REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: 1402/2013
6/10/2015
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between

RUAN KROHN **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

MADIMA. AJ

[1] The plaintiff is a 25 year old male who was involved in a motor vehicle accident ("the accident") on 10 July 2011 in Kuruman, Northern Cape. He was 22 years old at the time, and an apprentice boiler maker in the employ of Anglo American Corporation. The defendant is the Road Accident Fund whose place of business is situate at 38 Ida Street, Menlo Park, Pretoria.

[2] The accident occurred when the insured motor vehicle with registration letters and numbers BTW 503 NC, driven by one Armand Du Plooy, ("the insured driver"), left the road and overturned. The plaintiff was a passenger in the insured vehicle.

[3] The plaintiff instituted a third party claim against the defendant for damages arising from the injuries sustained in the accident. In the particulars of claim the plaintiff states that the accident was caused due to the sole negligent driving of the driver of the insured vehicle. The insured driver, according to the plaintiff *inter alia,* failed to keep a proper lookout, failed to avoid the collision, failed to take into account the rights of other users of the road, and in particular those of plaintiff, travelled at an excessive speed, failed to apply the brakes of the vehicle, failed to exercise or maintain proper control over the vehicle, allowed the vehicle to leave the road surface, drove at a speed which is not consistent with the road traffic conditions and disregarded the rights of other users of the road more particularly that of the passenger in his vehicle.

[4] The plaintiff states further that the injuries he sustained include, *inter alia,* a scalp laceration measuring 5-6cm, a fracture of the skull, a linear fracture of the left occipital area extending upwards into the vertex, haemorrhagic contusion of the left temporal lobe, diffuse brain swelling, blood in the fourth ventricle, injury to the nose, facial lacerations, injury to the left lower limb, injury to the neck, numerous lacerations and abrasions, psychological stress and trauma, loss of taste and smell and permanent cognitive deficits and neurocognitive depression.

[5] The plaintiff further claims that as a result of the above injuries, he received medical and hospital treatment and incurred expenses in connection therewith, and will in the future require further medical and hospital treatment which will necessitates the incurring of further expenses. Importantly the plaintiff claims further that he suffered

a loss of earnings and will in the future suffer a further loss of earnings and/or earning capacity.

[6] Over and above the injuries sustained, the plaintiff claims to have experienced pain, suffering and discomfort and will in the future continue to experience pain, suffering and discomfort. The plaintiff also alleges that he suffered loss of amenities of life and will in future continue to suffer such loss due to his injuries sustained in the accident.

[7] Various health experts' were called to testify on behalf of the plaintiff in support of his claim. I must state from the outset that not all the experts secured by the plaintiff took to the stand. Their reports were never challenged by the defendant.

[8] Dr J.J du Plessis, a neurosurgeon, confirmed that the plaintiff sustained the following injuries, namely, moderate to severe diffuse brain injury, focal brain injury in both temporal lobes. He also developed post traumatic epilepsy. The plaintiff, according to the neurosurgeon, and as a result of the epilepsy is not currently permitted to drive a motor vehicle. He should also not work in an environment where he could sustain injuries if he gets a seizure. The plaintiff has also lost his sense of smell and aromatic taste.

[9] The evidence of Dr J.S Enslin, an ear, nose and throat specialist was that the plaintiff suffered a loss of hearing, a fractured nose, and injuries to the left cheekbone and orbit. He has also suffered a permanent loss of smell.

[10] Dr P Gaus' evidence was that the plaintiff sustained injuries to his central nervous system because of the significant injury to his head. The visual field damage is permanent. The occupational therapist's evidence was also sought and states that the plaintiff has neurophysical limitations, diminished balance, dizziness, forgetfulness and concentration problems.

[11] A clinical psychologist-neurologist testified that the plaintiff has debilitating headaches and migraines, pain in the knee, neck and back. He has a problem with temper control. He is aggressive. He has anxiety and is depressed. The plaintiff has a limited concentration spell. His cognition ability has declined.

[12] The defendant conceded the merits of the action shortly before the proceedings commenced. I must mention that the defendant did not provide the court with a single expert or expert report of its own.

Issues not in dispute

[13] The parties were able to settle the following heads of damages:

[13.1]. General Damages:	R800 000.00
[13.2]. Past Medical Expenses:	R57 398.56
[13.3] Past Loss of Income:	R133 275.50
[13.4] Future Medical Expenses:	Section 17(4) (a) Undertaking

Issue in dispute

[14] The parties could not agree on the issue of future loss of income or earnings, particularly the issue of the relevant contingency deductions.

Plaintiff's loss of income / earning capacity

[15] The evidence led with regard to the plaintiff's loss of earning capacity was that given the severity of the brain injury and his probable post-traumatic epilepsy he was at risk of losing his job. If he does, he will probably struggle to find another job. His work record would probably be unstable in future due to the sequelae of the brain injury. The loss of the sense of smell and his visual problems would negatively affect his productivity and employability.

[16] The plaintiff testified that he was a good student who passed Grade 12. He has never repeated a grade. He was supposed to have taken his trade test in 2012. He could not do so because of the injuries he sustained in the accident. He failed the test at the first attempt, only passing in 2014, on his second attempt. It was submitted that this resulted in the plaintiff's loss of earnings over a period of two years.

[17] The evidence was also that given the severity of the brain injury and epilepsy, the plaintiff was at risk of losing his job. It was submitted that from an occupational point of view, he would have restrictions in a work situation. He is not supposed to work on heights, machinery or moving surfaces due to epilepsy and his dizziness as it poses a safety threat. He should not be allowed to handle heavy loads.

[18] It was also submitted that the plaintiff is not suited for his current position and he is considered to be a vulnerable individual and it is highly unlikely that he will work until retirement age and is therefore unlikely to sustain stable employment. The plaintiff has already been reprimanded by his employer on two previous occasions. His seizures and black-outs would preclude him from working in his trade. He is aware of this and goes to great length to conceal these problems. Should he lose his current position, which is a possibility, he is unlikely to maintain stable employment.

Contingency deductions

[19] According to the actuarial report presented on behalf of the plaintiff, the pre- and post-accident income has been calculated in accordance with the recommendations by an, Industrial Psychologist. It was recommended by the Industrial Psychologist that a substantially higher post-accident contingency deduction be applied.

[20] The basis of the report is not in dispute and is accepted by the defendant as being correct.

[21] It was submitted that prior to the accident the plaintiff was a healthy young man in the early years of his career. He was gaining experience in a very popular trade and already procured a position at Kolomela Mine. The evidence was that he was eligible to write his trade examination in 2012 to be qualified as a boiler maker.

[22] It was submitted that a 15% pre-morbid contingency deduction was fair and reasonable and there is no basis why I should deviate from the norm. Even if I was not sufficiently persuaded that the actuarial report was correct, my hands are tied behind my back because the defendant did not provide a counter report.

[23] The reports of the experts state that after the accident the plaintiff was no longer the same healthy young man that he used to be. The plaintiff is left with severe curtailments, of which the most significant is the severe brain injury.

[24] There is little doubt that having regard to the *sequelae* of his injuries as fully canvassed by the experts, the plaintiff is at risk of losing his current position and the prospects of him obtaining another position are indeed very slim.

[25] All the experts are in agreement that the plaintiff is not suited for his current position. The plaintiff himself testified that he applied for various positions, but has not been successful. He has already been subjected to two disciplinary hearings at his workplace, the third one is looming in the horizon. It is very difficult to imagine the pressure the plaintiff has to endure on a daily basis at his workplace, afraid that his limitations would be found out.

[26] Despite the plaintiff's attempts to conceal his epilepsy, he already had black-outs at work and it is just a question of time before he is caught out and there is no doubt in any of the experts' minds that he will not be able to remain in his current position.

[27] The plaintiff is on the proverbial "knife's edge". He can be dismissed from his job anytime. There is no other option in my mind other than to apply a 50% post-morbid contingency deduction. By applying the 50% contingency deduction, the plaintiff is regarded as having a 50% chance to sustain his current employment, alternatively to obtain alternative employment. This is a conservative approach if one has regard to the plaintiff's condition.

[28] If a contingency deduction of 15% pre-morbidly and a 50% post-morbid contingency is applied, the plaintiff's future loss of income / earning capacity will be in the order of **R 3 213 914.00.**

[29] The defendant is of the view that an amount of R1 900 000.00 represents a fair and reasonable offer. The defendant does not lay any scientific or legal basis for this

offer. The defendant does not even offer an explanation why the suggested contingency deductions should not be applied. The defendant's tender of the amount of R1 900 000.00 as being fair and reasonable is arrived at without any foundation. I take this tender as a thumb-suck as the defendant does not offer any explanation as to how it arrived at this amount. There is no factual or legal basis upon which it can be argued that this amount is fair and reasonable. It may well be. We shall however never know.

[30] I find it most disturbing that the defendant, despite defending this action, has not allowed its legal representatives to appoint medical and other experts to counter those experts of the plaintiff. Such experts would have offered balance to the dispute and afford the court an alternative view. The non-appointment of the experts by the defendant points to only one direction and conclusion, that is, the defendant did not have any basis to defend this matter, and should have conceded the merits and quantum without wasting the court's time and resources. This therefore means to me that the defendant admits to all of the allegations made by the plaintiff.

[31] The defendant should not defend matters that are clearly not defensible. This matter is one of those. This is not only a waste of the defendant's resources but also those of the court. The legal representatives of the defendant presented a very lame and poor defence and resistance to the claim against it. I do not blame counsel at all. He simply had one of those cases he knew he was going to lose. This matter would have been better settled by the parties before it even came to be heard in court.

[33] With regard to the costs, the defendant's counsel submitted that the reservation fees of the experts who testified (save for the Industrial Psychologist) should not be allowed, because the contents of the experts reports were admitted by Plaintiff. I agree. I do not see why the defendant should be encumbered with the reservation costs of experts whose reports were not disputed. The plaintiff was informed of this and it was not necessary to book them for the day.

[34] The plaintiff's counsel argued that being *dominis litis* the plaintiff should not be precluded from calling evidence and to place all relevant facts before the Court. The plaintiff has a duty to prove his case, so it was submitted. I agree. This the plaintiff

should do when there is resistance from the defendant. In this case there was none. I restate that it would be unfair on the defendant to be saddled with reservation costs of experts that were never called, that the plaintiff was never to call.

[35] Having had regard to all of the evidence placed before me, as well as having listened to the submissions made by counsel of both plaintiff and defendant, I make the following orders:

35.1. The defendant is to pay an amount of **R990 674.06** representing general damages in the amount of **R800 000.00,** past medical expenses in the amount of **R57 398.56** and past loss of earnings in the amount of **R133 275.50.**

35.2. The defendant is to pay the amount of **R 3 213 914.00** for future loss of earnings.

35.3. The above amounts must be paid to the Nedbank Trust Account of Savage Jooste & Adams Inc, Acardia branch number 16334507 and Account Number […].

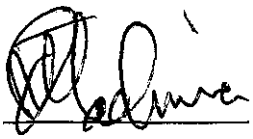
35.4. The defendant must also furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996 to compensate him for 100% of the reasonable cost of future accommodation in hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff resulting from injuries sustained by him as a result of the accident that occurred on 10 July 2011, in respect of the said costs after costs have been incurred and upon proof thereof.

35.5. The defendant is to pay all of the plaintiff's taxed or agreed party and party costs of the action on the High Court scale including costs up until and including 10 February 2015.

35.6. The defendant shall pay interest at the rate of 9% per annum a *tempora morae* from due date to date of payment.

35.7. The nett proceeds of the above payment, together with the plaintiff's taxed costs payable by the defendant, after deduction of the plaintiff's attorney and own client legal costs must be paid into the account controlled by the plaintiff's spouse.

35.8. The plaintiff has not signed a contingency fee agreement.



TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Plaintiff:	Adv M Van Rooyen
Instructed by:	Savage Jooste & Adams Pretoria Tel: 012 452 8200
On behalf of the Defendant:	Adv B.N Mbiko
Instructed by:	Tsebane Molaba INC Pretoria Tel: 012 328 5477
Dates of Trial:	9 February 2015
Date of Judgment:	6 October 2015