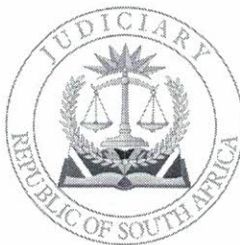


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 1778/16

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED YES

05/03/2019

DATE

SIGNATURE

In the matter between:

ZWELITHINI SKHUMBUZO NGOMANE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

1. This is an action wherein the Plaintiff claims damages arising from injuries sustained by the Plaintiff as passenger in a collision which occurred on 10 May 2013.
2. In the particulars of claim at paragraph 6 thereof the Plaintiff alleges to have sustained the following injuries:
 - 6.1 soft tissue injury.
 - 6.2 tear drop fracture of the C5;
 - 6.3 Laceration on his right wrist.
3. Furthermore at paragraph 8 thereof the plaintiff alleges as follows.

“As a result of the aforesaid injuries Plaintiff has suffered damage and is entitled to damages in the sum of R855 000, 00 made up as follows:

 - 8.1.1 Past medical/ Hospital expenses R100 000, 00
 - 8.1.2 Future medical expenses R300 000, 00
 - 8.1.3 Past and future loss of Earnings/earning capacity R 350 000, 00
 - 8.1.4 General Damages R500 000, 00”

8.2 The amount claimed for medical and Hospital expenses is an estimated amount and the Plaintiff is not currently in a position to give a breakdown of the amount claimed.

8.3 The amount claimed for future medical expenses is an estimated amount and the Plaintiff is not currently in a position to give a breakdown of the amount claimed.

8.4 The amount claimed for past and future loss of earning capacity is an estimated amount and the Plaintiff is not currently in a position to give a breakdown of the amount claimed.

8.5 The amount claimed for general Damages is a global amount for pain and suffering loss of amenities and the non-pecuniary aspects of temporary and permanent disability”.
4. At the commencement of the proceedings and at the request of the parties the court was requested to record the following:

- 4.1 That the issue of liability has become settled on the basis that the Defendant shall pay 100% of the Plaintiff's agreed or proven damages;
 - 4.2 That the Plaintiff was abandoning his claim in respect of past medical expenses;
 - 4.3 That the Plaintiff's claim in respect of general damages has become settled between the parties in the amount of R400 000,00;
 - 4.4 That the Defendant would provide the Plaintiff with an undertaking in terms of section 17(4)(a) of the Act in settlement of the plaintiff's claim in respect of future medical expenses;
 - 4.5 The Defendant admitted the contents and correctness of the Plaintiff's expert medico-legal reports which were handed in and marked as exhibit A;
 - 4.6 The Plaintiff admitted the contents and correctness of the Defendant's expert medico-legal reports, which were handed in and marked as Exhibit B;
 - 4.7 By agreement between the parties the contents and correctness of the joint minutes prepared by the experts, were handed in and marked as exhibits C.
5. The court further admitted the above-listed report into evidence without the need to call the individual experts to testify thereto.

DISPUTED ISSUES

6. This court had to determine the extent of the plaintiff's past and future loss of earnings and earning capacity.

EVIDENCE

7. The plaintiff, Mr Zwelithini Ngomane, sustained personal injuries in a motor vehicle collision that occurred on 11 May 2013. At the time of the collision he was employed by the National Lottery Board occupying the position of assistant company secretary. He is an LLB graduate from the University of Zululand.

8. During 2015, he voluntarily resigned from his position to take up a position overseeing the farm activities of his family sugarcane farm. His net salary during this period was approximately R75 029, 37.
9. During the collision he sustained the following injuries:
 - 9.1 Right hip contusion
 - 9.2 Cervical spine trauma consisting of a teardrop fracture of C5
 - 9.3 Contusion both shoulders
 - 9.4 Laceration right wrist.¹
10. Following the collision he was treated at the Tembisa Hospital where the laceration to his wrist was sutured and the C5 teardrop fracture was treated with a hard collar and analgesics.

EXPERT EVIDENCE

11. In their joint minute, the Orthopaedic surgeons recorded as follows:
 - 11.1 That the plaintiff's current complaints consist of pins and needles in both thumbs and index fingers; pain in both his legs when standing or walking for too long.
 - 11.2 Back, shoulder and neck pain and also pain in his right hip area.
 - 11.3 Headaches and loss of power in both arms.
12. The Orthopaedic Surgeons were in agreement that the claimant's work capabilities; work potential; age of retirement; loss of amenities of daily living needs to be assessed by expert opinion of the occupational therapist and industrial psychologist.
13. The experts further opined that his longevity will not be influenced except in the case of surgery.

¹Exhibit C Page 3 - 6

14. Dr Booyse further noted that the plaintiff must have suffered a severe psychological problem due to the circumstances of the injury and the expert recommended conservative treatment in the amount of R50 000, 00.
15. Dr Booyse was of the opinion that the plaintiff sustained a 26 % whole person impairment and although below the 30% threshold, he was of the opinion that the plaintiff sustained a serious injury and qualifies *via* the narrative test as set out in his report.
16. Dr Ngcoya rated the plaintiff's whole person impairment at 6 % and he was of the opinion that the plaintiff did not suffer a serious injury.
17. The Occupational Therapists in their joint minute made the following observations:²
18. Prior to the collision that the plaintiff held the occupation of Assistant Secretary which job tasks would have fallen within the parameters of sedentary to light physical nature depending on the task, duration of participation in such a task as well as weights handled. He reported to Ms Doran that he decided to resign due to the fact that he was experiencing difficulties with his memory, became forgetful as well as receiving a lack of support from his fellow colleagues. To Ms Doran he further indicated that he was forgetful, irritable, could not recall his acts, and suffered from poor concentration and that he felt helpless.
19. The experts were in agreement that on a purely physical level that Mr Ngomane did retain the physical ability to perform work tasks of a sedentary to light nature, but neither of these could be exerted on a constant basis (67% - 100% of the time) equivalent to his pre-accident position. The occupational therapists agree that as a result of the collision that the injuries which the plaintiff had sustained not only impacted on his physical abilities but also on his psychological functioning. As a result thereof the plaintiff finds himself unemployed post-collision and having challenging inter-personal relationships. They further were

² Exhibit C pages 7 - 10

in agreement that due to his ongoing symptomology, the plaintiff in future would probably always need to approach and execute tasks in an adjusted manner.

20. The Clinical Psychologists Ms Cramer and Ms Tromp also individually filed expert reports. During their joint meeting as experts they recorded that they were informed as at time of the meeting that the plaintiff suffered from concentration and memory complaints. He also exhibited fatigability, mood problems, insomnia and increased irritability. They both found evidence of post-traumatic stress symptoms and they were in agreement that he is depressed. He also displayed a loss of drive and motivation in life. The experts were further in agreement that although the plaintiff retains the physical and intellectual capacity to work he has suffered from a deteriorating mental health since the accident, which has hampered him in pursuit of suitable employment in spite of his qualifications. They were further in agreement that the plaintiff has been left emotionally vulnerable and lacking in resilience and that his quality of life has been left severely impacted.
21. The Industrial Psychologists met on 26 November 2018. During such meeting they agreed that at the time of the collision that the plaintiff was almost 38 years old and employed by the National Lottery Board as a Legal Administration Officer. The experts agree that in all likelihood the plaintiff's retirement age would have been 65 years of age furthermore given his level of progression as at Peterson D4 as at time of the collision, had it not been for the collision, he would have progressed at a more rapid pace than would usually be expected. Furthermore taking into account his Patterson level as at time of the collision post collision he would have been promoted to company secretary and with the necessary skill set development and experience he would have been able to reach Peterson D5 as a career ceiling at age 45 years.
22. Post morbid the experts further agreed that the plaintiff returned to his pre-accident employment after recuperating. Furthermore that the plaintiff voluntarily resigned from his position to take up employment at his family's farm. He however has been unemployed since December 2015. Having regard to all other expert reports presented to them, they opined that the plaintiff would be

able to return and continue to work in the open labour market and will be able to progress in his career path and likely earnings as anticipated in the pre-accident scenario until retirement age 65 years.

EVALUATION

23. Now in determining the plaintiff's post and future loss of earning and earning capacity this court has to determine whether post-accident and as a result of the *sequelae* of the collision, he has been unable to return to his position as a Legal Administration Officer.
24. Pre-accident the experts agreed that the plaintiff was employed in this capacity earning an income at Paterson level D4. Post-accident the experts further agreed albeit that the plaintiff returned to employment and later resigned voluntary in all likelihood he would have reached his career ceiling at Paterson level D5 at age 45 years.
25. In *Bridgman NO v Road Accident Fund 2002 (1) ALLSA 1 (CPD)* the court held that "in order to claim compensation for patrimonial loss a plaintiff must discharge the onus of proving on a balance of probabilities that such loss has indeed occurred. That does not necessarily mean that the plaintiff is required to prove the loss with mathematical precision however the plaintiff is required to place before the court all evidence reasonably available to enable the court to qualify the damages and to make an appropriate award in his favour."
26. In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA)* at para [36] and [37] the following is stated relative to expert evidence and opinions of expert witnesses:

"[36] That being so what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority (1997) UKHL 46 [199] AC 232 [HL(E)]*. With

the relevant dicta in the speech of Lord Browne Wilkinson we respectively agree. Summarized they are to the following effect.

[37] The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion.' "

27. In making an assessment on the conclusions opined by the experts and the weight to be attached to their opinions especially to that of the Industrial Psychologists relative to the projective earnings of the plaintiff and applying the above principles *in casu* I have had regard to the undisputed facts in the matter. I list them to be the following:

- 27.1 Pre-accident the plaintiff was gainfully employed in the position of Legal Administration Officer.
- 27.2 Following the collision he was able to return to his former employment but voluntarily resigned from this position.
- 27.3 The experts opined that he would be able to return and continue to work in the open labour market and would be able to progress in his career path and likely earnings as anticipated in the pre-accident scenario until retirement age of 65 years.

28. On behalf of the plaintiff, Mr Potgieter, prepared an actuarial report. Same was marked Exhibit A page 10 – 16. In terms of the said report the actuary approved contingency deductions of 5/0 % on past income and 20/30 % on future income. Regarding the future contingencies the application of 10 % (pre-morbid) and 20 % (past-morbid) was applied.

29. Given the totality of the evidence presented, I am satisfied that the plaintiff has discharged his *onus* of presenting reliable evidence in proving his loss of earnings and /or earning capacity.

30. Having regard further to the decision Goodall v President Insurance 1978 (1) SA 389 (W) and the sliding scale method laid down in this decision I am of the opinion that the percentages contingency deductions as proposed by the actuary is both fair and just.

ORDER

31. In the result, the following order is made:

- 31.1 The Plaintiff is entitled to 100% of his proven/agreed damages;
- 31.2 The Defendant shall pay the Plaintiff the total amount of R 2 150 377, 15 (Two Million One Hundred and Fifty Thousand Three Hundred and Seventy Seven Rand and Fifteen Cents) in respect of both his past and future loss of earning and earning capacity as well as his general damages;
- 31.3 The said amount to be paid into the Plaintiff's attorneys Trust Account No: 03 228 5280 Standard Bank Hatfield;
- 31.4 Interest on the above amount at a rate of 10,25% per annum from a date 14 days after the date of judgment to date of payment;
- 31.5 The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 in respect of future accommodation in a hospital or nursing home or treatment of and or rendering of a service or supplying of goods to him arising from injuries sustained by him in a collision which occurred on 10 May 2013 only after the costs have been incurred.
- 31.6 The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court Scale to date, subject thereto that such costs shall include the following:

- 31.6.1 The costs of Plaintiff's counsel;
- 31.6.2 The costs of all medico-legal, actuarial, addendum and joint reports served by the Plaintiff as well as such reports furnished to the defendant or its attorney or in the Defendant's possession including the costs of any investigations requested by the relevant experts;
- 31.6.3 The qualifying fees of the experts referred to in paragraph 31.6.2 above;
- 31.6.4 The reservation and preparation fees of the experts referred to in paragraph 31.6.2 if any;
- 31.6.5 The attendance fees of A. Cramer, the Clinical Psychologist;
- 31.6.6 The reasonable costs incurred by and on behalf of the Plaintiff as well as the costs consequent to attending the medico-legal examination of both parties;
- 31.6.7 The costs of all necessary witnesses and or the Plaintiff who attended court.



**COLLIS J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA**

Appearances:

For the Plaintiff	: Adv. A.P.J Bouwer
Attorney of the Plaintiff	: Schutte De Jong Inc.
For the Defendant	: Adv. E. Moukangwe
Attorney for the Defendant	: Tsebane Molaba Inc.
Date of Hearing	: 27 November 2018
Date of Judgment	: 05 March 2019