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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 12601/2017

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

.....
DATE

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SIGNATURE

In the matter between:

M E

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff, aged 27 years at the time of the accident, has instituted an action against the defendant for damages suffered as a result of bodily injuries he sustained in an accident. The accident occurred along Cloverdene Road, Cloverdene, Daveyton, Gauteng Province on 8 September 2015.

THE ISSUE FOR DETERMINATION

[2] At the commencement of the trial, the parties had settled all the other heads of damages in respect of the plaintiff's future medical and hospital expenses, adaptive and related expenses. It was agreed that the defendant shall provide the plaintiff with a certificate of undertaking as envisaged in section 17(4) of the Road Accident Fund Act¹. In as far as the plaintiff's claim for loss of earnings, and earning capacity is concerned the parties agreed that the plaintiff shall be awarded the amount of R2 129 817, 00. The only heads of damages for determination by this court is the issue of the plaintiff's general damages. By agreement between the parties, this determination should be based on the medico-legal reports. As a consequence, no oral evidence was led.

[3] The nature of the injuries sustained by the plaintiff in the accident as well as the probable *sequelae* thereof are almost exclusively common cause when gleaned from the various medico-legal reports, and in particular the joint minutes.

¹ 56 of 1996.

[4] In paragraphs 7 and 8 of the particulars of claim, the plaintiff's bodily injuries are described as follows:

- "7. As a result of the aforesaid collision, Plaintiff sustained severe bodily injuries consisting of:
 - 7.1 Severe head injuries characterized by:
 - 7.1.1 A period of loss of consciousness;
 - 7.1.2 A period of post-traumatic amnesia;
 - 7.1.3 Resultant brain damage;
 - 7.1.4 Resultant neuro-cognitive deficits involving:
 - 7.1.4.1 Impaired memory and concentration;
 - 7.1.4.2 Poor mental;
 - 7.1.4.3 Persistent dilapidating headaches.
 - 7.2 Neurobehavioral deficits, involving:
 - 7.2.1 A change of personality;
 - 7.2.2 Aggressive behaviour;
 - 7.2.3 Short temperedness;
 - 7.2.4 Irritability.
 - 7.3 Multiple lacerations and abrasions.
- 8. As a result of the aforesaid injuries, Plaintiff underwent hospitalization and received medical treatment, was disabled and disfigured and suffered pain and loss of amenities of life.

Particulars here of are the following:

8.1 Hospitalisation

Plaintiff was initially conveyed from the scene of the accident to Tambo Memorial Hospital where he was admitted as in-patient.

On admission the plaintiff was unconscious. CT brain scan was done and it revealed a head injury. On admission the plaintiff's GCS was 4/15. The plaintiff was breathing using artificial means and urinary catheter was administered.

For some days, the plaintiff was treated from a stretcher until he was transferred into the intensive Care Unit where remained unconscious and he was always lying on the bed. The plaintiff was intubated on a T-piece.

It was also noted that the plaintiff was unable to move his right side of his body. The plaintiff was unable to speak and he had to be seen by a speech therapist and by various experts including but not limited to physiotherapist, orthopaedic surgeon and neurosurgeon.

The plaintiff was subsequently discharged to convalesce at home. The plaintiff is currently attending physiotherapy as an outpatient as a result of the injuries he sustained in the said accident.

8.2 Pain and Suffering

Plaintiff initially suffered severe pain, which gradually abated with the passage of time. Plaintiff continues to suffer from symptomatology related to his injuries. In particular, plaintiff suffers from and severe restriction of mobility. It is anticipated that when plaintiff undergoes the future medical treatment, he will experience attendant pain and discomfort, disablement, and risk associated therewith.

8.3 Disability

- 8.3.1 Plaintiff was temporarily totally disabled during period of hospitalisation and whilst convalescing at home;
- 8.3.2 Plaintiff is presently still temporarily partially disabled as a result of the ongoing symptoms emanating from the injuries;
- 8.3.3 It is anticipated that despite future surgical and conservative treatment, plaintiff will suffer from ongoing residual functional disability.

8.4 Loss of amenities of life

The plaintiff has lost those amenities of life normally associated with the injuries and sequelae as set out above.

In particular, there has been a severe restriction in the level of physical activities the plaintiff is able to perform since the accident, consequently the plaintiff is unable to engage in recreational activities of his pastimes."

THE JOINT MINUTES

[5] There are about ten (10) sets of joint minutes of experts placed before the court. It is truly unnecessary to relate the contents of all these reports for present purposes. The joint minutes of the neurosurgeons (Drs J Earle and V Karan), agreed that the plaintiff was travelling as a restrained front seat passenger in a company vehicle when the accident occurred on 8 September 2015; he lost consciousness at the scene of the accident and was taken by ambulance to OR Tambo Memorial Hospital where he was investigated and then admitted for the injuries sustained. His GCS was 9/15 and this dropped further; he sustained a severe traumatic brain injury with both diffuse and focal components and he was treated conservatively for his head injury; he received extensive rehabilitation for the resultant *sequelae* of the injuries in the form of physiotherapy, occupational therapy and speech therapy for at least two months. At discharge he was still wheelchair-bound and could not mobilise on his own. He could not use crutches. He requires an assessment by a clinical psychologist for the neurocognitive and neuropsychological *sequelae* of the head injury; his life expectancy is not affected; he is at a great risk of developing epilepsy as compared to the general population; he will not be able to do the work that he did prior to the accident; and Dr Earle is of the opinion that the plaintiff still has slight weakness in the right arm and leg.

[6] The industrial psychologists, (Ms Sonet Vos and Mr Tshepo Tsiu) noted that:

“the plaintiff holds a (SV) Grade 12 school qualification, (TT) Grade 11 level education. He does not qualify for the National Senior Certificate. He passed 3 out of 7 subjects. The plaintiff was employed as a stock clerk at Lewis Stores (Bears) at the time of the accident. He was earning a gross salary of R4 102.04 per month. The plaintiff would most probably have continued working until the retirement age of 60/65 years, depending on the employer's retirement age policy.”

Post-accident the industrial psychologists noted that the plaintiff has not returned to any form of employment, and his services were terminated from Lewis Stores on 11 November 2016. The plaintiff presents significant physical limitations, cognitive defects, emotional difficulties, limitations in speech and language skills. In the light of the above, and given the fact that there is little hope for further improvement, the plaintiff will not be capable of returning to any form of employment, and should for all practical purposes be regarded as unemployable; and Ms Sonet Vos noted that the plaintiff now relies on help of others for his daily activities and self-care, and that the plaintiff should therefore be afforded the cost of employing a care-giver for the remainder of his lifespan. In this regard, Ms Vos suggested that based on the Quantum Yearbook, 2017, the cost of a care-giver is R151 000,00 per annum, which include relief attendants for weekends, etc.

[7] The occupational therapists (Ms Lesego Matlala and Ms Mamotshabo Mogoele) agreed that: the plaintiff currently does not possess the functional capacity to execute his occupation as a stock clerk in the open labour market; that although the plaintiff has residual work capacity to actively engage in

sedentary to light strength requirement workloads carried out mostly in a seated position, this will have to be with the exclusion of the use of his right dominant hand for maintenance of a power grip or fine motor coordination. The plaintiff, based on the following factors in combination, is a vulnerable employee: lack of vocational exposure and lack of employability skills, which would include self-discipline, work ethics and patterns of behaviour that are necessary for an individual to seek, gain and sustain employment and function effectively in the workplace; that should the plaintiff lose family support, provision must be made to allow him access to a fulltime domestic assistant with caregiver training; alternatively, the plaintiff will require placement in a care facility and that, should the plaintiff develop poorly controlled epilepsy, consideration should be given to afford him, *inter alia*, the cost of private transportation. Finally, in respect of the joint minutes, the psychiatrists (Drs Matjane and Matjila) agreed that: the injuries sustained by the plaintiff are likely to impact on his ability to compete in the open labour market; that the plaintiff's enjoyment of life is affected negatively by the physical and cognitive difficulties he suffers from as a consequence of the accident; that he will benefit from long-term psychotherapy; and that pain management will be an important part of his management. Based on the above, it is plain that the plaintiff has suffered a severe brain injury with diffuse and focal brain damage, with partial paralysis, and the probability of developing epilepsy. According to the report of the plaintiff's orthopaedic surgeon, the plaintiff sustained a head injury, and as a result has right sided weakness of the upper and lower limb. The report of Ms Gibson, a psychologist (Educational) with special interests in neuro-psychological and

educational assessment of Adults and Children, the same brain injury suffered by the plaintiff manifested in the following: the plaintiff has no recall for several weeks post injury; he required ventilation and feeding by nasogastric tube; he required extensive rehabilitation; he has retained right sided hemiplegia with severe co-ordination and mobility difficulties, these were confirmed on neuro-physical assessment, and he experiences severe headaches. At page 18 of the report, Ms Gibson opined:

“There is considered to be a nexus or direct, causal connection between the brain injury sustained and poor post-morbid outcome, supported by medical evidence, as evidenced by report of difficulties consistent with brain injury and findings on neuro-psychological assessment of neuro-physical, neuro-cognitive and neuro-affective and behavioural difficulties. It is considered that the brain injury was a watershed in the life of the injured party and no further improvement in functioning is likely to occur from a neuro-psychological perspective. The view of the current writer is that taking into consideration the outcome of the brain injury was very severe. The brain injury is considered to have caused serious and permanent mental and emotional impairment ... Mr M is considered unemployable from a neuro-psychological perspective with final comment regarding loss of earnings being deferred to an industrial psychologist and actuary.”

[8] Based on the entirety of the above exposition, it was argued on behalf of the plaintiff, and based on certain case law, that a fair and just amount in respect of the plaintiff's general damages would be the amount of R2,4 million (two million four hundred thousand rand). On the other hand, it was submitted on behalf of the defendant that, based on certain case law too, the fair amount for general damages in the particular circumstances of the case, would be an amount between R900 000,00 (nine hundred thousand rand) and R1,5 million (one and a half million rand) only. I must mention that, it was also argued on behalf of the plaintiff, that he was additionally entitled to an amount of

R151 000,00 (one hundred and fifty one thousand rand), per month as the cost of a care-giver, and as a result of the injuries sustained and *sequelae* thereof. This is the dilemma placed before the court.

SOME APPLICABLE LEGAL PRINCIPLES

[9] I refer to some legal principles, and case law, including that relied upon by the respective parties. In support of his contentions, counsel for the plaintiff relied on cases such as *Stephen N.O. v General Accident Fire and Life Assurance Corporation Limited*², and *Megalane N.O. v The Road Accident Fund* (Witwatersrand Local Division),³ a judgment delivered on 13 December 2006). On his turn, counsel for the defendant, for his contentions, relied on cases such as *Vakata v Road Accident Fund*⁴, *Kentridge v Road Accident Fund*⁵, *Torres v Road Accident Fund*⁶, *Quantum of Damages; Webster and Others v Commercial Union Insurance Company*⁷; *Celliers v South African Railways and Harbours*⁸; *Bartlett v Mutual and Federal Versekeringsmaatskappy 1989 (4) QOD A4 – 20 (T)*, and others. I have now due regard to all the above case law.

[10] The plaintiff was a passenger in his employer's motor vehicle. As a consequence, liability on the merits has been conceded fully (100%) in his favour.

² 1974 (4) SA 503 (RAD)

³ Case no 8572/2005

⁴ 2015 (7A4)

⁵ 2016 (7A4)

⁶ 2010 (6A4) page 1

⁷ 1997

⁸ 1961 (1) QOD 160 (T)

THE ASSESSMENT OF GENERAL DAMAGES

[11] It is trite law that the assessment of general damages cannot with ease, be done with any measure of mathematical accuracy, and the court has a wide discretion. See, for example, *AA Mutual Insurance Limited v Maqula*⁹ and *Southern Insurance Association Limited v Bailey N.O.*¹⁰. It is equally trite that no two cases are always similar since it is difficult to find a comparable matter that is on all fours in respect of the facts. Each case must be adjudicated on its own particular merits. See also *Van Dyk v Road Accident Fund*¹¹ for the proposition that an amount for general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which she/he has been subjected as a result of the particular injuries sustained; and that such an amount should be updated to present day values where appropriate.

THE APPROPRIATE AMOUNT AND REASONS

[12] Having considered carefully and cumulatively all the relevant circumstances of this matter, as sketched above, in particular, the serious nature of the injuries; the *sequelae* thereof; the current physical and mental condition of the plaintiff; his relative youth; the partial paralysis on the right

⁹ 1978(1) SA 801 (A)

¹⁰ 1984 (1) SA 98 (A) at 114

¹¹ 2003 (SE8) QOD 1 (AF), at paragraphs [22] and [23]

side; the probability of epilepsy; and the now dependency of the plaintiff, etc. I have come to the conclusion that the amount of R 1 900 000,00 (one million nine hundred thousand rand) will be fair and equitable as general damages for the plaintiff. It is also obligatory that this amount should be protected by the creation of a trust, as pointed out to plaintiff's counsel during closing argument, and indeed undertaken by him. It is also recommended strongly that from the above amount, consideration be given to paying to the plaintiff an immediate and initial amount of R40 000,00 (forty thousand rand) in order to alleviate the plaintiff's financial dependency from the date of the accident (8 September 2015), to the date hereof.

PLAINTIFF'S ALLEGED CLAIM FOR CARE-GIVER

[13] I must mention categorically that the above amount of general damages does not include the plaintiff's alleged claim for a care-giver. The claim is plainly misplaced. Such a claim cannot be brought competently (as it is) under the guise of general damages. The claim should properly and correctly be dealt with under the damages head, loss of income/earning capacity. Alternatively, it should be incorporated under the undertaking to be furnished by the defendant in terms of section 17(4) of the Road Accident Fund Act¹². That is if the provisions of the section are correctly interpreted. Indeed, when pressed further in closing argument, counsel for the plaintiff, conceded that the case of *Stephenson N.O. v General Accident*¹³, on which

¹² 56 of 1996

¹³ 1974 (4) SA 503 (RAD)

he relied for a claim for the cost of a care-giver, is not applicable here. In my view, the concession was well-made.

[14] I must draw to a conclusion. As stated earlier in the judgement, at the commencement of the trial, the court was informed that the other heads of damages had already been settled between the parties. These are, past hospital and medical expenses (no amount mentioned); future hospital and medical expenses (undertaking) and loss of earnings/earning capacity (R2 129 817,00). No specific figures were provided, which was unfortunate. However, the parties are at liberty to approach the unopposed motion court to make the settlement agreement an order of court, which may include issues such as the expenses and cost of witnesses. The creation of the actual trust may also be incorporated therein. The only issue for determination by this court was the plaintiff's general damages.

ORDER

[15] For present purposes, and for all the foregoing reasons, the following order is made:

1. The defendant shall pay to the plaintiff the sum of R2 129 817, 00 (two million one hundred twenty nine thousand, eight hundred and seventeen rand) in respect of loss of earnings and earning capacity.
2. The defendant shall pay to the plaintiff the sum of R1 900 000, 00 (one million nine hundred rand only) in respect of general damages.

3. The defendant shall furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, for the cost of all further accommodation of the plaintiff in a hospital/nursing home or treatment of or rendering of service(s) to the plaintiff or the supplying of goods to him arising from the injuries sustained in the accident on 8 September 2015.
4. The defendant shall pay the plaintiff's agreed or taxed costs of the action on the High Court party and party scale.
5. The orders made above shall be complied with within fifteen (15) days from the date of this judgement.
6. The amounts payable above shall be with interest at the applicable legal rate of interest at the time.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel For Plaintiff: LM Mataboge
Attorneys for Plaintiff: Mathebula & Jona Inc

Counsel for Defendant: J Van Zyl
Attorneys for Defendant: Twala Attorneys

Date of Hearing: 15 February 2018

Date of Judgement: 18 June 2018