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



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

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Case number: 2217/2014

In the matter between:

M J

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Based upon a stated case, this court was asked to determine the residual working capacity of a road accident victim, plaintiff in this matter.
2. Late in the afternoon of 21 September 2012 a collision occurred between two motor vehicles in Benoni in one of which plaintiff was a passenger. He suffered most severe injuries - facial injuries and lacerations, partial loss of hearing and dislocation of an eye, multiple fractured ribs on both sides of the torso and a diffuse brain injury.
3. Two years after the accident the RAF conceded that it was 100% liable for the damages sustained by plaintiff in this accident. General damages have been settled in a substantial amount and the RAF has tendered an undertaking in terms of section 17(4)(a) of the RAF Act.
4. In dispute between the parties remains the quantum of both past and future loss of income with the RAF maintaining that plaintiff could have worked post accident and prior to this hearing and that he retains the physical capacity for continued work and that a higher contingency should be applied insofar as loss of earnings is concerned. Plaintiff relies upon certain actuarial calculations based upon medical reports and submits that the contingency of 50% contained within such actuarial calculations should be applied.

FACTS SET OUT IN THE STATED CASE

5. Mr J M was born on [...] 1984 and was therefore 28 years old at the time of the accident. He is now 31 years old.
6. He had commenced working for Stone Tactical Security in February 2010 and remained working for this company at the time of the accident. He was employed as a Grade C security officer and earned a very basic salary of R 4 000 per month.
7. No less than 13 reports are admitted into evidence by way of this stated case. I shall not repeat their contents. Suffice it to say that they include ophthalmologists (1), maxilla-facial and oral surgeons (1), plastic surgeons (1), speech language pathologists and audiologists (1), clinical psychologists (1) neurologists (1) occupational therapists (2) industrial psychologists (2).
8. The physical facts before me which I find to be relevant to the issue which I must determine are:

- a. Plaintiff was employed at the time of the accident and had been so employed for more than two years.
- b. Plaintiff has been unemployed since the accident in 2012.
- c. Plaintiff's injuries are obvious to whomsoever just looks at him or attempts to engage with him. He is obviously disfigured and disempowered in a manner which renders him unlovely to behold and hampered in communication:
 - i. According to the ophthalmologist:
 - 1. There is a cheek scar below the lid of an eye causing distortion to the face.
 - 2. There are multiple foreign bodies (glass spicules, blackish particles of what may be road dirt, whitish particles) to nasally and temporally and inferiorly and superiorly.
 - 3. His cornea is peppered with multiple foreign body particles.
 - 4. There are scattered intra-stromal scars, pigment atrophy in the iris, displaced pupil, pupil sphincter ruptures, vitreous thickening,
 - 5. It is recorded that certain of these observed injuries could be surgically resolved but this would run the risk of complications which would not be to plaintiff's physical benefit.
 - ii. According to the plastic surgeon:
 - 1. There is extensive scarring involving his face, neck, chest and abdomen as well as around his reconstructed ear.
 - 2. Notwithstanding improvements by further surgery, there will always remain serious disfigurement in these regions.
 - iii. According to the speech language specialist:
 - 1. Plaintiff presents with speech and language difficulties redolent of brain injury which impacts upon communication demands.

SPECULATION AND HYPOTHESIS

- 9. In most areas of law, we are all enjoined to attempt to determine the facts and the law applicable thereto. Unfortunately, in the sphere of future damages a multiplicity of persons (medical practitioners, actuaries, lawyers) are required to assist a judicial officer to venture into uncertainties, operate on quite unverified suppositions, make the least wild conjectures, predict the future based on very little,

take a best guess. In short, these are extremely unjudicious exercises - based on guesswork the judge does some fortune-telling.

10. Regrettably that is what I am now asked to do.

11. The stated case tells me that:

- a. Plaintiff's sight is affected and there is permanent disability.
- b. He is scarred.
- c. His communication skills are hampered both as to word finding, speed of processing language and formulating his discourse as well as related difficulties in understanding. All these are associated with injuries to both left and front brain areas. He now has inadequate receptive, cognitive, expressive comprehension and reasoning skills.
- d. Plaintiff suffers from neurocognitive difficulties in attention and concentration as well as behavioural lapses.
- e. His memory, episodic and cognitive functioning is impaired.

12. I note that these findings are not in dispute. Either defendant does not put up an alternative diagnosis or prognosis or defendant's expert is in agreement with plaintiff's experts.

13. The only issue is whether or not plaintiff has any likelihood of returning to the labour market in some capacity. Plaintiff's experts are highly doubtful. One of defendants experts hope for work as a driver operating a light vehicle but fail to explain how a brain damaged individual (with a likelihood of epilepsy) would be able to obtain the necessary licence.

14. One fact which was not set out in the stated case, to which I am entitled to have notice, are the figures offered semi-annually by the Stats SA on unemployment in South Africa. I do take into account that plaintiff belongs to the demographically identified sector most vulnerable to unemployment in this country and I do have regard to the recessionary economic climate when I have regard to the reality of any speculation as to the future employment prospects of plaintiff.

15. I do not propose to repeat the comments of our courts on 'informed guesses', calculations as to likely return to employment, the nature of the contingencies to be considered (early death, loss of employment, the employment market, sickness, hazards of life, previous work history, the economic climate in South Africa, and so on) and how they should be applied. I was referred to the judgment of Moshidi J in

Gordon Gwaxula v RAF Case 09/418 which usefully reminds one of judicial approaches to these issues.

FINDING

16. In this day and age, a man of minimal or no skills other than use of his body to provide security services operates in a most vulnerable sector of the employment market. A man who is physically unsightly is obviously less likely to be employed. One who is discovered to be brain damaged immediately upon attempts at communication is most unlikely to obtain employment. A person whose entire make up (cognitive, communicative, expressive, behavioural) is now erratic and unreliable is virtually entirely unlikely to obtain let alone retain employment.
17. This was a man who was in employment. That his employer closed down after his accident and whilst he was still undergoing treatment (according to the reports) does no more than indicate his innate vulnerability in retaining employment in difficult economic times. But he has a work history, without his injuries and incapacities there is nothing to indicate that he would not have continued working within that industry.
18. It is my view that the contingencies in respect of his future earning capacity should not be assessed as high as 50%. That is not how he presented prior to the accident. It is the accident and its sequelae which have created his current difficulties. There is no indication of ill health or being workshy prior to the accident. Accordingly, I would deduct only 30% in respect of contingencies in relation to his claim for future earnings.
19. Regrettably my file does not contain the report of either actuarial report which the stated case [in paragraphs 33 and 35] claims to exist. I do not myself propose to do the arithmetic which will now require to be done. The parties may prepare an order to be made by myself within the next two weeks based on plaintiff's actuarial calculations in respect of past loss of earnings and based on plaintiff's actuarial calculations in respect of future loss of income.
20. Such order will obviously deal with those matters which have been settled – merits, general damages, an undertaking -as well as past loss of earnings and future loss of earnings. On the opinions set out in the reports of the medical practitioners, a Trust must be formed for the benefit of plaintiff – the costs of establishment and administration to be borne by the RAF.
21. A ruling is made that the appropriate order be prepared as a matter of urgency since I will not be sitting in this court subsequent to the Friday 9th September 2016.

DATED AT JOHANNESBURG 29th AUGUST 2016

SATCHWELL J

Counsel for Plaintiff: Adv Swart

Attorneys for Plaintiff: Sonya Meistre Attorneys.

Counsel for Defendant: Adv Magkate

Attorneys for Defendant: Nozuko Nxusani Incorporated

Dates of hearing: 10th August 2016.

Date of judgment: 29th August 2016.