IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO. 4933/ 2021

In the matter between:

ADV S BOTHA N.O

on behalf of **MICHAEL JAMES MIENIE** **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

PARKER, AJ:

Introduction

[1] Prior to hearing the matter in respect of quantum, Plaintiff filed an interlocutory application seeking an order for leave to be granted for the evidence of certain of its experts to be given on affidavit. The Defendant's opposition was withdrawn on the day of the hearing. In the exercise of my discretion, I deemed it prudent given the nature of the proceedings and the evidence on affidavit to be led, I found it to be fair to allow such evidence on affidavit[1] for the purposes of quantum, bearing in mind that there was very little in dispute between the parties. I am of the view that the application, which attracted additional costs, could have been conceded by the Defendant earlier than at the day of the hearing and erased the need for Plaintiff to have brought such application.

[2] The evidence adduced via affidavit related to the following expert witnesses namely:

2.1 Dr Rael Jaffe - Orthopedic Surgeon
2.2 Professor Tuviah Zabow – Psychiatrist;
2.3 Dr Zane Domingo – Neurosurgeon;
2.4 Ms N Hugo - Occupational Therapist;
2.5 Ms B Grobelaar - Industrial Psychologist; and
2.6 Ms A Valentine - Munro Forensic Actuary.

Background

[3] The Plaintiff instituted action against the Defendant following a collision which occurred on 9 August 2018 when Mr. Michael James Minnie (the patient) was injured. He suffered a brain injury and orthopedic injuries.

[4] Since the merits have been conceded all that remained in dispute is in respect of the Plaintiff's loss of earnings.

[1] Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) at 61G.

[5] The patient was assessed by the experts enumerated above including an expert report filed by the Defendant, namely that of Dr Zandile Madlabana-Luthuli, who is an Industrial Psychologist.

Joint minutes

[6] Both Plaintiff and Defendant's Industrial Psychologists concluded a joint minute and further, an addendum joint minute. The Industrial Psychologists were in agreement that based on the opinions of the Occupational Therapist, the Neurosurgeon and the Psychiatrist, the patient's psychiatric impairment is to a serious degree and that the patient would be unable to perform the work role of a CNC programmer. His deficits are in the physical, cognitive and emotional behavioral domains. It was reported that the patient was accommodated by a sympathetic employer post morbidly. However, eventually the employment ended in a dismissal on 15 May 2023 following incidents in March and April 2023 owing to misconduct and tardiness.

[7] The further findings were that the patient did not achieve matric however he progressed to be a CNC programmer.

[8] The patient would be unable to perform the role of a CNC programmer given his dismissal now, and in the future, and accordingly, has been rendered unemployable.

[9] Both Industrial Psychologists agreed that a total loss of earnings has now occurred given that the patient is no longer suited for the physical, cognitive and emotional/ behavioural perspectives to perform his work role.

[10] In a nutshell, this is one of those matters where the Industrial Psychologists are in agreement save that they are not able to pronounce on contingency deductions. The Plaintiff correctly argued that the parties are bound by the agreements reached between their respective experts.[2] However, that does not mean that judicial officers accept the

[2] Bee v Road Accident Fund 2018 (4) SA 366 (SCA)

opinions of experts blindly, even when such experts agree. The experts reasoning must still be sound and logical as held in SCA in Medi-Clinic v Vermeulen.[3] Furthermore, the SCA in NSS obo AS held;

> *"However, the wise judicial officer does not lightly reject expert evidence on matters falling within the purview of the expert witness's field"*

Loss of earnings

[11] Both Industrial Psychologists agree in respect of the patient's pre and post-morbid career paths.

Pre-morbid earnings

[12] The Industrial Psychologists agreed that the patient had 39 working years remaining and given the nature of his employment, his work experience, skills and vocation he could have reached his best at age 45 (2037) earnings (associated with Patterson grade B3 given that he was performing skilled work tasks in a technical capacity) of which the patient's earnings equated to R190 080.00 per annum.

[13] The findings of the Industrial Psychologists agreed that the patient would likely have continued working in the same capacity until he reached the retirement age of 65. In my view, this factor plays a pivotal role when assessing the percentage of contingencies to be applied.

Post Morbid Earnings

[14] The Industrial Psychologists addressed the post-morbid earnings in their addendum report dated 6th of June 2023. They concur that the patient's pre-morbid earnings based on the opinions of the Occupational Therapist, the Neurosurgeon and

[3] Medi-Clinic v Vermeulen 2015 SA 241 at 250 para 25-27.

Psychiatrist, the patient's impairment is to a serious degree and that they were clear he would be unable to perform work as a CNC programmer in the future.

Contingencies

[15] During argument, both counsels correctly conceded that contingencies are the prerogative of the court and both counsel advanced different percentages in respect of the patient's uninjured and injured state. In applying my judicial discretion I had regard to Road Accident Fund v Kerridge.[4] The SCA articulated some general rules regarding contingency deductions, one being the age of a claimant. Namely, the younger the claimant the more they may fall victim to the vicissitudes of life and other reasons which are impossible to enumerate. In so far as future loss of earnings is concerned, factors such as the poor economy and ill health are considerations. The longer the remaining working life, the more likely the possibility of an unforeseen event occurring – to be considered.

[16] The Plaintiff motivated the contingencies regarding Robert Koch in the Quantum Yearbook 2024 [5] using the sliding scale of a 0.5 percent contingency deduction per year to the time and age, calculating it to be 25% for a child, 20% for a youth and 10% for middle aged person respectively. It was argued by the Plaintiff's Counsel that the norm for a deduction of 5% is often applied for past loss of earnings and a 15% contingency deduction in respect of future loss of earnings. The Defendant did not challenge the Koch methodology but argued for a contingency deduction of 20% for past loss of earnings and 40% for future loss of earnings. My discretion then centered around these percentages.

Actuarial Calculations

[4] 2019 (2) SA 233 (SCA) para 44
[5] Publisher: Van Zyl Rudd

[17] The claim was actuarially calculated by Munro Forensic Actuaries in its report dated 26th of August 2024. The Plaintiff, in substantiating its argument for a 20% contingency deduction relied on the Industrial Psychologists who agreed that the patient was a career starter, and, although considered as an unskilled worker he was performing skilled work and would have continued working in the same capacity until retirement.

[18] The Defendant argued that a higher contingency of 40% should be applied given that the patient did not achieve matric and would still therefore fall into the unskilled category. The Defendant's argument was that the patient changed jobs at various employers and this factor was seen in a negative light by the Defendant. The Defendant lost sight that the court is bound by the findings of the Industrial Psychologists who agreed that the patient would have stayed in the job position as a CNC. Their joint minute clearly reflected that although *"considered an unskilled worker"* he *"was performing skilled work"*.

[19] I do not accept that it is appropriate to *"punish"* the patient for not achieving a matric. I am acutely aware that a matric in today's times is not enough, and even if a matric qualification is acquired, securing work is competitive, there is likely to be a much bigger pool for job seekers to compete when searching for work. I am mindful that despite the patient's education, his progress prospered, and his career growth is admirable. In relying on the factual basis and conclusions drawn by experts whose reasoning guided the court; I was hard-pressed to find factors which would substantiate increasing the contingency deduction significantly to 40% as suggested by the Defendant for the uninjured state. The Defendant did not advance arguments as to its reasoning for a 20% contingency deduction to be applied for the past loss of income.

[20] I do, however, lean in favour of an increased contingency deduction due to the joint minutes reflecting that the patient was going to be at a disadvantage *"when compared to his counterparts with the same work experience but higher level of*

education", of which I take cognizance of, and I have alluded to the job seeking market earlier, however, there is nothing to persuade me to venture higher than 30%.

[21] Given that the parties are not far apart at all, the Defendant is bound by its expert's joint minutes and therefore I am unable to apply a higher contingency as argued by Defendant. I do, however, think that 20% recommendation by the plaintiff's counsel is on the low scale. Accordingly, the calculation is as follows:

	Uninjured	Injured	Loss
Past income:	R927 400	R420 500	
Less contingencies	5%	0%	
Net past income	R881 030	R420 500	R 460 530
Future income:	R5 404 300	Rnil	
Less contingencies	30%	0%	
Net future income	R3 783 010	Rnil	R3 783 010
Total loss:			R4 243 540

Costs

[22] The Plaintiff argued for costs on scale B and the Defendant argued for costs on scale A. For the Plaintiff, considering the nature of the injuries, the importance of this case to the patient and the quantum, the costs are justified to be awarded on the higher scale.

Mediation

[23] This is one of such cases where there was so little in dispute that the Defendant could have, if it had applied its mind to the matter, have mitigated its costs. This is an example of a matter where a mediator could have played a meaningful role, focusing on

the narrow and singular issue of contingencies only. Had that been a consideration, time and costs would have been saved.

[24] As such, it was a golden opportunity for an earlier settlement, given the length of time it took for this matter eventually to be heard, given that the matter was declared-trial ready by Cloete J in June 2023. It is a pity that the Defendant did not consider settlement earlier and left it to the court on the single and narrow aspect of determining the contingencies to be applied.

Order

[25] Having heard the submissions made by counsel it is ordered:

a) The Defendant shall pay the Plaintiff's attorneys the sum of R 4 243 540.00 ("the capital"), by way of an electronic transfer to the trust account, details whereof are set out hereunder, in respect of the Plaintiff's claim for loss of earnings.

b) The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale in respect of the matter set down for 6 February 2025, including but not limited to the following:

(i) The costs incurred after the date of this order in obtaining payment of the amounts referred to herein.

(c) The qualifying and reservation (if any) fees of the following expert witnesses, including the costs attached to the procurement of medico-legal reports and any addendum reports, joint minutes, X-rays, MRI scans, and pathology reports:

(i) Dr Zayne Domingo (neurosurgeon)

(ii) Dr Rael Jaffe (orthopaedic surgeon);

(iii) Prof Tuviah Zabow (psychiatrist);

(iv) Ms Nicolette Hugo (occupational therapist)

(v) Ms Barbara Grobbelaar (industrial psychologist)

(vi) Munro forensic actuaries.

(d) The reasonable travelling and accommodation costs incurred by the Industrial Psychologist to be available at the hearing on 6 February 2025.

(e) The fees of the Plaintiff's counsel, including for furnishing advice on evidence, preparing for trial and drafting heads of argument, on Scale B.

(f) Payment of the capital amounts, as set out in this order, must be made within 14 calendar days from the date of this order.

(g) The Defendant will be liable for interest on the abovementioned capital amounts calculated at the legal rate from 14 calendar days after the date of this or the taxing master’s allocator, in the event of taxing the bill of costs, whichever is applicable.

(h) The plaintiff's attorneys' trust banking account details are as follows:

Bank:	First National Bank
Account Holder:	De Vries Shields Chiat Inc.
Branch:	Portside
Account Number:	6[...]
Branch Code:	21065

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PARKER AJ

Acting Judge of the High Court

Appearances

Counsel for the Plaintiff:	Adv Eugene Benade
Instructed by:	DSC Attorneys Mr Daneil Botha
For the Defendant:	Ms Claireese Thomas RAF State Attorney
Date of Hearing:	6 February 2025
Date of Judgment:	19 February 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.