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

Case number: 6016/2016

In the matter between:

JUNAID EDWIN JAFTA Plaintiff

and

ROAD ACCIDENT FUND Defendant

HEARD ON: 16 NOVEMBER 2022

JUDGMENT BY: KHOOE, AJ

DELIVERED ON: 11 MAY 2023

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for the hand-down are deemed to be 10:00 on 11 May 2023.

INTRODUCTION

[1] The plaintiff, a male born on 22 January 1999, was injured on 29 November 2015 alongside a road in Opkoms, Bloemfontein. The plaintiff and (5) five friends were pedestrians when two motor vehicles collided with one another and one veered onto the pavement where they were walking, injuring some and killing (2) two. The plaintiff then proceeded to institute proceedings against the defendant for the injuries he suffered as a result of the accident.

[2] The merits of the claim were settled by agreement between the parties on 30 January 2022, on the basis that the defendant is liable for 100% of the plaintiff's proven or agreed damages. The plaintiff's claim was for an amount of R 2 780 639.10, made up as follows:

2.1	Past medical and hospital expenses:	R	59 689.10
2.2	Future medical expenses:	R	79 000.00
2.3	Past and future loss of income:	R	1 841 950.00
2.4	General damages:	R	800 000.00

[3] On 10 October 2022, by agreement between the parties, the defendant was ordered to pay general damages to the plaintiff of R 500 000.00. The matter was set down for 15, 16 and 18 November 2022. The parties agreed that the plaintiff's claim for past medical and hospital expenses would stand over for later adjudication.

[4] The parties submitted at the hearing that they settled future medical expenses, I therefore will not make an order on it.

[5] The plaintiff was a student at the time of the accident and had no income, therefore, there was no past loss of income. The only issue for determination is the quantum of Plaintiff's future loss of income.

[6] The parties further agreed to settle the general damages in the amount of R280 000.00 after apportionment of 20% was applied.

[7] I have been called upon to decide the future loss of income.

[8] By agreement between the parties, the plaintiff handed in the reports of the following experts; Dr JJ Schutte (general practitioner), Dr LF Oelofse (orthopaedic surgeon), Dr B White (plastic surgeon), Ms Linda de Rooster (educational psychologist), Dr DA Shevel (practicing psychologist), Ms Liezel Stoltz (occupational therapist), Dr EJ Jacobs (industrial psychologist), Dr DR

Bogatsu (orthopaedic surgeon), Dr Kheswa (industrial psychologist) and Munroe Forensic Actuaries as evidence.

[9] As already mentioned, the accident happened in Opkoms on 29 November 2015. The plaintiff together with his five (5) friends were walking on the pavement when two-vehicles collided and veered off the road onto the pavement they were on, killing some and injuring the plaintiff.

[10] The plaintiff was admitted to hospital for approximately one week and was discharged with his arm in a sling that he wore for three (3) weeks. He attended three (3) physiotherapy sessions.

[11] According to Dr Oelofse's report, the plaintiff suffered head/facial injury with occasional headaches, cognitive changes, psychological trauma and disfigurement; a left humerus fracture with painful shoulder, residual biceps, tendonitis and scaring; lower back injury resulting in scoliosis lower back, chronic back pain, L4-5 and L5-S1 spondylosis.

[12] The report describes that the plaintiff was admitted and treated conservatively by means of elevation of his left arm and pain medication. He was taken to theatre on 30 November 2015, where an open reduction and internal fixation of his left upper arm was performed. He was discharged with his arm in a sling which he had to wear for three (3) weeks, and had to go back for a follow-up appointment where all sutures from the surgery and lacerations on his head were removed.

[13] In the report, the plaintiff is said to currently suffer from constant pain in his left upper arm, aggravated by prolonged period of use like carrying light objects, working above shoulder height, severe pain tends to radiate into his left shoulder which decreases his ability to use his left arm further. The plaintiff now suffers from lower back pain which is mostly present after being active for long periods and struggles with muscle spasms which increase his pain and decrease movement in his back and radicular symptoms in his lower limbs. Activities such as sitting for long periods, working hunched over or carrying weight remain painful and difficult to perform.

[14] Dr Oelofse concluded that if conservative treatment for these injuries is not effective or plaintiff develops a resistant pain in his left shoulder, an arthroscopy must be considered. He specifically said the plaintiff's lower back injury had a profound impact on his amenities of life, productivity and working ability and will continue to do so in the future. He said that timely and successful treatment of his orthopaedic injuries will increase his productivity but as the degeneration in his lumber spine progresses, his productivity will decrease again. He placed the plaintiff's chronic pain probability at 75% for the rest of his life, with periodic flare-ups that will necessitate treatment, medication and sick-leave which could happen two (2) to four (4) times per year. His assessment was that ultimately, the plaintiff is an unfair competitor in an open labour market and that had the accident not happened, the plaintiff would have been able to work till the retirement age of sixty- five (65). If accommodated in a light-duty/ back-friendly position, provision must be for ten (10) years.

[15] As far as the head injury is concerned, Dr Oelofse reported that the laceration on the right-frontal region of his head had healed well but there is visible scaring remaining. The head injury caused occasional headaches, decreased concentration span, loss of short-term memory, possible cognitive impairment leading to decreased academic performance, disfigurement and possible psychological trauma in the form of depressed mood and behavioural changes. He diagnosed the plaintiff with post-traumatic stress disorder.

[16] Dr Shevel reported that the plaintiff must be considered to be suffering from the chronic form of post-traumatic stress disorder. He reported that although the plaintiff had behavioural and academic problems prior the accident, his IQ testing falls in the border line of low normal range but this could be affected by anxiety and depression. He recommended intensive psychotherapy for at least four (4) to five (5) years and should ideally be admitted into a psychiatric clinic for about four (4) weeks. He also reported that post-traumatic stress disorder is a condition in which relapses and recurrences frequently occur.

[17] The plaintiff secured a Grade 12 qualification (NQF4). Mrs de Rooster first reported in January 2018 that the plaintiff had behavioural and learning problems prior the accident. He smoked cannabis and made himself guilty of various discipline related issues, which almost resulted in expulsion and he failed certain grades. She was of the opinion that due to his behavioural difficulties, low scholastic and cognitive functioning, further academic qualifications will probably not be successful and that NQF4 would have remained his highest outcome. In her last report she said that due to the psychiatric diagnosis, orthopaedic injuries and scarring, the plaintiff will be rendered a vulnerable employee and not because of his low cognitive abilities.

[18] Ms Stoltz reported that not only does the plaintiff have physical limitations such as decreased bilateral grip-strength, he also had symptoms of depression, aggression, personality change, concentration problems. She said that these functional difficulties may have a negative effect on his working life and work productivity, and he may find learning new skills difficult due to poor concentration and demotivation. Mrs Van Zyl reported continued cognitive deficits with poor concentration. She said that considering the psychological pathology and other orthopaedic pathology, along with recommended future surgery, the accident and its sequelae will likely continue to have a negative impact on the plaintiff's productivity and workability in future. He will always be an unfair competitor within an open market and will in the future not be in a position to perform exceeding light demands.

[19] Dr Jacobs reported that the plaintiff's scholastic level can be accepted as NQF4 and he was unlikely to achieve tertiary qualification including business management certificate he had registered for at CTI. He further said that the plaintiff's career would be restricted by his physical impairment, psycho-social-behavioural problems. He recommended that the plaintiff work in a more structured sympathetic environment as he may be prone to conflict,

absenteeism, subordination, misconduct, ignoring company procedures and other forms of unwanted behaviour. He said income associated with the plaintiff's NQF4 early career R71 000.00, mid-career R142 000.00 and late career R 207 000.00. Because of his orthopaedic injuries, he has considerable restrictions to compete for jobs such as mining, farming, construction, SAPS, handywork as a lot of them need physical capacity. He will be restricted to sedentary and light job demands; however, sedentary work may be a challenge to secure due to his psycho-social impairments.

[20] The defendant accepted the plaintiff's actuarial calculation before contingency and made an offer to settle past and future loss of earning by applying a 35% pre-morbid contingency in respect of future loss and 25% contingency in respect of post-morbid future loss. The plaintiff contends that the contingency in respect of pre-morbid future loss of income should be 25% and contingency in respect of post-morbid future loss of earning should be 20%.

[21] Counsel for the defendant submitted that the plaintiff's reports were accepted and could not take the matter further regarding the higher pre-morbid contingency. She submitted that the parties were not far apart and the court could exercise its discretion.

[22] In **Southern Insurance Association Limited v Bailey N.O**,[1] it was said;

> *"Even where method of actuarial calculations is adopted the trial Judge still has a discretion to award what he considers right …can make a discount for contingencies…nature of contingencies that can be taken into account…such contingencies not always have to be adverse"*

[23] In addressing the higher contingency application that the defendant applied in the proposed agreement, Counsel for the plaintiff referred me to a number of authorities. In **Groning v Road Accident Fund**[2] Strydom J said the following;

---

[1] 1884 (1) SA 98 (A) 98E-F.
[2] [2019] JOL 42902 (GP).

> "*With regards to the minor in casu and his specific capabilities, I am of the view that, a 25% pre-morbid contingency deduction would cater for the risk that he might not have (even if the accident had not occurred) obtained the certificate/ diploma level. This caters inter alia for the eventualities that his studies may have taken longer, financial restrictions or that he would have failed more grades, giving the pre-existing learning disabilities*."

[24] Counsel for the plaintiff further submitted that having looked at the above authorities and others similar to the present case, the courts generally have not been inclined to apply a much higher contingency (certainly not as much as 35%) where a plaintiff has, for instance, a record of cognitive disabilities and other problems before the accident. He argued that the courts have also not been inclined to apply a much lessor post-morbid contingency in respect of future income, because it has been said that the injuries had no effect on the cognitive ability of the plaintiff but the accident had negatively affected his physical abilities.

[25] I find no reason why a higher contingency should be applied in the present scenario. The defendant has accepted the plaintiff's reports and I also could not find reasons to disagree with the reports. Moreso when nothing to the contrary has been placed before me. In my view, a 25 % contingency deduction of pre-morbid is fair and caters for risks. A post-morbid deduction of 20% is fair as the experts did say he is an unfair competitor in the labour market due to his psychiatric diagnosis.

[26] In the result, I make the following order:

26.1 The defendant is liable for payment to the plaintiff in the amount of R 1 432 285.00 (one million four hundred and twenty-three thousand two hundred and eight-five rand) [hereafter "capital amount"], resulting from a motor vehicle collision that occurred on 29 November 2015.

26.2 The defendant to pay the plaintiff's taxed or agreed party and party costs on High Court scale, until date of this court order, including but not limited to the costs set out hereunder:

26.2.1 The reasonable preparation/ qualifying and reservation fees and expenses (if any) of the following experts:

26.2.1.1 Dr LF Oelofse (Orthopaedic surgeon);
26.2.1.2 Dr PB White (Plastic and reconstructive surgeon);
26.2.1.3 Dr DA Shevel (Psychiatrist);
26.2.1.4 Mrs L de Rooster (Educational Psychologist);
26.2.1.5 Ms L Stoltz of Rita van Biljon Occupational Therapists;
26.2.1.6 Mrs L van Zyl of Rita van Biljon Occupational Therapists;
26.2.1.7 Dr EJ Jacobs (Industrial Psychologist);
26.2.1.8 Munro Forensic Actuaries.

26.3 The payment provisions in respect of the aforegoing are ordered as follows:

26.3.1 Payment of the capital amounts shall be made without set-off or deduction, within 180 (hundred and eighty) calendar days from the date of 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 - Trust Account
Bank - […]
Branch Code - […]
Account No. - […]
Reference - […]
(Quote the reference at all times)

26.3.2 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.

26.4 Interest shall accrue at the statutory rate per annum, compounded, in respect of:

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

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

26.4.3 The plaintiff's claim for past hospital and medical expenses is hereby separated in terms of Rule 33(4) and postponed to the pre-trial.

N.J. KHOOE, AJ

On behalf of the Plaintiff: Adv. M C Louw
Instructed by:
Honey Attorneys
Bloemfontein

On behalf of the Defendant: Ms. K Mkwanazi
Instructed by:
State Attorney
Bloemfontein