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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: 6699/2022

Date: 25 March 2024

REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
DATE: 25/03/2024

In the matter between:

NAIR: NIVESH PRAVIN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MINNAAR AJ:

INTRODUCTION:

[1] The plaintiff, an adult male born on 13 August 1979, has instituted action against the defendant for injuries sustained and damages suffered as a result of a motor vehicle accident which occurred on 12 May 2021 at Sutherland Street, Newcastle. The accident occurred between the insured vehicle, a Renault Clio bearing registration

number N[...] driven by S Ntombela (“the insured driver”) and a motorcycle ridden by the plaintiff.

[2] At the time of the accident, the plaintiff was 42 years of age and he was employed as a traffic officer by the Newcastle Municipality since January 2005.

[3] In terms of the amended particulars of claim, the plaintiff pleads that the insured driver was the sole cause of the injuries sustained by the plaintiff.

[4] It is further the pleaded case of the plaintiff, that as a result of the accident, the plaintiff sustained the following injuries:

- a. Head injury with neuropsychological and neuropsychiatric sequelae.
- b. Psychological and psychiatric sequelae as a result of the injuries sustained in the accident.
- c. Fifty percent compression fractures of the 4th and 5th thoracic vertebral bodies.
- d. Fractures of traverse processes of the 5th, 6th and 7th cervical vertebrae.
- e. Grade 1 spleen injury.
- f. Grade 1 right kidney injury.
- g. Scarring and disfigurement.
- h. A fracture of the left distal radius.
- i. A fracture of the proximal phalanx of the right thumb.
- j. Left subdural subarachnoid haemorrhages with prolonged loss of consciousness, induced coma and amnesia for almost a month.

[5] It is further pleaded that as a consequence of the injuries sustained by the plaintiff:

- a. The plaintiff had to undergo medical treatment and will in future have to undergo medical treatment, requiring accommodation, medical goods and services as well as assistance and assistive devices.
- b. The plaintiff was and/or is and/or will continue to be subjected to pain, suffering, discomfort disfigurement, inconvenience, emotional impact due to the injuries, disability and loss of amenities of life.
- c. The plaintiff was unable to attend to his income earning activities, resulting in a loss of income.
- d. The plaintiff has suffered a partial alternatively complete destruction of his income earning capacity.
- e. As a result of the bodily injuries, the plaintiff has suffered damages of R11 263 337.00 made up as follows:
 - i. Past hospital, medical and other goods and services necessitated (estimate):
R1 200 000.00
 - ii. Estimated future hospital, medical and other goods and services necessitated (estimate): R250 000.00
 - iii. Past loss of earnings (incorporated in the calculation for the future loss of earning)
 - iv. Estimated future loss of earnings and interference with earning capacity:
R7 813 337.00
 - v. General damages for pain and suffering, disfigurement, inconvenience and loss of amenities of life: R2 000 000.00

Total of claim: R11 263 337.00

[6] The liability, nature and severity of the plaintiff's injuries, the sequelae thereof and the quantum of his damages are in dispute.

[7] In terms of the provisions of Rule 28 of the Uniform Rules of Court, the plaintiff applied that the following be admitted into evidence at the hearing on affidavit in terms of Rule 38(2):

- a. The reports and affidavits by:
 - i. Dr Barlin (9 November 2022): Orthopaedic Surgeon
 - ii. Dr Kaplan (14 November 2022): General Practitioner
 - iii. Dr Berkowitz (11 November 2022): Plastic Surgeon
 - iv. Dr Fine (18 December 2022): Psychiatrist
 - v. A Cramer (13 February 2023): Clinical Psychologist
 - vi. Dr Lewer-Allen (17 April 2023): Neurosurgeon
 - vii. K Nieuwoudt (3 May 2023): Occupational Therapist
 - viii. E Rossouw (21 November 2023): Industrial Psychologist
 - ix. I Kramer (23 November 2023): Actuary.
- b). Affidavits and/or witness statements by:
 - i. The plaintiff.
 - ii. Olga Isolde Scott (medical aid affidavit).

[8] The defendant had no objection to the Rule 28 application. In the premises, it is appropriate, suitable and fair that all the mentioned reports and affidavits are admitted into evidence as provided for in the provisions of Rule 38(2).¹

[9] I pause to state that the Defendant did not file any expert reports.

¹ *Havenga v Parker* 1993 (3) SA 724 (T); *Madibeng Local Municipality v PIC* 2018 (6) SA 55 (SCA)

LIABILITY:

[10] The plaintiff was not called to testify as, according to his counsel, he had no recollection of the accident.

[11] In terms of the plaintiff's affidavit:

- a. On the day in question he was the rider of the motorcycle and he was travelling along Sutherland Street, Newcastle near the Exclusive Car Wash.
- b. He was travelling in the right-hand of two lanes. As he proceeded along, the motor vehicle bearing registration letters and number N[...], which was travelling in the lane to his left suddenly executed a U-turn and struck his motorcycle.
- c. At the time of the accident the road was tarred and dry, visibility was good, the plaintiff was sober and he was wearing his helmet.

[12] The plaintiff called Mr S Xaba as a witness. Mr Xaba was an eyewitness to the accident and he testified that there was nothing the plaintiff could have done to avoid the collision with the insured driver.

[13] During cross-examination, Mr Xaba maintained this stance. According to his testimony, the plaintiff was travelling in the right-hand lane and there was a minibus taxi to his left. The plaintiff couldn't see the insured driver. The insured driver suddenly made a u-turn from the left-hand side and the plaintiff couldn't apply his brakes. Mr Xaba estimated that the plaintiff was about 30 metres from the insured driver when she executed the U-turn. He further testified that the insured driver was on her phone. He could not provide details as to the speed the plaintiff was travelling.

[14] Mr Xaba, as an independent eyewitness, made a good impression as a witness and there is no reason why his testimony should be rejected.

[15] From the photos presented by the plaintiff, it is evident that the plaintiff collided with the right rear of the insured vehicle as this vehicle was horizontal across the street.

[16] The defendant failed to call any witness on the accident and as such there is no evidence by the defendant before the court on the liability aspect.

[17] On consideration of the plaintiff's affidavit, the testimony of Mr Xaba and the photographs presented, I find that the conduct of the insured driver in executing the U-turn, whilst being on her phone, constituted gross negligence on her part. There was no space for the plaintiff to manoeuvre any preventative action and as such the sole cause of the collision was due to the negligence of the insured driver. It follows that the plaintiff is entitled to 100% of his proven damages.

QUANTUM:

[18] The plaintiff has undergone medico-legal examinations by seven experts on his behalf, all of whom have filed expert reports concerning the injuries sustained by the plaintiff and the sequelae thereof. The defendant elected and/or failed to file any expert reports to contradict those of the plaintiff.

[19] It is evident from the medico-legal reports and particulars of claim that the plaintiff sustained a severe head injury with severe traumatic brain injury with resultant neurocognitive, neuropsychological and neuropsychiatric sequelae. In addition, the plaintiff suffered compression fractures of the fourth and fifth thoracic vertebral bodies, fractures of the transverse processes of the fifth, sixth and seventh cervical vertebrae, fracture of the left radius, fracture of the phalanx of the right thumb and life-threatening internal injuries to his spleen and kidney.

[20] The plaintiff's counsel, provided the court with heads of argument which greatly assisted the court on a summary of the sequelae of the plaintiff's injuries and, in the paragraphs hereunder, those references are paraphrased.

[21] The plaintiff suffered an immediate loss of consciousness with a Glasgow coma scale ("GCS") recorded at the scene of the accident at 3/15. Plaintiff was transported by ambulance to the Newcastle Medi Clinic where he was intubated and ventilated. Due to the severity of the Plaintiff's injuries, it was however necessary to transfer to the Milpark Hospital where he arrived by helicopter at 04h00 on 13 May 2021. From the Netcare Milpark Hospital records, it is evident that on his arrival at Milpark his GCS still recorded as 3/15.

[22] CT brain scans demonstrated a subarachnoid haemorrhage and a sub-falx haematoma with multiple haemorrhagic contusions of the brain as well as cerebral oedema. On 21 May 2021, the plaintiff underwent operative procedures to the fracture of the left radius with open reduction and internal fixation and the fracture of

the right thumb was stabilised with Kirchner wires. The plaintiff sustained a Grade 1 splenic injury as well as a Grade 1 right kidney injury.

[23] On 9 June 2021, and after spending almost a full month in hospital, the plaintiff was discharged from Milpark Hospital. His GCS recording being 14/15. The plaintiff was transferred to the Netcare Rehabilitation Centre for further rehabilitative treatment and he had to remain on bedrest for an extended period after his discharge.

[24] Concerning the head injury, the neurosurgeon, Dr Lower-Allen concludes that the plaintiff suffered a severe head injury with severe traumatic brain injury comprising both diffuse and multiple focal components as well as risk of secondary brain injury from hypoxic factors resulting in changes in neurocognitive and behavioural function.

[25] The plaintiff has undergone neuropsychological assessment by Ms Cramer, a clinical and neuropsychologist. According to her report, the neuropsychological testing reveals multiple difficulties, *inter alia*, with memory, attention, psychomotor speed, reduced clerical efficiency, and executive functioning which are in keeping with the expected outcome following a severe head and brain injury. Ms Cremer further found that, from a neuropsychological perspective, the plaintiff is considered occupationally vulnerable.

[26] Dr Fine, the psychiatrist, concludes that the plaintiff sustained a traumatic head injury with significant organic brain damage resulting in ongoing difficulties with

memory, mood and behaviour and significant alteration in mental status. Cognition and highest integrative function (MSCHIF). The plaintiff also suffers from post-traumatic stress disorder and accident-related depression and, having sustained such brain trauma, the functional effect can be considered permanent and irreversible leaving the plaintiff vulnerable to the development of an array of organically based psychiatric disorders over his lifetime.

[27] Despite the traumatic head injury, it is imperative to note that Dr Fine found that it does not appear that the plaintiff requires protection on psychiatric and/or neuropsychiatric grounds for any large sum awarded.

[28] Dr Barlin, the orthopaedic surgeon, diagnoses a 50% compression fracture of the fourth and fifth thoracic vertebral bodies, fracture of transverse processes of the fifth, sixth and seventh cervical vertebrae, fracture of the left distal radius and fracture of the proximal phalanx of the right thumb. According to Dr Barlin, the plaintiff continues suffering ongoing back pain, wrist pain, neck pain and difficulty with his right thumb.

LOSS OF INCOME:

[29] The plaintiff has completed matric in 1997. Thereafter he completed and obtained numerous traffic-related courses and diplomas. In the opinion of Ms Cramer (neuropsychologist), the plaintiff was of average to high average intellectual potential before the accident. The court notes that it is recorded that the plaintiff obtained his Traffic Officer Diploma *cum laude* in 2004.

[30] At the time of the accident, the plaintiff was employed by the Newcastle Municipality as a traffic officer. He had been employed since January 2005 earning a gross average monthly salary of R68 379.00.

[31] After the accident, the plaintiff was off work for approximately 3 months whereafter he returned to his pre-accident employment in an accommodated capacity with fieldwork consisting of overseeing scholar patrols/school pedestrian crossings.

[32] Ms Cramer, the neuropsychologist, states that in her opinion, in consequence of the injuries sustained in the accident, the plaintiff has been rendered occupationally vulnerable due to difficulties with attention, concentration, memory, reduced efficiency and emotional distress aggravated by pain and discomfort and other physical limitations. She observed that the plaintiff has a sympathetic and supportive work environment but would struggle to obtain and maintain alternative employment should he lose his current position for any reason.

[33] Dr Fine, psychiatrist, concludes that the plaintiff has been rendered a vulnerable individual and unequal competitor being unable to compete in the open labour market due to the life-changing events of the accident.

[34] Dr Barlin, an orthopaedic surgeon, concludes that the plaintiff will not be able to undertake any work of a physical nature and will only be capable of performing administrative duties for the rest of his working life.

[35] It is the conclusive opinion of the occupational therapist, Me Nieuwoudt that due to the neurocognitive as well as neuropsychological difficulties, the plaintiff is extremely vulnerable while working as a traffic officer in the field and that it is justified that he has been assigned to administrative duties. The testing conducted confirmed that the plaintiff does not present with adequate cognitive requirements for his pre-accident occupation. According to her, the plaintiff remains functionally unemployable for work as a traffic officer even while executing administrative duties and the plaintiff remains employed as a result of a sympathetic employer/supervisor.

[36] Dr Rossouw, the industrial psychologist, conducted a comprehensive psycho-legal evaluation of employability. The purpose hereof was to evaluate the effects of the injuries sustained by the plaintiff and their sequelae on his employment and employability. In completing the said report, Dr Rossouw had full access to all of the medico-legal reports as well as collateral information from the plaintiff's employers. In the opinion of Dr Rossouw:

- a. Had it not been for the injuries sustained in the accident, the plaintiff would have secured promotion to the position of superintendent by February 2024 and thereafter he would have had a 50% chance of being promoted to chief traffic officer by July 2029. This would have been his employment ceiling with inflationary increases thereafter until the retirement age of 60 years. I pause to state that Dr Rossouw makes mention of a retirement age of 60 years old whilst in the plaintiff's employment contract it is stated to be 65 years.
- b. In consequence of the injuries sustained in the accident, the plaintiff requires a structured, simple and understanding work environment where accommodations and assisted devices are afforded. At present, and fortunate so, the plaintiff has the

support and understanding of his colleagues and superiors who assist and accommodate the plaintiff with his difficulties as far as possible.

- c. The plaintiff will remain highly vulnerable in his employment for the remainder of his working life and it is highly improbable that he will be able to compete for or sustain alternative employment on the open labour market. Should the plaintiff remain in his current employment, he will receive inflationary increases until retirement age.

[37] The actuary, Ivan Kramer, undertook actuarial reports and calculations based on the opinion of the industrial psychologist concerning the plaintiff's earning capacity. In his report, Mr Kramer applied a retirement age of 65 years.

[38] In preparing the report, Mr Kramer applied a 50% chance of the plaintiff remaining in the position of superintendent and a 50% chance of being promoted to chief traffic officer but for the accident. Mr Kramer assesses the plaintiff's earnings, having regard to the accident, based upon his current position and earnings.

[39] Mr Kramer, in addition, applies a 12.5% contingency deduction to the plaintiff's earnings but for the accident and a 22.5% contingency deduction having regard to the plaintiff's injuries (10% differential).

[40] Counsel for the defendant argued that the plaintiff has been a traffic officer for 16 years without any promotion but that now, had it not been for the accident, the plaintiff would have been promoted to superintendent and eventually to chief traffic officer. According to the defendant's counsel, the prospects of the plaintiff eventually being promoted to chief traffic officer are too optimistic and as such the postulations are unrealistic. It was argued that the postulation as contained in Basis A of Mr

Kramer's report (being promoted to superintendent) should be awarded and not Basis B of the report (being promoted to chief traffic officer). It was further argued that the post-morbid contingencies should be left as they are in the actuarial report as a deviation from this would otherwise result in overreach.

[41] Defendant's counsel conceded that should the plaintiff lose his current employment he will not be able to source alternative employment.

[42] The plaintiff's counsel submitted that based on the reports and opinions of the various experts concerning the plaintiff's future employment prospects, a substantially higher contingency deduction should be applied to the plaintiff's earnings having regard to the accident.

[43] In considering the damages herein, I rely on the well-known and much-quoted dictum by Nicholas JA in *Southern Insurance Association v Bailey* N.O. 1984 (1) SA 98 (AD) at 113G – 114A.

'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. 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.'

[44] The seriousness of the injuries sustained by the plaintiff's injuries and the effect on the plaintiff's employability and career prospects are not in dispute. The medico-legal reports of all the plaintiff's experts are also clear on these aspects.

[45] I agree with the approach adopted by the plaintiff's counsel that the more realistic scenario would be to apply a 50% deduction to the plaintiff's earnings having regard to the accident and utilise the mean average of the plaintiff's earnings but for the accident, the plaintiff's net loss of income would total an amount of R6 991 418.00. I deem this an appropriate reward for the plaintiff's net loss of income.

GENERAL DAMAGES:

[46] On the day of trial, the defendant's counsel confirmed that the defendant conceded that the plaintiff suffered serious injuries. In this regard, it is the case of the plaintiff that the RAF4 serious injury assessment reports have been completed by Drs Barlin, Kaplan and Berkowitz, who qualified the Plaintiff in terms of paragraphs

5.1 and 5.2 of the narrative test. In addition, Dr Kaplan assesses the plaintiff's whole person impairment at 36%.

[47] The principles relevant to the assessment of general damages are well-known and appear from cases such as *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194, *Protea Assurance CO Ltd v Lamb* 1971 (1) SA 530 (A), *AA Onderlinge Assuransie Assosiasie Bpk v Solomons* 1980 (3) SA 134 (A) and *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (AD).

[48] In considering the amount to be awarded for general damages it is acceptable to have regard to awards issued in broadly comparative cases and the decrease in the value of monies since the previous cases were decided.

[49] The plaintiff's counsel referred the court to the following two comparable cases concerning head injuries:

a. *Torres v Road Accident Fund* 2007 (6) QOD: A4-1 GSJ:

R600 000.00 awarded (current day value: R1 538 000.00).

b. *Ndokweni v Road Accident Fund* 2013 (7) A4 QOD: 9 ECP:

R800 000.00 awarded (current day value: R1 403 000.00).

[50] It is well established that an assessment of an appropriate award of general damages (sometimes also referred to as non-pecuniary damages) is a discretionary matter and has as its objective to fairly and adequately compensate an injured party (see *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534H-535A and *Road*

Accident Fund v Marunga ZASCA (144/2002) [2003] ZASCA 19; 2003 (5) SA 164 (SCA) para 23).

[51] There are no questions as to the seriousness of the injuries sustained by the plaintiff herein and the dire sequelae of same. The plaintiff is severely, and negatively impacted by this incident and will never be able to escape any of the consequences thereof on his day-to-day existence or professional career. Following the accident, the plaintiff spent almost a full calendar month in the hospital and thereafter he had to attend rehabilitative treatment. After his discharge, he remained on bedrest for an extended period. On his recovery, he was also unable to commence with the full capacity of his pre-accident employment and, to his benefit, and at least for the time being, is being accommodated by a sympathetic supervisor and colleagues.

[52] In the amended particulars of claim an amount of R2 000 000.00 is claimed for general damages. In the plaintiff's heads of argument an amount of R1 200 000.00 was mentioned. During argument, the plaintiff's counsel submitted that an amount of R1 500 000.00 would be reasonable.

[53] Defendant's counsel submitted that an amount of R1 200 000.00 would be reasonable and that the proposed R1 500 000.00 came as a surprise.

[54] On consideration of all the evidence provided this court is of the view that an amount of R1 500 000.00 would be reasonable and as such that general damages in the amount of R1 500 000.00 is awarded to the plaintiff for general damages.

PAST MEDICAL AND HOSPITALISATION COSTS:

[55] In his amended particulars of claim the plaintiff claimed an estimated R1 200 000.00 for past medical and hospitalisation costs.

[56] The plaintiff submitted a Rule 35(9) notice in terms of which the total of the past medical and hospital expenses are the amount of R926 059.82.

[57] There was no objection raised by the defendant to this notice and no evidence, nor submissions, was adduced to challenge same.

[58] The plaintiff is therefore entitled to his claim for past medical and hospital expenses in the amount of R926 059.82.

FUTURE MEDICAL EXPENSES:

[59] In terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse 100% of the Plaintiff for the costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by plaintiff in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.

COSTS:

[60] There is no reason why costs should not follow the outcome hereof and as such the defendant is liable for the plaintiff's costs.

ORDER:

The following order is made:

[1] The Defendant is liable for 100% of the Plaintiff's proven damages.

[2] The Defendant shall pay to the Plaintiff a capital amount of R9 417 477.82 (Nine Million, Four Hundred and Seventeen Thousand, Four Hundred and Seventy-Seven Rand and Eighty-Two Cents Only) of which:

- a. R6 991 418.00 is in respect of Loss of Earnings
- b. R1 500 000.00 is in respect of General Damages
- c. R926 059.82 is in respect of Past Hospital and Medical Expenses, together with interest *a tempore mora* calculated in accordance with the Prescribed Rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996.

[3] Payment will be made directly to the trust account of the Plaintiff's attorneys within a 180 (hundred and eighty) days from the granting of this order: Provided that interest shall start running on the capital amount within 14 (fourteen) days of the granting of this order:

Holder	D[...] B[...] A[...] I[...]
Account Number	1[...]
Bank & Branch	N[...] – N[...] G[...]
Code	1[...]
Ref	N[...]

[4] The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act

56 of 1996 to reimburse **100%** of the Plaintiff for the costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by plaintiff in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.

[5] The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party, subject to the discretion of the taxing master.

[6] The Plaintiff shall, in the event that the costs are not agreed:

- a. serve the Notice of Taxation on the Defendant's; and
- b. allow the Defendant fourteen (14) days to make payment of the taxed costs.

[7] It is noted that there is a contingency fee agreement in existence between the Plaintiff and her Attorneys.

Minnaar AJ

Case number: 6699/2022

Heard on: 15 March 2024

For the Plaintiff: Adv I Zidel SC

Instructed by: De Broglia Attorneys Inc.

For the Defendant: Adv M Segota

Instructed by: State Attorney

Date of Judgment: 25 March 2024