

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO. 4391/2014

Date heard: 23 April 2021

In the matter between:

ANELE SOTOMELA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

REASONS FOR ORDER

RUGUNANAN J

[1] Following the defendant's non-appearance on 23 April 2021 when the matter was called for trial, the plaintiff proceeded under uniform rule 39(1) to prove his remaining claim for damages for loss of earnings and / or loss of earning capacity in so far as the burden lay upon him.

[2] Plainly, the defendant was in default of appearance.¹

¹ Knowledge of the trial date being at all times attributed to the defendant through its claims handler who confirmed by email dated 22 April "... we leave it up to the court to decide on a reasonable outcome and judgment herein.", as per Exhibit A3 read with rule 37 minutes, 13 March 2021 and per Exhibit B. See also *Ferreiras (Pty) Ltd v Naidoo* (69094/2014) [2017] ZAGPJHC 392 (11 December 2017) at paragraph [12] where default of appearance connotes absence of a party; also *Masango v Kimberley Clark of South Africa (Pty) Ltd* (24922/06) [2007] ZAGPHC 58 [22 May 2007] at paragraph 9 and the

- [3] The plaintiff, at the age of 24, suffered multiple and extensive bodily injuries² in a motor vehicle collision on 8 December 2012. Liability on the merits is not in issue³, nor are general damages, past hospital expenses, and future hospital and related expenses - such heads of damages becoming settled, the last-mentioned on tender of a certificate of undertaking.
- [4] On the plaintiff's remaining claim, the issue for determination turned on whether the calculation⁴ of his loss by actuaries Arch Consulting ought to be accepted.
- [5] After hearing testimony from the plaintiff and his expert witness, Ben Moodie, an Industrial Psychologist, I granted an order in terms of the draft attached hereto as "Annexure SR" and stated that reasons would be furnished later.
- [6] Such reasons as are stated hereunder are couched without undue emphasis on the minutiae of the evidence.
- [7] Among the extensive bodily injuries suffered by the plaintiff is a closed head injury described as a mild traumatic brain injury with a consequent mild neurocognitive disorder.⁵ The brain injury is responsible for changes in mental activity⁶ associated with memory impairment, learning difficulties and other complications as to which the plaintiff testified.
- [8] The facts in support of the plaintiff's claim are pleaded in the following terms:⁷

"Future loss of earnings and / or loss of earning capacity: R5 289 392.00

The ... claim ... has been calculated based on the medico-legal reports filed of record ... and is premised on the future uninjured career path, progression and

authority cited therein ... " ... he who does not attend on the day fixed [is] to be accounted a dallier and defaulter ..."

² Amended POC, in Exhibit C - Bundle of documents, paragraph 8

³ Conceded in October 2016, Joint practice Note, 6 October 2020, paragraph 2.2

⁴ Dated 4 February 2021 and introduced into evidence under affidavit

⁵ Amended POC paragraph 8

⁶ Otherwise known as mentation, report Moodie, 29 quoting from neurosurgeon Copley

⁷ Amended POC, Exhibit C, bundle of documents. Notice of intention to amend on date of trial was given to the defendant on 22 April 2021, to which no objection was raised

earnings of the plaintiff as detailed per scenario 1 under paragraph 5 of the ... report of Mr B Moodie, an industrial psychologist, dated 22 August 2018, as read together with scenario 1 under paragraph 2.3 of the actuarial report of Arch Actuarial Consulting, dated 4 February 2021; and further premised on the injured career path and earnings of the plaintiff as per paragraph 7 of the said report of Mr B Moodie, as read together with paragraph 2.4 of the said actuarial report, and with the application of a future uninjured contingency deduction of 25% and a future injured contingency deduction of 35%, with the said future injured contingency deduction being in consequence of the residual difficulties and facts detailed in the said report of Mr B Moodie, is claimed in the aforesaid amount, as capped ...”

[9] Except for the reports by Mr Moodie and Arch Consulting, the defendant admitted all expert medico-legal reports filed by the plaintiff. Among them are notably those by an orthopaedic surgeon⁸, a neurosurgeon⁹, a clinical psychologist¹⁰ and an occupational therapist¹¹. The admission traverses the contents of the reports and opinions by the experts being received into evidence without the necessity for formal proof.¹²

[10] Accordingly, the plaintiff's compromised earning capacity constituting a loss which diminished his estate is not in issue.¹³ For present purposes the *onus* only lay upon him to quantify or compute that loss, the essence of the computation being to compensate him for his loss of earning capacity.¹⁴

[11] By way of a brief excursus, the defendant procured reports from its own experts, an industrial psychologist and a consultant actuary. These reports were not filed for the reason that approval, due to circumstances out of the hands of the claims handler, could not be obtained.¹⁵

⁸ Dr V Oelofse 13 October 2016

⁹ Prof I B Copley 4 July 2018

¹⁰ Dr H Swanepoel 26 July 2018

¹¹ Ms C Mercer 12 July 2018

¹² Minutes rule 37, 13 March 2021, paragraphs 1.1 to 1.9 and 2

¹³ see *Deyssel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at paragraphs [17] to [19] and the reference therein to *Rudman v Road Accident Fund* [2002] 4 All SA 422

¹⁴ *Bane and Others v D'Ambrosi* 2010 (2) SA 539 (SCA) at 547E

¹⁵ Minutes rule 37, 13 March 2021, paragraph 3

- [12] The plaintiff's testimony, supplemented and corroborated by the admitted medico-legal reports, is that he is employed in the South African National Defence Force (SANDF) since 2009. Prior thereto he held employment as a general worker in a construction company. He currently holds the rank of Corporal and primarily performs access control and security related duties. He is required to carry a firearm daily. He is short-tempered and easily angered¹⁶ and complains of frequent headaches and facial numbness and is obliged to take untimely breaks which he is not allowed to do.
- [13] He is required to stand for long periods of time and experiences chronic pain and discomfort, particularly in his lower back and left arm and when lifting heavy objects such as trunks containing weaponry.¹⁷ He is forgetful and is unable to retain information. In the course of his duties he is obliged to write down messages that are telephonically relayed to him, at times being forgetful of what must be written if not done immediately.
- [14] In the past year due to the Covid-19 pandemic he has not undergone a medical and / or competency assessment. He is concerned that he might not make the grade for such an assessment should this be undertaken and in which event his employment tenure and / or chances of promotion¹⁸ will be placed at risk.
- [15] His impediments, particularly forgetfulness, affected his attempts to study at tertiary level,¹⁹ post-accident, and precluded him (in 2013) from pursuing an introductory course geared towards an LLB degree and from completing modules in pursuit of a BMIL qualification in the field of Security and African studies (in 2014).²⁰ Had he completed the latter degree he would have applied for a position in the intelligence department within the SANDF. A law degree would have enabled him to move into the private sector.

¹⁶ report Moodie, 21 quoting from clinical neuropsychologist Swanepoel

¹⁷ report Moodie, 21 quoting from clinical neuropsychologist Swanepoel

¹⁸ report Moodie, 21 quoting from clinical neuropsychologist Swanepoel

¹⁹ UNISA and Stellenbosch University –Report Moodie, 11

²⁰ A degree for which he enrolled at Stellenbosch

- [16] On the basis of the above and the plaintiff's biographical information, including the opinions expressed by the experts in the admitted medico-legal reports, Mr Moodie conducted an assessment of the plaintiff's pre-accident and post-accident career progression and income earning potential. He documented his conclusions in a report and confirmed its contents in oral evidence.²¹
- [17] Pre-accident, it is postulated that the plaintiff would have studied law while maintaining his current employment in access control. On completion of his studies, two scenarios are proposed; only the first being relevant for present purposes (it being evident from the claim as pleaded)²². In this scenario, the plaintiff completes 'articles of clerkship' and is inter-departmentally transferred to the Department of Justice, earning a median salary at Paterson level D2 with inflationary increases until retirement at age 65.²³
- [18] Post-accident, it is postulated that the plaintiff will retain his current employment with annual earnings of R314 000 plus inflationary increases until retirement at age 60. His impediments and subjective complaints will be intrusive factors in his work environment, making it difficult for him to outperform his counterparts.²⁴ For these reasons and considering the evidence presented, plaintiff's counsel, Mr Paterson, correctly submitted that an elevated general contingency deduction is warranted in the post-accident scenario.
- [19] The plaintiff's postulated pre-accident income level and current post-accident earnings have been assimilated into the calculation by actuaries Arch Consulting, prefactoring general contingencies of 25% and 35% respectively for these scenarios resulting in a quantified loss of R5 289 392 after capping. Acknowledging the discretionary power accorded to a court, the contingency deductions, in my view, not being unreasonable and fully justified given the uncontested facts and circumstances, and thus the court's acceptance of the

²¹ The report is dated 22 August 2018

²² Amended POC, Exhibit C

²³ Report Moodie, 18

²⁴ Report Moodie 29

calculation. In summary, the evidence presented by the plaintiff insofar as the burden lay upon him accords with the formulation of his claim as pleaded and the *onus* accordingly discharged.

[20] In the circumstances the draft order marked "Annexure SR" hereto, reference to agreement between the parties being deleted,²⁵ is made an order of court.



M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:

Adv. N. M. Paterson

Instructed by:

John B. Scott Attorneys
Plaintiff's attorneys
6 Bird Street
Central
Port Elizabeth
(Ref: JBS/S0275)
Tel: 041-582 2238
Email: hannelie@jbsainc.com

For the Defendant:

No Appearance

Reasons handed down electronically on 07 May 2021 at 11h30.

²⁵ Correctly brought to my attention by Mr Paterson prior to the handing down of these reasons

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)
PORT ELIZABETH on this the 23rd day of April 2021**

'SR'
23/04/21

Before the Honourable Justice Rugunanan

Case No. 4391/2014
RAF Claim No: 503/12187161/1027/0
Link number: 3536886

In the matter between:

ANELE SOTOMELA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

Having read the papers filed of record and having heard Adv N Paterson for
the Plaintiff ~~and by agreement between the parties:~~

GA

IT IS ORDERED

1. That the Defendant is directed to pay compensation to the Plaintiff in
the sum of **R5 289 392.00 (Five Million, Two Hundred and Eighty**

Nine Thousand, Three Hundred and Ninety Two Rand) in respect of the Plaintiff's claim for future loss of earnings and/or loss of earning capacity;

2. That the Defendant shall pay Plaintiff's taxed or agreed party and party costs of the Plaintiff's action, on the High Court scale, and with such costs to include:

- 2.1. the reasonable costs of consultations between Plaintiff's counsel, and Plaintiff's attorney, with Plaintiff's expert and lay-witnesses in preparation for trial;

- 2.2. the costs of the reports and supplementary reports as well as the qualifying fees and expenses, if any, of the following expert witnesses:

- 2.2.1. Dr. N Peterson;
 - 2.2.2. Dr. L Oelofse;
 - 2.2.3. Dr. D Solomons;
 - 2.2.4. Prof I Copley;
 - 2.2.5. Dr. I Gopal;
 - 2.2.6. Ms. C Mercer;
 - 2.2.7. Dr. H J Swanepoel;

2.2.8. Mr. B Moodie;

2.2.9. Arch Actuarial Consulting;

2.3. the reservation and testifying fees of Mr. B Moodie, including travelling fees and disbursements;

2.4. the costs of the trial days set down for hearing on 4 February 2021 and 23 April 2021;

2.5. the costs of the appearance fees of the Plaintiff's attorney and Counsel on attending at Court on attending at Court on the dates on which the matter was stood down thereafter, being 5, 8, 9 and 10 February 2021;

2.6. the costs of the case flow management and roll call proceedings in respect of the Plaintiff's action;

2.7. the costs of the trial, reserved in terms of the Court Order dated 14 May 2020;

3. Payment of the aforementioned amount (as referred to in paragraph 1 and 2 above) shall be effected by means of an electronic transfer of

the funds into the trust account of the Plaintiff's attorneys of record, details whereof are as follows:

Account holder: **JOHN SCOTT ATTORNEYS TRUST ACC.**

Account number: **121 608 4106**

Bank: **NEDBANK**

Branch code: **12 16 17**

Reference: **JBS/HN/S0275**

4. That the Defendant shall be liable for interest on the aforesaid amount (set out at paragraph 1 above), calculated from a date 14 (fourteen) days after date of this Order, at the prevailing legal rate per annum, to date of final payment;
5. That the Defendant shall be liable for interest on the said amount (set out at paragraph 2 above), calculated at the prevailing legal rate per annum and from a date 14 (fourteen) days after date of taxation or agreement, as the case may be, to date of final payment.

BY ORDER OF COURT

REGISTRAR