IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: 910/2016

In the matter between:

QUINTON SUPRA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 18 NOVEMBER 2022

DELIVERED ON: 25 APRIL 2023

This judgement was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 15H00 on 25 APRIL 2023.

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[1] This is an action for damages arising out of bodily injuries suffered by the plaintiff in a motor vehicle collision on 16 January 2015. On

28 March 2017 the court held that the defendant was liable for 100% of the plaintiff's proven or agreed damages. The claim for future hospital and medical expenses were also finalised. The claim for general damages was rejected by the Health Professions Council of South Africa.

[2] In these proceedings the court is only called upon to adjudicate the claim for past and future loss of income. Central to this issue is the contention regarding the Plaintiff's pre-morbid career path.

[3] The plaintiff served and filed numerous medico legal reports. At the hearing of this action, the parties agreed to submit the report of the plaintiff's psychiatrist, Dr Shevell as well as the joint minutes between the orthopaedic surgeons, clinical psychologists and occupational therapist as undisputed evidence.

[4] In the joint minutes, the orthopaedic surgeons, Drs Oelofse and Bogatsu agree that the plaintiff was 38 years old when he was involved in an accident. They further agreed that during the accident the plaintiff sustained a neck and back injury with residual pain. Dr Oelofse opined that the plaintiff sustained a neck injury *in Atlanto axial* instability and C4-C7 spondylosis, a united T12 fracture with adjacent level spondylosis and psychological trauma. Both surgeons opine that the injuries sustained had a profound impact on the plaintiff's amenities of life and will continue to do so in the future.

[5] Both orthopaedic surgeons opine that the accident and accompanying injuries would not have any detrimental effect on the plaintiff's life expectancy.

[6] Dr Oelofse is of the opinion that the plaintiff is now an unfair competitor in the open labour market. That he must be accommodated in a light duty and spinal friendly working environment. He opines that he (the plaintiff) must not be allowed to do physical labour. On the other hand, Dr Bogatsu opines that the orthopaedic injuries have not resulted in significant losses of living capacity, employment capacity, amenities, independence and enjoyment of life. Both experts are in agreement that the injuries did not result in a whole person impairment(WPI) of 30 % or more. Dr Oelofse is of the view that the Plaintiff qualifies under the narrative test, while Dr Bogatsu opines that he does not qualify. In this regard, Dr Bogatsu is supported by the HPCSA who also found that the Plaintiff's injury did not qualify as serious.

[7] The occupational therapists, Mesdames Grobler and Moagi also compiled their joint minutes. These experts agree that the plaintiff lacks the functional capacity to meet the physical demands of manual labour with light, medium, heavy and very heavy demands, thus excluding him from meeting the physical demands of his previously functional position, i.e. as an Electrical Technician. Both agreed that the plaintiff is best suited for sedentary type work with tasks which allows the implementation of postural adjustments and standing rest breaks to accommodate his spinal symptoms.

[8] In consultation with Dr Shevell the plaintiff informed the doctor that he joined the military where he became a paramedic. After this he was worked at Bosana Diamonds Ltd in Sierra Leone as a clinical manager. He returned to South Africa where he later took employment with Net Care. He later left to join ER21 in Bloemfontein. He also worked in Afghanistan as a paramedic.

[9] The Plaintiff testified that he was an acting leasing auditor in the employ of PRC Utility Management. He further testified about his studies and vocational training. That he, inter alia, qualified as an advanced operational medic care practitioner and flight medic assistant. This qualification equipped him to render paramedic assistance in helicopter and/ or airplanes.

[11] In 2011 he was recruited to work as an ops medic in Afghanistan where he earned $8000 per month. He testified that he worked in a war zone although he did not work on the front line. From time to time they found themselves at the firing end. Between 2011 and 2012 he did three stints of duty in Afghanistan. During his last stint of duty, he enrolled for a diploma at Exercise Training Academy(ETA) in order to skill himself with regard to the musculo skeletal system of the human body. Part of his curriculum obliged him to have practical experience. For this purpose, he was employed at Super Sport Health and Adventure Club for about 9 months.

[12] From August 2013 until August 2014 he was unemployed. It was during August 2014 that he obtained employment with PEC Utility Management as an electrical technician.

[13] Dr Evert Jacobs prepared 3 medico legal reports and also testified in these proceedings. He testified that his third report is a culmination of the previous two reports. The report repeats the qualifications and work experience of the plaintiff. Dr Jacobs states the following with regard to the plaintiff's pre and post morbid career intentions; that the plaintiff was satisfied with his employer and job; that he was looking for more job opportunities oversees as he has the qualifications and experience. That he felt restricted after the accident. That he knows he cannot pursue any jobs in the paramedic environment. All his efforts through the years to qualify himself is down the drain. He cannot revert to the career as a paramedic.

[14] Dr Jacobs postulated an uninjured career in two scenarios. The first scenario is based on the current employment of the plaintiff as a technician. According to Dr Jacobs, in this first scenario, pre-morbidly, the plaintiff earned R167 292 per annum. He also received R107 overtime per hour. He was also part of the pension fund.

[15] Post morbidly, on the first scenario, the plaintiff was able to earn an amount of R188 304 per annum. He also received a contribution of R502 per month for a pension fund and R143 per month for a group life fund. Dr Jacobs states that from Koch

Quantum Yearbook 2017…that the income of R188 304 in the corporate sector falls on the Patterson B3/3 level(semi-skill).

[16] In the second scenario Dr Jacobs postulates that the plaintiff would not be able to work as a paramedic again. With regard to income overseas, he postulates that the going rate is about $400 per day (about R5172 per day as at 6 September 2017. That the plaintiff was paid for 7 days while working oversees and also paid for days spent in South Africa.

[17] In both scenarios, Dr Jacobs opines that the plaintiff would have been able to work in any of those two scenarios without restriction until he reached the age of 65. He however opines that in the second scenario, post morbidly, the plaintiff would be able to perform only sedentary duties.

[18] The evidence of the experts irrefutably establish that the plaintiff's earning capacity has been impaired and this has resulted in a loss. The court in *Dippenaar v Shield*[1] said the following:

" In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate. This was the approach in Union

[1] 1979(2) SA 904(AD).

Government (*Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where the following appears:

' In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between the *universitas* as it was after the act of the damage, and as it would have been if the act had not been committed(Greuber at 269). Any element- of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland."

[19] The enquiry into damages for loss of earning capacity is by its nature speculative. [2] The court in *Oosthuizen v Road Accident Fund*[3] gave a useful summary of case law on contingencies and I refer to it extensively as follows:

"Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies, and are usually provided for by deducting a stated percentage of the amount or specific claims. (De Jongh v Gunter 1975(4) SA 78 (W) 80F).

Contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. (Erdmann v SANTAM Insurance Co Ltd 1985 3 SA 402 (C) 404-405; Burns v National Employers General Insurance Co Ltd 1988 3 SA 355 (C) 365).

In a wide sense contingencies are described as "*the hazards that normally beset the lives and circumstances of ordinary people*". (AA Mutual Insurance Association Ltd v Van Jaarsveld 1974 4 SA 729 (A); Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980 3 SA 105 (A); Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 117).

[2] Southern Insurance Association v Bailey N.O. 1984(1) SA 98(AD) on page 113G.

[3] 2015JDR 1717 (GJ).

Contingencies have also been described as "*unforeseen circumstances of life*". (De Jongh v Gunther 1975 (4) SA 78 (W) 80F).

The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812; De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D; Goodall v President 1978(1) SA 389 (W) 393; Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114-115A-D).

Contingencies are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff (Goodal v President Insurance Co Ltd 1978 1 SA 389 (W) 393; Rij NO v Employers' Liability Assurance 1964 (4) SA 737 (W); Sigournay v Gillbanks 1960 2 SA 552 (A) 569; Smith v SA Eagle Insurance Co Ltd 1986 2 SA 314 (SE) 319).

Often, what is described as a "*sliding scale*" is used, under which it is allocated a "1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age". (Goodall v President Insurance Company Limited 1978(1) SA 398(W) and Road Accident Fund v Guedes 2006(5) SA 583(A) 588D-C. Likewise, see Nonwali v Road Accident Fund (771/2004) [2009] ZAECMHC 5 (21 May 2009) (para 23))

Colman J provided a useful exposition Burger v Union National South British Insurance Co *1975 (4) SA 72 (W) 75* of the approach to be adopted by the Court:

"*A related aspect of the technique of assessing damages is this one; it is recognized as proper, in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said on a preponderance of probability that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 percent change that an injury to the leg will lead to amputation, that possibility is not ignored because 30 percent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for* *by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."*

But the difficulty with this approach was appreciated by Margo J in Goodwill v President Insurance Co Ltd 1978(1) SA 389 W at 392H:

"*In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office".*

The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 113H-114E , where the Court stated :

"Any enquiry into damages for loss of earning capacity is of its nature speculative

…..

All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.

……..

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach *offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess' it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."*

[20] It is undisputed that the plaintiff is entitled to a claim for loss of earnings. The plaintiff contends that he is entitled to be compensated as postulated in scenario two of the actuary while the defendant argues that he should be compensated on scenario one. It is clear that the dispute regarding which scenario the plaintiff has to be compensated has everything to do with the probability of the plaintiff's pre-morbid career path. There appears to be no dispute with regard to the calculations by the actuary, including the percentage of contingencies to be applied.

[21] The plaintiff is a qualified paramedic with skills such as an operational medic assistant. He is also a qualified advanced operational medical care practitioner and flight medical assistant. This latter qualification allows him to provide medical care assistance in helicopters and aeroplanes. From 2004 to 2007 he worked for the South African Defence Force as an Operational Emergency Care practitioner. From 2007 to 2009 he worked in Sierra Leone for Bosana Diamonds Ltd as a clinic manager.

[22] He thereafter came to South Africa and in 2010 he worked for Netcare in Colesburg as an intermediate paramedic. While working

in Colesburg he met his wife and moved with her to Bloemfontein where he worked for ER24 also as an intermediate paramedic.

[23] in 2011 he was recruited on a contractual basis to work as an operational medic in Afghanistan. This work entailed working in war zones. He testified in cross examination that his work in Afghanistan was very dangerous and he could be killed anytime. While in Afghanistan he started a two year course with Exercise Training Academy in order to enrich his knowledge with regards to musculo skeletal system of the human body. He never finished the course.

[24] From October 2013 to July 2013 he was employed at Super Sport Health and Adventure Club. He was thereafter unemployed for the better part of 2014 until he took employment with PEC Utility Management as an electrical technician. Because of the injuries he sustained and the fact that the work of an Electrical Technician required a fair amount of physical excursion, his employer accommodated him in a sedentary position as an acting leasing auditor.

[25] When this court is called upon to adjudicate on the probability of the uninjured career path of the plaintiff the court has to look at the evidence adduced. It is undisputed that the plaintiff was a paramedic who had skilled himself with other qualifications in his chosen field. While he was in Afghanistan he also enrolled for a diploma to enrich his knowledge with musculo skeletal system.

[26] He contends that it had always been his intention to go and work and earn higher salary in war zones. The evidence reveal that the plaintiff worked in Afghanistan for about eleven months with intermittent periods of leave. He had worked in Afghanistan on three different periods during the material time. It is his evidence that the first time he went to work in Afghanistan was motivated by the desire to get married and consequently to establish a family.

[27] The evidence reveal that his last contract in Afghanistan was on 28 June 2011. After the termination of the contract he worked for Super Sport Health and Adventure Club. He became unemployed for the better part of 2014 and thus remained not working for about a year. He took employment as an electrical technician I accept that the salary in war zones was more lucrative as according to him, he earned about $8 000 per month.

[28] During the two and half years that he had returned to South Africa he chose to work in other disciplines outside of the paramedic work. Even when he was unemployed he chose not to go and work as a paramedic. Instead he chooses a vocation in completely different direction. His explanation as to why he did not do any paramedic work is attributed to his studies. The mere fact that the plaintiff had the necessary qualifications cannot on its own be an indication that he wanted to perform paramedic in war zones.

[29] Much as he made a roundabout turn in the vocations he chose subsequent to returning from Afghanistan, I cannot ignore the following. That the first time he went to Afghanistan the intention

was to have money in order to get married. That on the last stint in Afghanistan he enrolled for a two-year diploma in order to enrich his knowledge with regards to musculo skeletal system of the human body. In my view this illustrates his passion for paramedic work. I accept that he did not complete the course but that in its own is no proof that he does not intend to complete the same.

[30] That he is sufficiently skilled and qualified to work as a paramedic and flight medical assistant is beyond doubt. The skill which is scares. He had previously worked oversees for significant periods and has expressed the wish to return. This is undisputed. His natural career is that of a paramedic and there is currently no impediment in terms of the law that can prevent him to work oversees. He worked in a dangerous war zone and one can infer that his military background most probably equipped him for the kind of work he did oversees. The jobs that he is passionate about are still in existence. I cannot find that he had completely decided that he was not going to return to the work oversees as contended by the defendant.

[31] The injuries and the sequelae thereof are not dispute. The impact of the injuries is also not in dispute. Having regard to all the evidence I am satisfied that the amounts used in the calculation by the actuary and the allowances made for the contingencies have been properly made. I am of the considered view that the total loss suffered by the plaintiff in respect of loss if income is R3 692 500.00

ORDER

[32] The following order is issued:

1. The defendant is liable for payment to the plaintiff in the sum of R 3 692 500 (Three million six hundred and ninety two thousand five hundred Rands) in respect of the plaintiff's claim for past and future loss of income resulting from a motor vehicle collision that occurred on **16 January 2015**.

2. The defendant to pay the plaintiff's taxed or agreed party and party costs until the date of this order, including but not limited to the costs set out hereunder:

2.1. The reasonable preparation / qualifying / accommodation / travelling and reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:

2.1.1. Dr JJ Schutte (general practitioner)
2.1.2. Dr LF Oelofse (orthopaedic surgeon)
2.1.3. Dr DA Shevel (psychiatrist)
2.1.4. Ms M Grobler of Rita van Biljon Occupational Therapists
2.1.5. Ms M Coetzee (clinical psychologist)
2.1.6. Dr EJ Jacobs (industrial psychologist);

2.1.7. Munro Forensic Actuaries.

2.2. The costs of senior counsel.

2.3. The following witnesses are deemed necessary witnesses

2.3.1 Mr S Walters

2.4. The payment provisions in respect of a foregoing are as follows:

2.4.1 Payment of the capital amount shall be made without set-off or deduction, within 180 (hundred and eighty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys	**- […]**
Bank	**- […]**
Branch Code	**- […]**
Account No	**- […]**
Reference	**- […]**

2.5. Payment of the taxed or agreed costs shall be made within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

2.6. Interest shall accrue at 9% (the statutory rate per annum), compounded, in respect of:

2.6.1 the capital of the claim, calculated 14 (fourteen) days from date of this order.

2.6.2 the taxed or agreed costs calculated 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

By order of this court

P.E. MOLITSOANE, J

Appearances:

For the Plaintiff : Adv. PJJZietsman
Instructed by: Honey Attorneys
BLOEMFONTEIN

For the Defendant: Ms Bornman
Instructed by: The State Attorney
BLOEMFONTEIN