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THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

CASE NO: 3802/2017

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

PHILIP VILJOEN

Plaintiff¹

and

THE ROAD ACCIDENT FUND

Defendant²

Coram: Opperman, J

Heard on: 12 & 13 September 2023, the matter was postponed for heads of argument to be filed by the defendant and, if any, plaintiff's heads in reply, to 26 September 2023. Heads of argument were filed on 13 September 2023, 18 September 2023, and 22 September 2023.

Delivered: 9 October 2023. The judgment was handed down in court and electronically by circulation to the parties' legal representatives by email and release to

¹ "Viljoen/plaintiff".

² "RAF/defendant".

SAFLII on 9 October 2023. The date and time for hand-down is deemed to be 9 October 2023 at 15h00

Judgment: Opperman, J

Summary: Contingencies to be applied to the plaintiff's actuarial calculation on past and future loss of income

JUDGMENT

[1] The plaintiff, a 32-year-old man, instituted action against the RAF as a result of injuries which he sustained on 23 May 2014 when he was involved, as a passenger, in a motor vehicle accident.

[2] On 6 August 2018 Naidoo, J held that the RAF is liable for 100% of the plaintiff's proven and/or agreed damages and made an order that the plaintiff's damages is to be adjudicated at a later stage. The quantum of plaintiff's claim was set down for trial on 12, 13 & 15 September 2023.

[3] On the first day of trial the legal representatives of the plaintiff and the RAF settled the plaintiff's claim for general damages on an amount of R600 000.00:

1. They agreed that the plaintiff's claim for past medical and hospital expenses be separated in terms of rule 33(4) and be referred to the pre-trial roll. The reason for separating the claim for past medical and hospital expenses is because of the RAF's pending application to the Constitutional Court.

2. The RAF agreed to provide the plaintiff with an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 in respect of the plaintiff's claim for future medical expenses.

3. The only remaining issue for adjudication is now the plaintiff's claim for past and future loss of income.

4. In this regard, the RAF conceded to the submission as evidence for the plaintiff, all of the plaintiff's expert reports. The reports were admitted as being true and correct.

5. The defendant closed their case without adducing evidence and indicated that they will address the court on the dispute that remained.

6. The dispute that remained is the contingencies to be applied to the plaintiff's actuarial calculation on the past and future loss of income.

[4] The plaintiff maintained in their heads of argument that:

7.1 In light of the aforementioned it is submitted that a contingency deduction of 40% (20% in real terms) would be fair and just given the particular circumstances and the sequelae of the injuries sustained by the plaintiff.

7.2. A contingency deduction as aforesaid equates to a loss of income of R3 144 765.00.

[5] The defendant suggested a contingency deduction of 35% for future loss of earnings but for the accident and contingency deduction of 20% for future loss of earning having regard to the accident. The net amount for the loss of earnings comes in at R654 500.00.”³

[6] The claim of the plaintiff was initially in 2017:

7.

³ Page 6 at paragraph 1.2 of the heads of argument for the defendant.

7.1	General Damages	R 500 000.00
7.2	Past Medical and Hospital Expenses (See annexure "A")	R 80 320.48
7.3	Past Loss of Income (See annexure "B")	R 17 765
7.4	Future Loss of Income (See annexure "B")	R4 152 360
	TOTAL	R4 750 445.48

10.

In the premises the Defendant is liable to pay Plaintiff the amount claimed, but, despite demand, Defendant has to date, failed to do so.

WHEREFORE Plaintiff prays for judgment against Defendant for:

1. Payment of the sum of R4 750 445.48
2. Interest a *tempore morae* on the aforesaid amount at the rate of 10.5% per annum from date of judgment to date of payment, if payment is not effected within fourteen (14) days of date of judgment.
3. Costs of suit.

[7] The evidence proven and as correctly summarised by counsel for the plaintiff is:

1. In the uninjured future scenario, the point of departure is, of course, the 15% normal contingency. The evidence shows that the plaintiff suffered from a pre-existing depressive condition. The plaintiff's depression started during approximately 2012 and he was placed on medication. However, the plaintiff's symptoms were relatively mild.

2. Dr Oelofse, the orthopaedic surgeon's evidence is that he diagnosed the plaintiff with a head/facial injury with chronic headaches, chronic muscle spasms and residual neurological symptoms. There is also present, a united C5 fracture with chronic headaches, chronic pain and muscle spasms, moderate decreased range of movement of the cervical spine and C4-5 early post traumatic

spondylosis, a left scaphoid fracture with resulting painful wrist joint, moderately decreased range of motion of the wrist joint, scapholunate ligament injury with widening of the scaphoid-lunate space and a probability of more than 50% for the wrist joint to deteriorate to end stage osteo-arthritis within the plaintiff's total lifespan. Dr Oelofse recommends conservative treatment to the plaintiff's cervical spine injury with non-steroidal anti-inflammatory drugs, physiotherapy and long-term rehabilitation and bio-kinetics. Should the plaintiff not respond to the treatment he will be a candidate for facet joint blocks in theatre, but there is a possibility that the treatment will not help in which case the plaintiff will be admitted to hospital for five days for intensive conservative treatment and rhizotomy in theatre. Dr Oelofse opines that the plaintiff has a possibility estimated at 40% of having to undergo the suggested surgery within his total lifespan. Dr Oelofse is also of the opinion that the plaintiff has a possibility of 25% to 35% of undergoing a cervical fusion of the involved levels (C4-5) due to hyper mobility and progression of degeneration in his cervical spine. As already mentioned, the plaintiff has a probability of more than 50% (i.e., a balance of probabilities) that his wrist joint will deteriorate to end stage osteoarthritis within his total lifespan and therefore Dr Oelofse is of the opinion that conservative treatment will not be effective. He therefore recommends scharhотrapeziotrapezoid fusion. If this treatment is not effective, the plaintiff's wrist joint will develop end stage osteoarthritis and provision should be made for a wrist arthrodesis or a wrist replacement. Insofar as the plaintiff's employment is concerned, Dr Oelofse is of the opinion that the plaintiff must not only be placed in a permanent light duty/spine friendly working environment, but that provision must be made for sick leave. The plaintiff's neck and wrist injuries had a profound impact on the plaintiff's productivity and his working ability and will continue to do so in future. With timely and successful treatment of the plaintiff's cervical spine and his left wrist injuries his productivity will increase but as degeneration progresses his productivity will decrease again. The plaintiff's injuries, especially his cervical spine and left wrist injuries will adversely affect his chances of promotion and advancement in any future career. The plaintiff will not be able to

perform physical labour again. The plaintiff is an unfair competitor in the open labour market and his working abilities have been affected negatively by the accident.

3. Dr van Aswegen, the neuropsychologist diagnosed the plaintiff with a mild traumatic brain injury. The complaints recorded by the plaintiff to Dr van Aswegen are constant headaches with a grading of 4/10 and about 1 to 2 intense headaches per month which the plaintiff rates as 7/10. The plaintiff struggles to remember certain things and he finds it especially challenging to remember what he has learned. He also has to keep meticulous diary of meetings and tasks that needs to be done. The plaintiff also complains of severe attention deficit since the accident. Furthermore, the plaintiff also complains of pain in his neck and in his back. Dr van Aswegen is of the opinion that the plaintiff's neurocognitive symptoms can be ascribed to the motor vehicle accident. Dr van Aswegen is further of the opinion that the plaintiff will in all likelihood never reach his full potential even in the event that he does manage to pass all his exams he is at risk of developing so-called "burn out". Furthermore, the plaintiff has a lifetime risk of between 2% to 5% to develop epilepsy due to his head injury.

4. Mr Brian Mallinson the neuropsychologist, that testified in court, describes the plaintiff's present difficulties to be a state of being very aggressive. The plaintiff that was never in the habit to become involved in any physical altercations before 2014 had since had to attend two assault cases in 2019 and 2020. The plaintiff was involved in two further incidents. On 13 January 2021, the plaintiff was pulled over by two traffic policeman and they assaulted him. Mr Mallinson also recorded that the plaintiff suffers of constant mild headaches and that he forgets things very easily. He diagnosed the following neuropsychological difficulties: Poor auditory and visual attention consistent with concentration difficulties, psychomotor slowing, a high level of impulsivity resulting in poor planning especially on unstructured tasks and probable poor retention of information in verbal memory. It is the opinion of this expert that the plaintiff's

neuropsychological profile is consistent with that which is commonly seen after mild to moderate traumatic brain injury and the neuropsychological difficulties are consistent with the plaintiff's difficulties that was noted during the interview. The plaintiff's lack of impulse control and his high level of aggression may have a negative impact on him pursuing a career as a teacher and that he may make bad business decisions or become involved in staff disputes involving aggression which could impact negatively on his business. Furthermore, his poor temper control could well have a negative influence on his personal relationships and his ability to maintain a stable marriage relationship. The plaintiff will require ongoing psychiatric treatment.

5. Dr Shevel as a psychiatrist warned the court that head injury individuals often are poor witnesses of their own condition. He diagnosed the plaintiff with a mild post traumatic organic brain syndrome with associated dysthymia. He is further of the opinion that the symptoms of the mild post-traumatic organic brain syndrome must be considered permanent and that symptoms can include changes in cognitive functioning, mood, and personality. All three of the above modalities of the plaintiff appears to have been affected and that, apart from the plaintiff's mood/depression the symptoms are relatively mild. However, Dr Shevel's clinical impression is that the plaintiff's irritability will remain but that he will have more control of the situation. The irritability, cognitive changes and other personality deficits will probably prevent the plaintiff from promotion within the school system and his chances of becoming the head or vice-head of a department will be much lower than pre-accident. Furthermore, the plaintiff's post-traumatic brain syndrome, although mild, may have a delayed negative impact on the plaintiff's coping and adaptation skills and he may have to retire about two years earlier than he would have been expecting. According to Dr Shevel the plaintiff's psychiatric condition has had a negative impact on his interpersonal skills and relationships.

6. Me Linda Swart is an educational psychologist. Her assessment of the accident and the injuries is that although the plaintiff may be able to complete his degree, even though it may take longer than the minimum prescribed period and will require a considerable bigger effort on his part, taking the challenges he experiences when studying into consideration; the biggest concern is the plaintiff's personality profile especially the plaintiff's irritability, anger and short temperedness. She questions whether the plaintiff is suitable for the role/position as an educator, especially in the FET phase. According to her, the plaintiff may find it difficult to deal with teenagers if he cannot control his temper and if it turns out to be the case he will probably remain in his current position and may experience challenges in the workplace. The plaintiff is rendered an unequal competitor in the open labour market due to the injuries he sustained and their subsequent sequelae.

7. Dr Evert Jacobs, a seasoned industrial psychologist, reported that no further career progression is foreseen notwithstanding the HoD degree. Due to his irritability, anger, and short temperedness he may find it difficult to deal with teenagers if he cannot control his temper. In his opinion the plaintiff might not be able to sustain employment as a teacher. In his opinion the parties should consider further applicable post morbid contingency deductions.

[8] Counsel for the defendant cautioned the court to also give regard to the fact that Dr Everd Jacobs (Industrial Psychologist) at paragraph 5 and paragraph 9.5 of his report has indicated that at the time of the accident Mr Phillip Viljoen had obtained grade 12 and had applied to Unisa to obtain a teaching degree. It was further noted that at the time of the accident, the plaintiff was working for his father as a salesperson. He is able to earn R4500 per month in basic and commission and on further makes another R5000.00 per month by running a car wash. The plaintiff took two months to recuperate, and he received the same income, which was confirmed by his father. Dr Everd Jacobs at paragraph 12.1 to 12.2 of his report had indicated that post-morbidly, the plaintiff's latest reported figures confirmed by his father are R15 000 for car sales and R5 000 for

the car wash. In total R20 000 per month or R240 000 per annum. The plaintiff was accepted into university and has passed all his subjects, as further confirmed by the reports provided on page 28 of the report marked as annexure "D". **What is imperative here is that the plaintiff works for his father, and he is protected by his father.** Dr Everd Jacobs at paragraph 5 noted the report of Dr Shevel (Psychiatrist) at bullet points "n", "o" and "p". It is stated that Mr Viljoen is studying to become a teacher and should qualify by 2024. The irritability, cognitive changes, and other personality deficits has probably lowered his chances of becoming head or vice head of department. The post-traumatic brain syndrome, although mild, may have a delayed impact on his coping and adaption skills and he may retire 2 years earlier than expected. Dr Everd Jacobs at paragraph 6 noted the report of Ms A Stroebel (occupational therapist) at bullet point "h" that indicated that the plaintiff was employed as an educator's assistant which entailed assisting with lessons and supervision of children. There are no negative instances involving the plaintiff and a child and/or children while employed within the teaching industry. The report of Dr Everd Jacobs indicates numerous employment ventures and opportunity obtained by the plaintiff and furthermore, his reports indicate that the plaintiff is passing his degree to become a teacher. The plaintiff was able to study and while running a car wash and assisting his father's business. The report of Mr Mallinson dated 26 March 2021 indicated on paragraph 7.1 that "Despite the neuropsychological difficulties noted in paragraph 6.8 above, Mr Viljoen has been able to gain admission to a university and complete his first year of a Bachelor of Education degree, whilst simultaneously running a small business. His lack of impulse control and his high level of aggression may have a negative impact on him pursuing a career as a teacher.

[9] Counsel for the defendant is of the view that in light of the evidence provided, the plaintiff is not entitled to his claim for past loss of earnings as it is confirmed that he indeed received an income while recuperating from the injuries sustained. Furthermore, his income had increased post-morbidly.

[10] Counsel for the plaintiff gave an extensive and credible depiction of the law and jurisprudence applicable to the circumstances of this case at paragraphs 3.1 to 3.17 of

their heads of argument. I will not regurgitate this. He maintained that the basis for the actuarial calculations, save for contingencies to be applied, was agreed between the parties and as such, the RAF's argument that the plaintiff did not suffer a past loss of earning, is wrong. The contingencies suggested by the RAF is not corroborated by the facts of the case.

[11] The evidence in totality convinces that the contingencies suggested by counsel for the plaintiff is the best outcome for the case. Therefor is the following order regarded as just and equitable in the circumstances of the case:

ORDER

PART A

By agreement between the parties, it is ordered that:

1. The defendant is liable for payment to the plaintiff in the amount of R 600 000.00 (SIX HUNDRED THOUSAND RAND) in respect of plaintiff's claim for general damages resulting from a motor vehicle collision that occurred on 23 May 2014.
2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by him in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate him in respect of the said costs after the costs have been incurred and on proof thereof.

3. The plaintiff's claim for past hospital and medical expenses is separated in terms of rule 33(4) and the adjudication thereof is postponed to the pre-trial roll of 27 November 2023.

PART B

Having considered the documentary evidence filed of record, the *viva voce* evidence of Mr Mallinson and having heard the legal practitioners for both parties, it is ordered that:

4. The defendant is liable for payment to the plaintiff in the amount of R 3 144 765,00 (THREE MILLION ONE HUNDRED AND FOURTY FOUR THOUSAND SEVEN HUNDRED AND SIXTY-FIVE RAND) in respect of plaintiff's claim for past and future loss of income resulting from a motor vehicle collision that occurred on 23 May 2014.

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

5.1 The reasonable qualifying and reservation fees and expenses, if any, of the following experts:

5.1.1 Dr LF Oelofse (orthopedic surgeon).

5.1.2 Van Dyk & Partners (diagnostic radiologists).

5.1.3 Dr A van Aswegen (neurosurgeon).

5.1.4 Dr A Sevel (psychiatrist).

5.1.5 B Mallinson (neuropsychologist).

5.1.6 L Swart (educational psychologist).

5.1.7 A Stroebe (occupational therapist).

5.1.8 Dr EJ Jacobs (industrial psychologist).

5.1.9 Munro Forensic Actuaries.

5.2 The cost of senior counsel.

6. The payment provisions in respect of the foregoing are ordered as follows:

6.1 Payment of the amounts referred to in paragraphs 1 and 4 above (hereafter collectively 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	Trust Account
Bank	Nedbank, Maitland Street, Bfn
Branch Code	110 234 00
Account No.	1[...]
Reference	HL Buchner/vch/J03764

6.2 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.

7. Interest shall accrue at 11.75% (the statutory rate per annum) in respect of:

7.1 the capital amount of the claim, calculated from 14 (fourteen) days from date of this order;

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

M OPPERMAN, J

APPEARANCES:

Plaintiff: **P.J.J. ZIETSMAN SC**

Instructed by: Honey Attorneys, Bloemfontein

Defendant: **M BOOYSEN**

Instructed by: State Attorney, Free State, Bloemfontein