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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER: 17884/07

DATE: 01/10/2010

In the matter between:

VAND DER HOECK, A

FIRST PLAINTIFF

N, EA

SECOND PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAVUNDLA, J.

[1] This case is a sequel to a motor vehicle collision that occurred on 11 March 2006 at an intersection of Gordon and Harris Streets in Colbyn, Pretoria, between motor vehicle with registration number DHZ 445 GP, then and there driven by one D B, and motor vehicle with registration number RKH 330 GP, then and there driven by one S Haggard, herein after referred to as the insured driver.

[2] The first plaintiff sues in her capacity as the mother and natural guardian of a then minor E A N who was born on 18 December 1987 and a passenger in the motor vehicle with registration number DHZ 445 GP. The second plaintiff is now a major over 22 years old. The claim is in respect of damages sustained by the plaintiffs as the result of the injuries sustained by the second plaintiff consequent to the collision.

[3] The defendant has since conceded that the insured driver was negligent and that it is therefore 100% liable to the plaintiff's proven damages. This concession, is in my view, wisely made, having regard to the fact that the second plaintiff was a passenger in the insured motor vehicle, the plaintiffs needed to prove only 1% negligence on the part of the insured driver.

[4] The second plaintiff, according to the particulars of claim sustained the following injuries as the result of the aforesaid collision:

- 4.1 shattered teeth and displaced jaw;
- 4.2 lacerations to the forehead;
- 4.3 soft tissue injury of the neck and back; and
- 4.4 fracture of the left wrist and hand.

[5] As the result of the aforesaid injuries, the first plaintiff claims for payment of an amount of R21 674, 02 being the amount spent at the private hospitals together with doctors and medical costs incurred as the result of the collision. In this regard the plaintiff has attached annexure "A" which is allegedly the index to the medical accounts (paginated page 11). This amount of R21 674, 02 has since been agreed upon by both parties to be the damages suffered by the first plaintiff in respect of past medical

expenses she suffered.

[6] The amount claimed in respect of alleged damages as the result of injuries sustained by the second plaintiff is an amount of R900 000, 00 computed as follows:

6.1 future medical expenses R100 000. 00

6.2 future loss of earnings, alternatively loss of earning capacity R550 000. 00

[7] The parties have settled the general damages in the amount of R150 000. 00. In respect of past future medical expenses the parties have agreed that the defendant will issue a certificate in Section 17(4)(a) undertaking in terms of the Road Accident Act, Act 56 of 1996. The outstanding issue is in respect of future loss of earning capacity.

[8] The parties have agreed that the medical reports of the expert witnesses of the respective parties be handed in without calling the respective doctors, and that the contents of these reports are accepted for what they purport to be. The same attaints with regard to the joint reports of the respective experts. Neither of the parties called any witness. The matter had to be decided on the documents presented at Court.

[9] The second plaintiff was on the day of the accident the 11 March 2007 admitted at Eugene Marais Hospital. X-rays were taken but he was not admitted.¹ After receiving treatment, the second plaintiff, according to Dr. Birrel's report, was subsequently admitted to Unitas Hospital on 4 May 2007 until 5 May 2007 as a result of his scaphoid surgery. He would have experienced acute pain after the accident for 2 or 3 days and after his wrist surgery also for a further 2 or 3 days. He also experienced moderate pain for 3 to 4 days as the result of the accident. The plaintiff has a 5% chance for neck surgery. His neck problems have since abated. His wrist scaphoid fracture has healed

1 ¹Paginated page I37of Esme Noble's report.

well although excessive strain on the wrist when lifting heavy objects might result in some pain.

[10] The plaintiff has not as yet approached this Court for leave to have what the parties have agreed upon made an order of the Court. That being the position, I am of the view that this Court is at liberty to determine what is a just and fair amount for general damages, vide *Griffiths v Mutual & Federal Insurance Co Ltd*.²

[11] In *De Jongh v Du Pisane NO*³ the Supreme Court of Appeal cited Holmes J in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287E-F as saying:

'(T)he Court must take care to see that its award is fair to both sides—it must give just consideration to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.' Conservatism in awards for general damages has its origin in a need that there should also be fairness towards the defendant and not in miserliness of society towards the plaintiff."

[12] There is no doubt that the plaintiff suffered serious facial injuries resulting at the loss of one of his incisors as well as fractured right wrists. Indeed he suffered pain. He had a previous fracture of his right wrist sustained during roller blading prior to the accident.⁴ It must be noted that the very right wrist is the one that he complains of subsequent to the accident, and is the basis for his alleged future loss of earning capacity. The plaintiff was not wearing a seat belt at the time of the accident. A compensation for general damages is in essence a compensation for an intangible, the pain endured and disfigurement, inter alia, that cannot with mathematical precision be measured and quantified in monetary terms but a pure uneducated guess. The Courts

² 1994 (1) SA 535 at 549A-C

³ 2005 (5) SA 457 (SCA) at 476C-D para [60].

⁴ Paginated page 5 of report of Cecile Nel (Industrial Psychologist).

must guard against being over excessive with the defendant's funds which are in essence public funds.

[13] The second plaintiff was not hospitalized for any significant period. The duration of pain endured and also about to be endured is not for a prolonged period. In the circumstances I am of the view that the agreed amount of R150 000. 00 in respect of general damages is rather excessive. Awarding damages in respect of moneys that are essentially from public funds is a prerogative of the Court. Such awards must be proportionate to the injuries, as the Court deems meet. In the exercise of my discretion, I am of the view that in casu a fair and reasonable amount for general damages should be an amount of R90 000. 00.

[14] The reports of plaintiff's experts witnesses, whose reports have been handed with the court bundle of joint reports. It needs recorded that neither party called any witness. The matter is therefore to be decided on the material that has been placed before the Court by agreement.

[15] The Minutes of joint meeting of the orthopaedic surgeons, Dr. VM Close and DR DA Birrel reflect that the doctors are ad idem that the second plaintiff has a loss of work capacity as the result of the accident in his present type of work of 7%. This does not, however, equal to a 7% gross straight-off loss of income, but certainly represents an inconvenience at work, and at times, pain, possibly sick leave, etc, and the doctors agree that some form of compensation is due to the second plaintiff in this regard which should be assessed, for example, by a consultation with an industrial psychologist. The doctors are further agreed that the second plaintiff has a chance of requiring wrist surgery, particular a wrist fusion (15% chance), which will increase his loss of work

capacity to between 12% (Dr. Birrell) and 15% (Dr. Close). The doctors have further opined that was the second plaintiff to have a more sedentary or supervisory work of a lighter nature his loss of work capacity will not increase beyond the percentage already given.

[16] In her report Nortje opines as follows: "On personal perusal of the X-rays, the scaphoid has been fixed in a good position and there is no evidence of degenerative change in the carpus or in the distal radius....The prognosis therefore is good and future surgery to the wrist such as radial styliodectomy or wrist fusion is considered unlikely; (15% chance)⁵.

[17] According to the plaintiffs neurosurgeon Dr. Jacques J Du Plessis, although the second plaintiff sustained head injury it is unlikely that this would result in neurocognitive impairment. The fact that the second plaintiff has not resumed his studies, the doctor is reluctant to blame this to the accident, vide par 6.3.

[18] According to the second plaintiffs industrial psychologist Cecil J Nel, the second plaintiff has a poor motivation and would probably continue with his lackadaisical approach to his studies. "At the time of neither the accident he was employed nor a student. Further career progress with a Grade 10 (Std 08) education would have been minimal and, as indicated, confined to job content at the level of Paterson Grade B1 (at best) likely in the semi-formal sector. It is highly improbable that he would have been able to enter the formal, corporate sector with a Grade 10 (Std 08) education." The entry level with grade 10 is A1 and ultimate level B1, vide page 64-65 of Nel's report.

5 Paginated page 10-15 of Dr. Close's report.

[19] The joint report of the industrial psychologists, E Noble and C Nell, is dated 11 March 2006. These industrial psychologists are agreed that the second plaintiff with his present academic qualifications his work progress will lead him to a post Paterson B2 (according to Noble) and B1/B2 (according to Nel). They are both agreed that the second plaintiff has the intellectual ability to pass grade 12 in which event if he ever obtains such qualification he will progress to Paterson B4 level.

[20] Both industrial psychologists point that the second applicant was as from 7 January 2008 employed at Rob's Discount Tyres as a counter salesperson with a basic salary of R6 480 per month, plus a commission and a 13th cheque. They are further agreed that he is physically handicapped as the result of the fact that he could not do medium to heavy tasks. They are not certain that his work would not in the future require of him to do more physical tasks. It needs however be pointed out that the second plaintiff is currently a sales assistant and storerman and has undergone computerized storekeeping and ordering system and largely based at the counter as a cashier/salesperson⁶. This in my view negates any possibility of the plaintiff having to do in the future any job that would require of him to lift heavy objects that might affect his injured wrist. The probabilities are very high that he would retain his current work and progress there within, thus discounting the views of Dr. Birrell on the 12% he has referred to, vide herein below.

[21] According to the joint report of the orthopedic surgeons Dr. V. M. Close and Dr. D.A Birrell the second defendant sustained bruising of the face and also, according to the second plaintiff, lost one lower incisor, and also injured his cervical spine. The fracture of the scaphoid did not initially heal and required surgery. It is further recorded in this joint report that the second plaintiff works for Rob Tyres as a salesman, but has to carry

⁶ aginated page 85 of the plaintiffs expert Lee Randall.

tyres to and fro the storeroom and at times helps with arriving stock.

[22] It is agreed by both orthopedic surgeons that the second plaintiff has a loss of work capacity as a result of the accident in his present type of work of 7%. This does not, however equal to a 7% gross straight-off loss income, but certainly represents an inconvenience at work, and at times, pain, possibly sick leave etc. In respect of the assessment of the compensation the two doctors, wisely deferred to an industrial psychologist. The doctors are also agreed that the second plaintiff has a chance of requiring wrist surgery, particularly wrists fusion (15% chance) which will increase his loss of work capacity to between 12% (Dr. Birell and 15% (Dr Close). They further opine that if his work became more physical in future, the second plaintiff's percentage loss of work capacity could increase, although he could engage in more physical activity if forced to by circumstances, but he should choose to follow a less physical work. If his work becomes more sedentary or supervisory and was of a light duty nature, his loss of work capacity will not increase beyond the given percentages.

[23] In their joint report the occupational therapists Ms Lee Randall and Ms Lowinda Jaquire, agree that the capacity of the second plaintiff to perform light work with occasional medium work tasks matches the broad requirements of his present job description as a salesperson in tyre company. They are also agreed that he is constrained in relation to heavy work tasks (e.g. handling of tyres for heavy vehicles and even for medium work tasks he will need to follow precaution in relation to his right wrists.

It is further anticipated by these occupational therapists that the condition of the second appellant will deteriorate over some time and that he will become less able to perform

medium work tasks, depending on whether he would need the wrists surgery. They however hope that his natural progression at work will move him to into a more purely sales oriented or supervisory tasks. They are agreed that he would have difficulty with highly physical-oriented tasks, like being an exhaust fitter.

The occupational therapists have recommended that the second plaintiff should be provided to cover the costs of 'assistive' devices in the work place. These would enhance his comfort and productivity. The specific devices needed, will be determined by his treating occupational therapists on the basis of his work duties at the time, and could include devices like a raised computer keyboard with wrists supporting, a rolling workshop box or multi-purpose trolley on which to transport objects around the workplace. A life time allowance in the amount of R4 000 is recommended.

[24] Dr. Birrel, the plaintiffs orthopedic allocated 7 to 8% loss of earning capacity as the result of the accident. He further opined that in the event the plaintiff were to have a fusion of his wrists his loss of work capacity would increase to 12% while Dr. Cost places this possibility at 15%.

[25] The plaintiff's future loss of income, on plaintiff's version has been calculated at the Paterson B4. It has further been submitted that there is a need for a bigger contingency because in 10 years time the second plaintiff might need a wrist surgery. The net loss of the plaintiff was calculated at an amount of R260, 436. 00.

[26] It must be accepted that the second plaintiff at the time of the collision was 18 years old. He began grade 11/12 in 2005 via home-schooling and managed to write only 2 of 6 subjects at the end of the year, and attributed this slow progress to "laziness".⁷ "At the

⁷ Vide Report of Dr. M. Mazabow (clinical neuropsychologist) paginated page 21 and 23.

time of the accident Mr. Nortje was busy with his education through home schooling, but he has not resumed these studies post-accident (not entirely due to the accident-related reasons, as he evidently had pre-accident difficulties with self-discipline required of home-based learners."⁸

[27] The evidence placed at my disposal reveals that the second plaintiff is not a highly motivated person. In my opinion the view expressed by Noble and Nel that the second plaintiff may progress to a post Paterson B2 or B1/B2 is rather too optimistic and does not accord with what his past reveals of him. He is not a motivated person, so his past reveals. I am not persuaded that the second plaintiff will progress beyond grade 10 and qualify to be at Paterson B4. I am of the view that the quantification of his loss of earning must be perked at Paterson B2.

[28] The defendant calculated the second plaintiff's future loss of earning capacity on plateau Paterson B2 and applied a 20% contingency deduction and a 24% contingency deduction the value of the income premobid for the first 10 years averaging a difference of R38 361. 36. Thereafter the defendant applied a contingency deduction of 20% and 25% on the projected income of R2204, 433 and R2195, 779.00 respectively to get an average difference of an amount of R116, 712.15. The respective average net losses were combined to arrive at a total loss of R155, 073.

[29] The parties have also furnished me with an alternative joint calculation based on career plateau Paterson as submitted by the defendant and by applying the contingency submitted by the plaintiff. On this calculation the total loss of the plaintiff is R260, 436.00.

⁸ Paginated page 109 of Lee Randall (occupational therapist) of the plaintiff.

[30] However, the evidence placed before me shows that the wrist of the plaintiff has mended very well. Besides, the second plaintiff had a previous fracture of the said wrist resulting in him stopping his sports activity. The accident, in my view merely aggravated a pre-existing injury. The plaintiff had to stop his sporting activity before the accident. I am of the view that the defendant should not be burdened with any factor which arises outside the accident that would have adversely affected the plaintiffs future work capacity. It does not seem that in calculating his future loss of income the aspect of his pre-accident injury was factored in. For this reason, I am of the view that the contingency submitted by the plaintiff are exaggerated and there is a need to work on a higher contingency, particularly, as the defendant has done, vide *Krugel v Shield Versekkeringsmpy Bpk* 1982 (4) SA 95 at 104H-105F.

[31] It must be borne in mind that there is no mathematical process of determining what is an appropriate contingency percentage to be employed at any given instant and this depends on the individual circumstances of a case, vide *De Jongh v Du Pisane* NO9. Even the mathematical computed figures, are an educated guess without a crystal ball to peer into the future. But because I do have figures presented to me, I am of the view that I am at liberty in the exercise of my discretion to accept, as in this instance, the figures of the defendant, rather than bring my own global guess figure. I am of the view that the alternative calculation is flawed because it has not taken into account the pre-accident injuries of the plaintiff, besides the contingencies employed by the plaintiff are inaccurate. The contingencies that I would have employed, so as to cater for the pre-accident injury of the plaintiff and his lackadaisical or lack of motivation, would have been more or less the same with those employed by the defendant. In the premises I am of the view that it is prudent and fair to accept the calculations of the defendant. In the event I was to venture a global figure, it certainly would not have exceeded the

9 *supra*) at 472 paragraph [47].

amount calculated by the defendant. In the premises I am of the view that an amount of R150 000. 00 as compensation for the second plaintiff's future loss of earning capacity is fair and reasonable.

[32] In the result I am of the view that the amount of R155, 073.51 as calculated by the defendant is fair and reasonable to compensate the plaintiff for his future loss capacity.

[33] Consequently I make the following order: 1. That the Defendant is ordered to pay:

1.1 to the First Plaintiff the sum of R21678. 32 (twenty one thousand six hundred and seventy four rand and thirty two cents) in respect of past medical expenses; 1.2. to the Second Plaintiff:

1.2.1 In respect of general damages, the sum of R90 000 (ninety thousand rand);

1.2.2 In respect of future loss of earnings/ earning capacity, the sum of R150 000 (hundred and fifty thousand rand);

2. That the aforesaid capital amount will not bear interest unless the Defendant fails to effect payment on the specified date in which event the capital amount will bear interest at the rate of 15,5% per annum calculated from and including the fifteenth calendar day after the date of this Order to and including the date of payment thereof;

3. The Defendant will furnish the Second plaintiff with an undertaking in terms Section 17 (4)(a) of Act 56 of 1996 in respect of the future accommodation of the Second Plaintiff in a hospital or nursing home or treatment of or rendering of service or supplying of goods to her/him resulting from a motor accident on 11 March 2006, to compensate the Second Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof;

4. The Defendant will pay the Plaintiffs' party and party costs, on the High Court scale, up to and including 24 August 2009 and the 1 October 2010 as taxed or agreed, which

costs will include;

4.1 Costs of counsel on senior-junior scale,

4.2 Costs of all medico- legal, actuarial and accident reconstruction reports furnished to the Defendant.

4.3 The costs associated with joint meetings and minutes of the parties' experts.

4.4 The full qualifying, preparation and reservation costs, if any, in such amounts as the Taxing Master may allow, of the following experts:

4.4.1 Dr J.J. du Plessis;

4.4.2 Dr D.A. Birrell;

4.4.3 Dr M. Mazabow

4.4.4 Dr D. Shevei

4.4.5 Dr B.White

4.4.6 Dr E.D. Fischer

4.4.7 Mr. KTruter;

4.4.8 Ms L Randall

4.4.9 Mrs E Noble;

4.4.10 Mr. G. Whittaker;

4.4.11 Prof G. Lemmer.

4.5 The reasonable traveling costs incurred by the Plaintiff in attending the medico-legal examinations by both parties' experts, in such amounts as the Taxing Mater may determine.

5. The amounts referred to in paragraphs 1.2 and 4 shall be paid to the Plaintiffs' attorneys, Adams & Adams, by direct transfer into their trust account, details of which are the following:

Bank: Nedbank, Pretoria

Branch Code:

Account Number:

Reference:

N M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGEMENT: 01 October 2010

PLAINTIFF'S ATT : ADAMS & ADAMS

PALINTIFF'S ADV : ADV J.F. GROBLER

DEFENDANTS' ATT : MOTHLE JOOMA & SABDIA

RESPONDETS' ADV : ADV R. STRYDOM