

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

Case number: 6036/2018
Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

NICOLAS ALEXANDER SPYROU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 05 OCTOBER 2021

CORAM: MATHEBULA, J

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 01 February 2022. The date and time for hand-down is deemed to be 01 February 2022 at 10H00.

Introduction

- [1] In this matter the plaintiff claims damages from the defendant arising from the injuries sustained in a motor vehicle accident on 28 June 2015. On 22 October 2019 the matter served before me and liability was settled fifty percent (50%) in favour of the plaintiff. This matter is set down for quantum only.

Preliminary Issues

- [2] It is apposite to mention that the defendant gave an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 limited to fifty percent (50%) of the medical expenses to be incurred by the defendant. The parties further agreed that there is no need to lead evidence in respect of the general damages. The matter will be argued on admitted reports and a determination made on that basis. The main dispute is about past and future loss of income.
- [3] The plaintiff served and filed numerous expert summaries and reports. The contents thereof were conceded by the defendant save the reports of the industrial psychologist and an actuary. The concession meant that their expertise was also not in dispute. I understood this agreement which was conveyed to me during the hearing as a confirmation that the plaintiff does not need to call these witnesses to give oral evidence. Regrettably, the defendant in the heads of argument seems to be recanting from the agreement. Pertinently the defendant contends that the agreement does not mean that the contents of the reports are conceded. The concession, so the argument goes, agrees to the reports what they purport to be and that they are still subject to scrutiny and argument.

- [4] Accordingly the basis for the concession was to save the defendant the immense pressure of spiralling costs of litigation. That is not what was conveyed to me on behalf of the defendant and to bring it up at the end stage of the proceedings is akin to an ambush. The plaintiff did not call these witnesses to give oral evidence because their reports were admitted by the defendant. None of these assertions or claims made on behalf of the defendant has merit.

Evidence for the plaintiff

- [5] The plaintiff testified that he was born in this Republic to Cypriots parents. He relocated to Cyprus with his mother while still a toddler. After he completed his basic education studies and mandatory military service, he enrolled at Culinary Arts School to train as a chef. He was a student there from September 2009 until June 2011. He then entered the job market as a chef on part-time basis. He started out at Gratzie Italian Restaurant from June 2011 to May 2012 before proceeding to Almyra Hotel where he remained from June 2012 until March 2014. According to him, he was promoted to the level of being in charge of the Greek Restaurant at the aforementioned hotel. He explained that he started out as Cook C chef but in fact he was performing duties of a Cook A chef.
- [6] He came back to the Republic to attend to some family matters. It is common cause that he was involved in an accident on 25 June 2015 and suffered injuries. According to him, these injuries put paid to his dream of ever being employed as a chef. He felt that

the injuries had rendered him unable to perform at the required level. The nature of the work is physically demanding and exhausting. He is unable to stand for long hours because of the knee injury. The kitchen is a highly stressed environment and plagued by frequent dizzy spells and anxiety disorder, he is unable to handle the demands of the job.

- [7] Unknown to him, at the time that he was still admitted at the hospital, he was offered employment at Gold Sakira Japanese Dining Restaurant in Cyprus from 1 August 2015 at a salary of €1,800.00 per month. Needless to mention, he was unable to accept the offer. At the moment he is employed by his grandmother as a manager/caretaker of her properties. He testified that he is not employed in the real sense because she does not essentially need his services. The entire employer-employee relationship is primarily to affirm him as person and also help him out.
- [8] Dr Everd Jacobs, the Industrial Psychologist, assessed the plaintiff on 20 February 2020 and 23 March 2021 respectively. It will appear that the second assessment was necessitated by the late discovery of the letter of employment mentioned in paragraph 7. He explained that he used the information sourced from the hospitality industry in the Republic as a guide to express an opinion on his most probable career progression and earning capacity. He suggested the career ceiling in the uninjured scenario of R40,000.00 per month calculated on 2016 value. The earning plateau was considered to be at age forty-five (45). This was in line with the evidence of the plaintiff that progression to the position of the Head Chef could take up to seven (7) years. On the basis of

the medical evidence made available to him, he concluded that the employment relationship between the plaintiff and his grandmother was a sympathetic one. He outlined that past loss of income is calculated from date of accident to date of calculation. Although the plaintiff was unemployed at the time of the accident, it did not mean that he had no capacity to earn.

- [9] Dr Jacobs also testified about the difference between the educational and industrial psychologist disciplines. He added that his main purpose was to provide an opinion on the plaintiff's most probable career path in the pre and post-accident scenario. On the other hand, the educational psychologist provides an opinion on the plaintiff's pre and post-accident educational levels of function.
- [10] Turning to the actuarial calculations the parties agreed that same be included as part of admitted evidence. The only sticking point are the contingencies still to be applied.

Discussion

- [11] The role of experts and the purpose of their opinion evidence is a matter that is well settled in our law. The key requirement is that the reasons of their opinions must be acceptable and the court is not bound by the expert testimony. Their evidence is part of the body of evidence to be considered in the determination of the probabilities.
- [12] The defendant adopted an armchair critic approach by simply pointing out on some discrepancies or contradictions contained in the admitted reports of the experts. According to the report of Ms

Elmarie Prinsloo, Educational Psychologist, the plaintiff came back to the Republic to work on the family chicken farm and desired to acquire a qualification in business management. This was thwarted by the accident. Ms Prinsloo also noted during consultation that the plaintiff indicated that he was content to be part of the business and management component of the family business. This motivated him to proceed with his studies up to university level.

[13] Importantly it was pointed out that the plaintiff displayed good interpersonal skills and gave his full co-operation to Ms Prinsloo. His memory skills were found to be intact and no significant attention or memory deficit was detected. The same with his concentration levels and ability to solve complex tasks. The argument is that despite the accident, the plaintiff has not suffered major setbacks to the extent stated by other experts. In fact, it was pointed out that other experts in particular Dr Louis Oelofse, the Orthopaedic Surgeon recorded what the plaintiff narrated to him.

[14] The defendant also took issue with the injuries narrated by the plaintiff and the conclusions of the ophthalmologist to wit Dr Roland Berger. According to him there was no direct injuries to the plaintiff's eyeballs during the accident. He also touched on the allegation that the plaintiff suffered "stroke" on his left eye approximately two (2) years after the accident which resulted in loss of vision in the centre of the image. His conclusion is that a "fact embolization can follow a fracture of a big bone about 48 hours after the event."¹

General Damages

¹ Index Expert Bundle at page 248 par 6.5.

[15] This brings me to the question of general damages. The parties have opted to refer me to numerous comparable awards. It must be stated that although their individual approach is different, they come to the same amount. Before dealing with the appropriate amount in the circumstances, it is worth it to reiterate that the approach in determining the award for damages is a flexible one without adhering to strict rules. The court must give consideration to broad generalisations and act with fairness in all circumstances.²

[16] The comparable awards serve as a useful guide given the task on hand. The plain reality is that these cases are not on all forms with the present matter. The court must carefully strike a balance which must be just to both parties. The injuries sustained by the plaintiff are described by Mr P Bruce White, a Plastic and Reconstructive Surgeon, in the following terms: -

- a head injury with a degloving wound of the frontal region,
- trauma of the chest with:
 - a bilateral haemo-pneumothorax,
 - a traumatic thoracic aorta rupture,
- a laceration of the liver,
- a fracture of the left femur.³

[17] At the time he assessed the plaintiff, he recorded the complaints of the plaintiff as follows: -

“unsightly scarring, loss of sensation of the forehead, ongoing headaches, ongoing pain of the chest with dyspnoea (shortness of breath) after strenuous exercise,

² Sandler v Wholesale Coal Suppliers 1941 AD 194 at 199.

³ Amended Index: Expert Notices at page 94.

ongoing pain of the left thigh and knee, a deformed left big toe, poor memory, poor concentration and he is short-tempered.”⁴

- [18] The plaintiff relied on the following cases to advance his case namely **Bismilla v Road Accident Fund**⁵ and **Laubscher v Road Accident Fund**.⁶ These are cases that come close to the case of the plaintiff. The submission made is that the injuries in the Bismilla matter are less serious than those of the plaintiff. The award made by the court was R800,000.00. In the only case that I was referred to that was in line with that of the plaintiff, the court awarded compensation in the sum of R1,175,000.00. In the Laubscher case it was submitted that the injuries were more serious and the court awarded compensation in the sum of R1,375,000.00. On these basis, counsel for the plaintiff argued that the sum of R1,000,000.00 should be awarded which will translate into R500,000.00 after the application of percentage apportionment.
- [19] The defendant relied on **Sterris v Road Accident Fund**⁷ and **Mgudlwa v Road Accident Fund**.⁸ In the Sterris matter the court confronted with more serious injuries, awarded the sum of R435,800.00. Again in the Mgudlwa matter with more serious injuries the court awarded the sum of R500,000.00.
- [20] Clearly there are parts of the plaintiff's evidence that were not corroborated and are open to doubt. The event about having suffered a stroke in the left eye was not corroborated and is open

⁴ Amended Index: Expert Notices at page 96.

⁵ Quantum of Damages Volume VII [B4-64].

⁶ 2018 JDR 1227 (GP).

⁷ 2009 LNQD 23 (WCC).

⁸ (818/2002) [2010] ZAECMHC 13 (5 February 2010).

to doubt. The admitted evidence of Dr Berger deals with this matter in a comprehensive manner which negates his evidence. Then there is an issue of him suffering hypertension as a result of this accident. This too is uncorroborated and there is evidence that he has a family history of illnesses that are notoriously hereditary. There is also evidence that the plaintiff has good memory and the injury sustained did not make any cognitive changes. It seems that indeed cumulatively the plaintiff suffered injuries to which he must be adequately compensated.

- [21] In the exercise of my judicial discretion, informed by the evidence and principles of law, it is my considered opinion that the just award before apportionment should be the sum of R500,000.00.

Past Hospital and Medical Expenses

- [22] The parties settled the claim for past hospital and medical expenses at R661,423.42 before apportionment.

Loss of Earnings

- [23] This brings me to the last heading of the claim pertaining to the loss of earnings. The approach of the courts was set out in **Road Accident Fund v Guedes** as follows: -

“It is trite that a person is entitled to be compensated to the extent that the person’s patrimony has been diminished in consequence of another’s negligence. Such damages include loss of future earning capacity (see for example *President Insurance Co Ltd v Mathews*). The calculation of the quantum of a future amount, such as

loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example *Southern Insurance Association Ltd v Bailey NO*. The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just (see for example the *Bailey* case and *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd.*)⁹

[24] It is trite that the evaluation of the amount to be awarded is an estimate. On this occasion the role of an actuary is a critical one in assisting the court about the unknown. It is up to the presiding Judge to make an estimate of an amount that is just, fair and reasonable.¹⁰ Despite the fact that it is not an easy task to resort to precise arithmetical calculations, the plaintiff bears the onus to prove the quantum of his claim.

[25] The actuarial report compiled by Munro Actuaries on the instructions of the plaintiff is based on information provided by the attorneys and report compiled by Dr Jacobs. They were further instructed to apply 5% and 15% contingencies on past and future earnings as well as 30% on future earnings.

⁹ 2006 (5) SA 583 (SCA) at para 8.

¹⁰ *Southern Insurance Association Limited v Bailey NO* 1984 (1) SA 98 (A) at 113G-114E.

[26] Dealing with contingencies, it is so that in the evaluation thereof, both positive and negative factors should be taken into considerations. This is something that is not readily ascertainable or can be accurately ascertained. I have no issue with the underlying principles upon which the calculations are made. However, it does not end there. What also comes into play is my impressions of the matter and the surrounding circumstances.

[27] In preceding paragraphs I have stated that the plaintiff has not suffered severe intellectual, psychological and negative setbacks. I gained the impression that he can still operate as a chef but perhaps being a meticulous person that he claims to be, he rather not. It is therefore my considered opinion that higher contingencies percentage will suffice.

[28] The following order is made:

28.1. The defendant is liable for payment to the plaintiff in the amount of **R 5,038,601.71 (five million, thirty-eight thousand, six hundred and one rand and seventy-one cent) [hereafter “the capital”]** in full and final settlement, as set out hereunder:

28.1.1. **R 4,457,890.00** in respect of past and future loss of income;

28.1.2. **R 250,000.00** in respect of general damages.

28.1.3. **R330 711.71** in respect of the plaintiff's claim for past medical and hospital expenses.

28.2. The defendant is ordered to furnish to the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 50% 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.

28.3. The defendant 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:

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

28.4.1. Dr JJ Schutte (General Practitioner);

28.4.2. Dr LF Oelofse and Dr MB Deacon
(Orthopedic Surgeons);

28.4.3. Dr PB White (Plastic and
Reconstructive Surgeon);

- 28.4.4. Dr A van Aswegen (Neurosurgeon);
- 28.4.5. B Mallinson (Neuropsychologist);
- 28.4.6. Ingrid Erasmus of Rita van Biljon
Occupational Therapists;
- 28.4.7. E Prinsloo (Educational Psychologist);
- 28.4.8. Dr R Berger (Ophthalmologist);
- 28.4.9. Dr EJ Jacobs (Industrial Psychologist);
- 28.4.10. Munro Forensic Actuaries.

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

28.6. 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	-	Trust Account
Bank	-	Nedbank, Maitland Street, Bloemfontein
Branch Code	-	11023400
Account No.	-	1[...]
Reference	-	HL Buchner/J03428

(please quote the reference at all times)

- 28.7. 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.
- 28.8. Interest shall accrue at 7% (the statutory rate per annum), compounded, in respect of the claim calculated from fourteen (14) days of the date of this order.
- 28.9. The defendant shall be liable to pay interest as per paragraph 28.8 above in the event the defendant does not effect payment within 180 days of the date of this order.

M.A. MATHEBULA, J

On behalf of plaintiff:
Instructed by:

Adv. P.J.J. Zietsman SC
Honey Attorneys
BLOEMFONTEIN

On behalf of defendant:
Instructed by:

Ms C. Bornman
State Attorney
BLOEMFONTEIN

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