IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

Case number: 98614/2015
Date of hearing: 24 October 2019
Date delivered: 1 November 2019

In the matter between:

CORIN, SEAN BRENDON **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

SWANEPOEL AJ:

[1] Plaintiff is currently 29 years of age. He sues for damages arising from a motor vehicle accident which occurred on 13 June 2014. Defendant has been ordered to pay 80% of plaintiffs proven damages. The aspect of general damages and future medical expenses have also been dealt with, and what remains to be determined by me is plaintiff's past and future loss of earnings.

APPLICATION TO POSTPONE

[2] The parties approached me in chambers prior to the matter being called, at which point defendant's counsel intimated that defendant was of the view that the matter was not ripe for hearing, and that a postponement would be sought. When the

matter was called, defendant sought a postponement on the basis that an addendum to the industrial psychologist's joint minute contained new facts which defendant would have to investigate. The alleged new facts are essentially that plaintiffs employer reported that the company was under financial strain, and that plaintiffs employment was no longer guaranteed. The experts agreed on those facts, and consequently they prepared a joint minute which recorded their agreement. The application to postpone was vehemently opposed.

[3] In argument, the following facts transpired:

[3.1] On 29 May 2019 the parties' respective industrial psychologists met in order to consider an addendum to their previous joint minute of 19 July 2017. The minute in question is the one which allegedly contains new facts. It was served on defendant's attorney on 3 June 2019.

[3.2] A pre-trial meeting was held on 20 August 2019 at which the parties specifically canvassed whether either party had suffered prejudice. Defendant recorded that it had not suffered prejudice. The parties agreed that the matter was ready for trial. Had defendant been of the view that the addendum to the joint minute was incorrect, or that it required further investigation, that would have been the time to raise its concerns.

[3.3] A certification hearing was held on 6 September 2019. Once again, defendant failed to raise any concerns about the addendum, and the matter was certified trial ready.

[3.4] I am told that an agreement was previously reached between the parties to argue the matter on the expert reports and joint minutes. It seems that only at the last minute did defendant intimate that it did not agree with the addendum to the joint minute.

[4] I dismissed the application for a postponement. The reason was, firstly, that it is not proper for a party to litigate by ambush. Defendant cannot wait until the last minute, renege on its undertaking that the matter is trial ready, and then surprise plaintiff with an application to postpone. More importantly, I pointed out to counsel that a party who appoints an expert to meet with and to discuss the matter with the

opposing expert, is bound by the agreements reached by the experts.

[5] In ***Thomas v BD Sarens (Pty) Ltd [2012] ZAGPJHC 161*** Sutherland J held that where facts are agreed on between the parties in civil litigation, the court is generally bound by such an agreement. That approach has been followed in several cases thereafter, and specifically in ***BEE v RAF 2018 (4) SA 366 (SCA)*** the Supreme Court of Appeal endorsed Sutherland J's finding. It was held by the majority of the Court (at 384 A):

> *"Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts,* a *litigant may not repudiate the agreement 'unless it does* so *clearly and, at the very latest, at the outset of the trial' (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings* or *facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on* a *matter of opinion, the litigants are not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare...."*

[6] In ***BEE*** *(supra* at 384 H) Rogers AJA held that where expert witnesses are directed to file a joint minute, and they subsequently do so, then the joint minute will be regarded as limiting the issues on which evidence is needed. Therefore, even if defendant were to investigate the matter further, the fact is that defendant would still be bound by the agreement reached by the experts. There would have been no point to the postponement, and I therefore refused the application.

PAST AND FUTURE LOSS OF INCOME

[7] The sole remaining issue before me is plaintiff's loss of past and future income, the other heads of damages having already been addressed. The plaintiff's injuries were significant. Plaintiff suffered a broken nose in the accident, which it seems was not regarded as significant at the time. He also suffered a left-femoral head/hip injury, a right tibia compound fracture, a right knee patella fracture and a fibula fracture. Plaintiff was hospitalized for three-and-a-half months following the accident. An attempt was made to treat his hip injury by open reduction and internal fixation, but ultimately he had a total left hip replacement in January 2015.

[8] Plaintiff's neurosurgeon reports that plaintiff suffers from loss of concentration, memory loss, word identifying difficulties and problems communicating. He is irritable and short tempered. He suffers from headaches on a daily basis, has dizzy spells, and suffers from visual impairment. His symptoms are consistent with a traumatic brain injury.

[9] In addition, plaintiff has suffered severe orthopaedic injuries. Due to the right knee and lower leg injury plaintiff is unable to stand or sit for long. The hip injury has left plaintiff with pain on a daily basis and with severe balance problems. He struggles to drive a car and he struggles with household chores. He cannot participate in his previous sports, running, gym and cricket. Plaintiff will most likely require a further hip replacement in future.

[10] The effect of the injuries on plaintiffs employment has been significant. But for the accident he would most likely have progressed to the level of project manager, and he would have been able to compete in the open market. He would have graduated to more complex and larger projects, and he would have qualified for the company bonus scheme.

[11] Post-accident, plaintiff was off work for nine months. Since returning to work he has proven to be a liability on site, and he has been limited to administrative work in the office. He is only suited to light sedentary work, and even then he needs to be accommodated. Fortunately, plaintiff has a sympathetic employer who is supportive of his deficits. Although he is regarded as a hard worker, his employer is concerned that he evidences emotional and behavioural issues. As his emotional stability has an effect on his progress in the company, plaintiffs options are limited. More importantly, his memory and concentration deficits have an impact on his employment. Plaintiff will in all likelihood retire by age 57. He is unable to work for a full day, and if he is to look for part- time work, he is unlikely to be successful in obtaining suitable employment.

[12] Plaintiff is regarded as important to his employer. However, given the current financial position of the company, plaintiff's employment is quite possibly at risk. It was envisaged that plaintiff would have to change the type of work that he does, and it was planned for him to take up a training position with a sister-company to his employer. However, the addendum to the joint minute of the industrial psychologists notes that due to the closing down of the training company, the training position is no

longer an option. In addition, plaintiff's employer is under financial pressure. It is prepared to continue to accommodate the plaintiff, but he has no possibility of promotion, and his employment is at risk. Should plaintiff lose his employment, it is unlikely, the experts agree, that he will obtain employment again.

[13] It is against the above background that the actuarial report was prepared. Pre-morbid it was postulated that plaintiff would have progressed to the level of project manager, achieving Paterson level C5 by age 43.5. Post-morbid it is postulated that he will continue in his current position, until retirement at age 57. It is also taken into consideration that plaintiff will remain a vulnerable employee, and that he is an unequal competitor in the labour market.

[14] Having initially taken issue with the actuarial report, defendant's counsel indicated that the actual amounts set out therein were no longer in dispute. It was only the contingency deductions to be applied that defendant was concerned about. The actuarial report calculates the plaintiffs income but for the accident at R 11 149 639.00. This amount is reached by applying a 5% contingency deduction to the past income, and a 15% contingency to the future income. Having regard to the accident, the income is calculated at R 2 779 471.00. This amount is calculated by applying a 50% contingency deduction to the future loss. Plaintiffs counsel argues for the latter deduction on the following grounds:

[14.1] Plaintiff is still relatively young;

[14.2] Plaintiff cannot work a full day, and will likely have to seek an alternative position.

[14.3] Plaintiff has suffered serious injuries which have left him in severe pain on a daily basis, which has a direct impact on his employment;

[14.4] Plaintiff has neuropsychological and cognitive deficits which limit his potential employment, and he is only suited to administrative work, in which he also has to be accommodated.

[14.5] Plaintiff cannot advance the business of his employer, is at risk of losing his employment, and he will likely not obtain alternative employment should he be dismissed or retrenched.

[15] Defendant's counsel was in agreement with all the contingency deductions, save for the 50% deduction on the future loss having regard to the accident.

Defendant's counsel contended for a 40% deduction.

His submission was based on the proposition that the Court should not grant "the highest award". I am of the view that this submission has no merit. Defendant has not taken issue with any of plaintiff's submissions made in justification of a 50% deduction.

[16] I am thus of the view that the loss as calculated by the actuary is correct. After applying the RAF cap, the loss of past and future income is R 7 398 133.00. Defendant is liable for 80% of that amount, being R 5 918 506.40. I have been handed a draft order which provides for an appropriate costs order, and I have inserted the amount awarded in manuscript.

[17] **In the premises I make the following order:**

[17.1] The draft order marked "X" is made an order of Court.

_____

Swanepoel AJ

Acting Judge of the High Court,

Gauteng Division, Pretoria

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

Case No: 98614/2015

In the matter between:

CORIN, SEAN BRENDON PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

DRAFT ORDER

On 23rd of October 2019 before the Honourable Justice Swanepoel AJ; by agreement between the parties and having heard counsel; it is ordered:

1. The Defendant shall pay to the Plaintiff the capital amount of **R 5 918 506-40 (Five million nine hundred and eighteen thousand five hundred and six rand forty cents,)** in respect of Loss of Earnings, 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.
2. Payment will be made directly to the trust account of the Plaintiff's attorneys with fourteen (14) days:

Holder	De Broglio Attorneys
Account Number	[….]
Bank & Branch	Nedbank - Northern Gauteng
Code	198 765

Ref	C450

3. 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 Plaintiff's reports to be served between the parties, inclusive of the time spent by Experts for preparation for and of the draft joint minute, drafting of proposed joint minute and time spent in finalizing joint minutes, the Plaintiff's reasonable travel and accommodation costs to attend the Defendant's and own experts, and senior counsel. All past reserved costs, if any, are hereby declared costs in the cause and the Plaintiff as well as subpoenaed witnesses are declared necessary witnesses.

4A. The Plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the Defendants Attorney of record; and

4B. The Plaintiff shall allow the Defendant fourteen (14) days to make payment of the taxed costs.

5. There is a contingency fee agreement in existence between the Plaintiff and his Attorneys.

COUNSEL FOR PLAINTIFF	Gerhard Strydom, SC
	Tel: 082 452 8943
ATTORNEY FOR PLAINTIFF	Nikita Nagel
	Tel: 011 442 4200
COUNSEL FOR DEFENDANT	Norman Le bepe
	Tel: 072 543 4293
ATTORNEY FOR DEFENDANT	Mr Bopape
	Tel: 012 343 0492

BY ORDER

_____

REGISTRAR OF THE HIGH COURT