusion with instrumentation, physiotherapy and long-term rehabilitation.

10. In respect of the right knee injury Dr. Marin recommends removal of the instrumentation from the femur and patella, an open reduction and internal fixation of the patella, conservative treatment with nonsteroidal anti inflammatory drugs (non steroidal anti inflammatory drugs) and analgesics, physiotherapy and biokinetics. In his opinion there is a 50% probability for the degeneration in his knee joint to progress to end-stage osteoarthritis. Provision should, therefore, be made for the a total knee replacement with one revision, physiotherapy and long-term rehabilitation. The injuries sustained has continued to have a profound impact on the plaintiff's amenities of life, productivity and working ability and will continue to do so in the future. With successful treatment his productivity will improve, however, as the degeneration in his lumbar spine and right knee progresses, his productivity will decrease again. According to Dr. Marin regardless of successful treatment he will always have a permanent deficit. The injuries the plaintiff sustained has rendered him an unfair competitor in the labour market. He will regularly be absent from work for conservative and surgical treatment. The plaintiff must be accommodated in a permanent back friendly/sedentary environment. Provision must be made for 10 (ten) to 15 (fifteen) years early retirement.
11. According to Dr. Hoffman the Plaintiff presented with extensive accident related scarring only some of which was amenable to improvement with treatment but will always be present. His scarring will always be visible and it is therefore permanent.

12. According to Dr Labuschagne as a result of the collision, the plaintiff presents with a number of subjective complaints. He has residual memory disturbances, difficulty concentrating and headaches approximately one to two times per week. He struggles with aggression flashbacks and nightmares following the collision. The plaintiff cannot control his moods after the collision. During the collision, the plaintiff sustained a high impact blow to his cranium that resulted in a skull fracture and subdural haemorrhage. The plaintiff's recollection of events supports a period of post-traumatic amnesia of several days. Formal assessment of loss of consciousness at hospital indicated a Glasgow Coma Scale (GCS) score of 14/15. The plaintiff was kept ventilated in ICU for several days following evacuation of the subdural hematoma. This, according to Dr. Labuschagne was not compatible with a GCS score of 14/15 and at some stage this must have deteriorated. In his opinion the plaintiff sustained a severe head injury during the collision.
13. According to Ms Grootboom as a result of the collision the plaintiff has mild to significant neurocognitive outcomes with a compromise in most areas assessed, including simple and complex attention and concentration, working memory, verbal memory, complex visual memory, manual dexterity, verbal fluency, visuo-graphic skills, processing speed and aspects of executive functioning. He presented with severe symptoms of depression, residual post-traumatic stress symptoms and difficulty adjusting to his altered circumstances. The plaintiff's physical symptoms and limitations act as constant reminders of the collision and the trauma he experienced. The scars may furthermore continue to have long-term emotional effect caused by memories of the collision and from unhappiness at his appearance. The plaintiff's pre-morbid

psychological history related to his diagnosed bipolar disorder rendered him more vulnerable to the effects of psychological trauma. He reported increased depressive and situational anxiety symptoms following the collision despite having been stabilised on psychotropic medication for several years. The plaintiff's enjoyment and quality of life have been affected by the collision and its sequelae. He has been unable to pursue social, physical and occupational activities he was able to perform before the accident due to pain and physical difficulties. The plaintiff's neurocognitive deficits would affect his functioning in most areas and may result in mistakes and a decline in efficiency and productivity. His memory difficulties will affect his ability to encode and retain new material and thus the mastering of new information and skills. His emotional symptoms and psychological deficits would have an impact on his motivation, efficiency and productivity, and are likely to affect his relationships with co-workers or clients, should he manage to secure employment in future. The neurocognitive, neurobehavioral and neuropsychiatric deficits indicated by her assessment rendered him unsuited to his pre-morbid occupation as an addiction counsellor, which requires the ability to handle and manage stress. In her opinion any large sum awarded to the Plaintiff should be protected.

14. To Dr. Naidoo the Plaintiff recounted similar subjective complaints that he did to the other experts. Prior to the collision, the plaintiff attended a psychiatrist due to depression. He was treated as an outpatient but was admitted to hospital in May 2019 after he stopped using his medication. The plaintiff is using medication to assist with his mental well-being. This includes tegretol, eptec, epleptin and zopivane. The Plaintiff developed chronic headaches and pain in the affected regions after the collision which began compromising his

ongoing ability to engage in all his activities of daily living to the same extent. The changes in his functioning are impacting negatively on his mental well being and he is presenting with depressive and travel related anxiety symptoms. His chronic pain is likely to have a psychosomatic component. He is at risk for developing neuropsychiatric sequelae. Any awarded funds should be protected.

15. To Ms, Tudor the Plaintiff reported that after completing Matric in 2014 he enrolled at the Tshwane University of Technology where he completed six months of life rescue studies. He then tried to study business management at Boston College but dropped out due to his inability to concentrate because of drug addiction and having to attend subsequent drug rehabilitation. He thereafter joined his father's company as a depot manager in 2017 but resigned in 2019 because he didn't enjoy the administrative aspects of the job. His duties were mostly sedentary to light in nature.
16. The Plaintiff further reported to Ms. Tudor that he started to study drug for a course in drug addiction counselling in June 2019 through ACCSA but that he had not yet completed it by the time of his interview with her in April 2021. In August 2019 he started an internship under a Mr. Craig Van Tonder at the Cornerstone Wellness Centre, a rehabilitation facility for men with addiction problems. Mr. Van Tonder was the driver of the vehicle in which he was injured on the 9th of March 2020. Mr. Van Tonder himself was seriously injured in the accident. The Plaintiff reported that due to him being hospitalised for an extended period of time, he did not return to his pre-morbid employment as an intern at the Cornerstone Wellness Centre. In any event Mr. Van Tonder, due to his own injuries, was unable to continue his training. The plaintiff also

abandoned his studies as a result of the extended hospitalization period. Whilst the plaintiff was recuperating at home, he completed an Teaching English as a Foreign Language (TEFL) course online and had secured a contract to teach English to children between the ages of 6-10 in China in 2021. Ms. Tudor opined that the plaintiff would have difficulty with the physical demands of teaching. Her testing showed that while there was a job match between some of the critical demands of teaching and his FCE abilities, there was however a mismatch for standing work. According to her the plaintiff is only suited to standing occasionally in the classroom, due to his right lower limb limitations, which will be a problem on long teaching days. The plaintiff will require accommodation with intermittent sitting during or between lessons due to his right lower limb limitations. The plaintiff's work ability is further impacted by the significant psychological and cognitive difficulties arising from the head injury sustained in the collision. During evaluation the plaintiff presented with a number of psychological and cognitive difficulties. His concentration and attention are severely impaired and he has difficulty with set shifting. He had specific difficulty with semantic fluency, and his immediate and delayed recall was below average. He has difficulties with emotional control, impulsivity and anxiety since the accident, and his motivation, energy and drive are lower since the collision and this is in keeping with his low mood.

17. According to Ms. Tudor having regard of the plaintiff's pre-collision employment as an intern whilst studying to be an addiction councilor, it is apparent that the plaintiff does not possess the skills and characteristics of an addiction councilor consisting of insight into other's needs, empathy, attentive listening skills, good social skills and stress management. This would require

the plaintiff to work with a wide variety of personalities who themselves struggle with numerous mental, physical, and emotional conditions.

18. According to Ms. Tudor with the plaintiff's poor neuropsychological prognosis, he would have difficulty coping with the cognitive and psychological demands of a career in teaching. During her assessment of the plaintiff, it was established that the plaintiff was found to be suited to the physical demands of sedentary to light work. Her formal functional testing displayed that the plaintiff has some limitation in performing elevated work, forward bending, standing, walking, climbing stairs and he would only be able to work in these positions occasionally. The collision had resulted in the plaintiff being left a vulnerable individual in the open labour market due to his physical, cognitive and psychological limitations that impact on his work capacity. The Plaintiff was no longer considered an equal competitor in the open labour market with his current limitations, and his neuropsychological prognosis following treatment is still poor. He remains a vulnerable individual with a pre-morbid history of mental illness and substance abuse, which further impacts on his long-term outcomes.
19. To Mr. Peverett the plaintiff gave the following educational and employment history. He completed grade 12 at Hoërskool Wonderboom in 2014, whereafter he enrolled at the Tshwane University of Technology in 2015 to complete a Degree in Lifesaving. Due to the plaintiff's substance abuse and his admission to the Eden Recovery Rehabilitation Centre he never completed this degree.

20. In January 2017 the Plaintiff was appointed as Depot Manager at his father's company WJ Fleet Services earning R 8 500 per month. During July 2017, the plaintiff enrolled for an addiction counsellor certificate which he attended online. He aspired to become an addiction counsellor following his experience with substance abuse and rehabilitation. He resigned in July 2019 from WJ Fleet Services in order to commence his mandatory volunteer counselling hours in order to obtain his certificate and qualify as an addiction counsellor. The plaintiff subsequently commenced his volunteering at the Cornerstone Wellness Centre on 3 August 2019 until the date of the collision. In March 2021 the plaintiff secured employment as an assistant English teacher for Trakarn Primary School in Thailand earning R 204 000 per annum. Mr. Peverett reported in his addendum report that the Cornerstone wellness centre confirmed in a letter, dated 30 November 2020 that the plaintiff would have been offered a position as a permanent addiction counsellor following the completion of his volunteer hours and that the director of the Cornerstone Wellness Centre confirmed that the plaintiff would have earned R. 180,000 per annum in his capacity as permanent addiction counsellor. It is postulated that the plaintiff, but for the collision, upon qualifying as an addiction counsellor from 2020, considering the plaintiff's pre-morbid intellectual ability, young age at the time (24 years), and certificate skills training in counselling, he would probably have gone on to progress along median income levels outlined according to an NQF level 4 (Grade 12) with a certificate. According to Mr. Peverett the Plaintiff's postulated pre accident career progression deemed applicable for consideration would have been entry level earnings of R180000 per annum from age 25 following a straight-line progression to R 545 000 per

annum to age 45 whereafter inflationary increases would be indicated thereafter to his ultimate retirement age of 65.

21. According to the information provided to Mr. Peverett by the plaintiff, following the accident he was unemployed until 22 March 2021 when he secured employment as an assistant English teacher for Trakam Primary School in Thailand earning R 204 000 per annum. At the time of the trial the plaintiff remained employed in the same capacity at the Anuban Ubon primary school in Thailand, with his current contract expiring on 24 April 2024. The plaintiff changed schools due to smaller walking distance and absence of stairs at the new school. The plaintiff was currently earning the Thai equivalent of R 216 588. He was rendered a significantly vulnerable employee as it relates to his neuropsychological, psychiatric and orthopaedic profile.
22. In the opinion of Mr. Peverett as outlined in his reports post-collision, over the long term, the Plaintiff will probably present with a career history that is increasingly unstable with longer periods of unemployment, considering his widespread cognitive impairment and psychiatric vulnerability. In terms of his future earnings, at best, progressing beyond his current level of functioning is not probable. The plaintiff may retain his position as an assistant English teacher until his contract expires, which according to the information supplied to Mr. Peverett would be at the end of April 2024. Considering expert opinions at hand, the plaintiff's likelihood of having his contract renewed is not deemed probable. Thereafter, at best, from April 2024, plaintiff will probably go on to progress along lower quartile income levels outlined according to an NQF level 4 (Grade 12) with a certificate. Entry level earnings will be indicated as R 64

000 per annum. Following a straight-line progression, his earnings progression would be indicated as R169 000 per annum from age 45 until early retirement.

23. Two witnesses were called for the Plaintiff at the hearing of the matter, the Plaintiff himself and Mr. Peverett.
24. The Plaintiff testified that he had been resident in Thailand for three years, and employed there as an assistant teacher at Ubon Ratchatani school, which is a government school. In order for him to be employed as a teacher he required a license which he wasn't yet in possession of. However he was in possession of four teacher letters which allowed him to work as an assistant teacher for a maximum of eight years as each letter was valid for two years. He did not intend to come back to South Africa as he was engaged to be married to a Thai national, Ms. Warang Kana Wiriyan. He stated that after the marriage he will only be entitled to permanent residency but not full citizenship. He would need a marriage visa in order to acquire permanent residency.
25. The Plaintiff testified that to become a permanent teacher in English in Thailand takes between two to four years and requires one to pass an exam. One is only allowed one opportunity to pass the examination and this must be done before the teacher letters expired. He testified further that he hadn't had enough time to start studying towards his examination yet.
26. He testified that he had changed since the accident. He can only be an assistant teacher because of his inability to participate in physical activities, especially due to his knee and back injuries. His speech was markedly slower now and he couldn't concentrate as before. He had difficulties studying and to focus on the task at hand. Hence he found it difficult to teach. His duties

mainly entailed teaching English to primary school pupils between grades four and six. He himself had passed English as a second language in matric.

27. Under cross examination the Plaintiff testified that he stayed home for six months after the accident. He was not coping with the activities of daily living and used crutches during this period. When asked he said he could not remember when he had first consulted with an orthopaedic surgeon, but admitted that it was December 2020 when it was put to him by counsel for the Defendant that according to the report of Dr. Marin the Plaintiff was seen by him on the 4th of December 2020.
28. The Plaintiff couldn't recall how many other times he consulted with Dr. Marin. However, the first time he saw Dr. Marin he had a knee brace and walked with the assistance of his father as his injuries had not resolved yet.
29. The Plaintiff further testified that he started his internship with Cornerstone in 2019, as he wanted to be an addiction counsellor. In order to qualify he also needed to study at ACCSA. The total period of study was between four to six years, at the end of which he was required to write and pass an examination. He first registered at ACCSA in July 2017 and was in his third year of study.
30. The Plaintiff further testified that while recuperating at home after the accident he completed an online TEFL (Teaching English as a Foreign Language) course and thereafter wrote an examination which he passed and had got a certificate. He stated that the exam was not difficult to pass and he did it with the assistance of a company called Eye to Eye via Zoom. He testified that he received his first offer to teach in China but he didn't take it up as he couldn't travel because of Covid-19 restrictions. Instead he took up an offer to teach in

Thailand. His current contract expires in April 2024, but he would thereafter be able to work on year to year contracts provided the school is happy and one has the necessary teacher letters which he possessed. His ambition is to qualify as a permanent assistant teacher.

31. Upon questioning by me, the plaintiff testified that he was twenty seven years old and that he completed matric with a university entrance pass in 2014. He initially worked for his father before taking up his internship at Cornerstone. His supervisor and boss was also injured in the accident, was no longer able to supervise him and that is why he gave up his internship. At present he was still receiving treatment for his bipolar disorder and depression. He had a marijuana addiction pre-accident. At the time of the accident his plan was to become a fully licensed addiction counsellor.
32. The plaintiff testified that he met his fiancé in Thailand and that she was also a teacher. He planned to get married on the 22nd of March 2023. If he doesn't pass his exams he will be obliged to leave the country as the only work a foreigner can do in Thailand is that of a teacher. He is required to pass his exams during the validity period of his letters, namely eight years. The subjects are Physical Education, English, Science and Mathematics.
33. According to the Plaintiff he is currently receiving treatment in Thailand for his accident related injuries. He had also consulted a clinical psychologist in Thailand for his anxiety and bipolar disorder. He was paying for his own treatment in Thailand. He testified that he had been drug free since one year post accident. At some point he registered as a student at the Tshwane University of Technology for a course in Sea Rescue, but didn't attend lectures

because of his drug addiction and having to check into drug rehabilitation, namely the Eden Recovery Centre, where he spent six months. His father's company was still around and he inter alia worked there as a diesel mechanic.

34. The next witness to be called by the Plaintiff was Mr. Peverett. He has been practising as an industrial psychologist for twenty years and specialises in medico-legal report writing, human resource management and executive development. He has assessed the Plaintiff on numerous occasions. His latest interaction with the Plaintiff was on the 11th of July 2023 via email culminating in a report dated the 13th of July 2023. He wasn't in court when the Plaintiff testified.
35. He was not made aware of the formal letters extending the Plaintiff's employment as an assistant teacher for a period of eight years in which time the Plaintiff was required to write and pass one examination if he wanted to secure a permanent post. He was of the opinion that pre accident the Plaintiff was suited to the type of work he intended to do, namely as an addiction counsellor. These types of posts were fairly prevalent in the drug rehabilitation industry, but earnings structures were fairly flat. Progress within that structure would take some time, as it did not take place within a large corporate structure. He referred to his latest report to advance the proposition that but for the accident the Plaintiff's entry level earnings as an addiction counsellor would be indicated as R180 000 per annum and following a straight line progression his career ceiling would be indicated at R545 000 in 2023 terms by the time he reached 45. Thereafter inflationary increases would apply. The Plaintiff's pre-accident vulnerabilities would have to be taken into account.

36. Based on the testimony of the Plaintiff and the new information provided by him during his testimony, Mr. Peverett had to modify his post accident prediction of the Plaintiff's career progression. The Plaintiff, according to Mr. Peverett, would continue as an assistant teacher in Thailand earning at roughly the same amount he was currently earnings save for inflationary increases until early retirement. This is captured in an actuarial report dated the 23rd of October 2023 by Mr. Jacobsen.
37. Under cross examination Mr. Peverett confirmed that he had consulted the Plaintiff on at least three occasions. He conceded that there was a lack of collateral proof to backup the information provided by the Plaintiff. There wasn't even any documentary proof that he had completed matric. He further conceded that pre accident contingencies should be higher, and that he did not investigate the feasibility of the Plaintiff returning to his fathers business.
38. In his heads of argument Mr. Uys for the Plaintiff contends for a pre accident contingency deduction of 20% for prospective loss of earnings. I am of the opinion that a 35% contingency deduction would be more appropriate given the pre-accident vulnerabilities the Plaintiff suffered from and also the fact that his supervisor was also injured in the accident and would in any event have been unable to mentor him during his internship. This was the reason given by the Plaintiff for not continuing with his internship.
39. On the post accident scenario I propose to follow the approach in *Nlanaber v RAF*³, and deal with the possibility of early retirement by applying higher post accident contingencies instead of fixing a specific date for early retirement.

³ *Nienaber v Road Accident Fund* (A5012/11) [2011] ZAGPJHC 150 (27 October 2011)

These contingencies would also be higher as there is a possibility that the plaintiff may not pass his permanent assistant teacher examination in Thailand and may have to come back to South Africa. However, they would have to be tampered by the fact that Mr. Peverett doesn't make any allowance for career progression in the post accident scenario, nor a possible return to his father's business. I believe a total post accident contingency deduction in respect of future loss of earnings of 40% to be appropriate.

40. Applying the above approach yields the following results in respect of the Plaintiff's claim for loss of earnings:

Value of Income but for accident	R 462 181
Less 5% Contingency Deduction	R 23 109
	R 439 072
Value of Income having regard to accident	R 504 501
Net Past Loss:	R -65 429

Future Loss

Value of Income but for accident	R 7 003 613
Less 35% Contingency Deduction	R 2 451 255
Net value of income but for accident	R 4 552 348
Value of Income having regard to accident	R 4 305 468
Less 40% Contingency Deduction	R 1 722 187
Net value of income having regard to accident	R 2 583 281
Net Future Loss:	R 1 969 067
TOTAL NET LOSS:	R 1 903 638

41. As regards the Plaintiff's claim for general damages goes, it has been submitted that the fact that the Defendant made an offer in respect of this head of damages constitutes an acceptance of liability in respect thereof. It appears to be based on the full bench decision in *Alvina Chetty v Road Accident Fund*⁴ at paragraph [19] where it was held:

"Faced with the uncertainty in respect of whether the Fund had accepted the plaintiff's serious injury assessment form or not I requested the Plaintiff's Counsel to file supplementary heads of argument to address us on this aspect. Counsel for the Plaintiff duly filed the heads and we are indebted to him. It appears from the supplementary heads that the Fund had offered an amount as compensation for general damages and therefore we are satisfied that the Fund had accepted the plaintiff's injury as serious".

42. I had regard to the heads of argument filed in the Chetty matter and the facts of that case by accessing caselines. At paragraph 2.5 of the heads filed by Plaintiff's counsel⁵ it was pointed out that the RAF in that case had waived any privilege in respect of the offer it had made during an earlier application for a postponement where an appropriate award in respect of an interim payment had to be decided. There is no such waiver of privilege in this matter. In the

⁴ (A91/21) [2021] ZAGPPHC 848 (7 December 2021)

⁵ The relevant paragraph reads as follows:

"In so far as it may be relevant (it is submitted that it is for the present purposes not relevant), the Road Accident Fund specifically waived any privilege that may have attached to the offer mentioned in paragraph 2.2 of the answering affidavit it filed in an application for postponement that was heard by her ladyship Potterill J on 30 May 2018. I however also point out that a substantial tender was made in respect of this claim. I am however mindful thereof that the plaintiff may hold that the details thereof are privileged ... I respectfully submit that the details of any tender may however be disclosed to court"

premises the facts of this case can be distinguished from those in the Chetty matter.

43. It would indeed hamper the process of litigation and settlement negotiations if without prejudice offers could be used against parties where privilege in respect of such tenders are not waived. In my opinion this would apply with even more force in litigation involving the RAF which should be encouraged to try and settle matters as amicably as possible.
44. The facts of the present case are also distinguishable from those of Mertz v Road Accident Fund ⁶, where the Road Accident Fund conceded liability for General Damages in a pretrial conference held between the parties. There is no such concession in this matter.
45. In the premises I make the following order:
 - 45.1. The Defendant shall pay the total amount of **R1 903 638 (One Million Nine Hundred and Three Thousand Six Hundred and Thirty Eight Rands)** directly into the Trust Account of the Plaintiff's Attorneys in respect of his claim for past and future loss of earnings.
 - 45.2. The aforesaid sum shall be paid within 180 days directly into the Trust Account of the Plaintiff's Attorneys of record
 - 45.3. The Defendant shall not be liable for any interest on the said amount/sum until the lapse of 180 calendar days.
 - 45.4. 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, to pay for the costs of future medical expenses of the Plaintiff arising out of the

⁶ (A96/2021) [2022] ZAGPPHC 961 (2 December 2022)

injuries she sustained in a motor vehicle collision on 9th March 2020 and the sequelae therefore after such costs have been incurred and upon proof thereof.

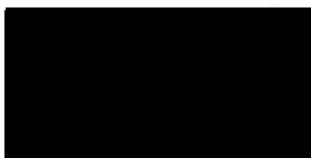
45.5. The Defendant shall pay the Plaintiff's taxed or agreed party and party High Court costs of the action, which costs shall include Counsel's fees as well as the preparation fees of Mr. Peverett and the costs of the Plaintiff's expert reports as allowed by the taxing master.

45.6. In the event that costs are not agreed: -

45.6.1. The Plaintiff shall serve the notice of taxation on the Defendant;
and

45.6.2. The Plaintiff shall allow the Defendant 180 days Court days to make payment of the taxed costs into the bank account of the Plaintiff's attorney of record.

45.7. The Plaintiff's claim for General Damages is postponed sine die.



CAJEE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

DATE HEARD: 6TH OCTOBER 2023

PLAINTIFF'S HEADS OF ARGUMENT FILED: 31ST OCTOBER 2023

DEFENDANT'S HEADS OF ARGUMENT FILED: 29TH NOVEMBER 2023

DATE OF JUDGMENT: 1ST FEBRUARY 2023

APPEARANCES:

COUNSEL FOR THE PLAINTIFF:

Mr. Piet Uys

INSTRUCTED BY:

A. Wolmarans Inc

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