

L113

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



Case number: 30307/2014

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

27-6-2019

DATE

SIGNATURE

In the matter between:

SEMANGELE REGINA NKANJENI

PLAINTIFF

AND

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

TOLMAY, J:

- [1] Plaintiff instituted action against the Road Accident Fund (the RAF) as a result of an accident that occurred on 22 June 2006 near Thabong Village, Welkom, Free State, when a vehicle driven by the insured driver collided with the Plaintiff who was a pedestrian at the time.
- [2] The merits and quantum were separated. The merits were finalised and conceded in favour of the Plaintiff.
- [3] At the hearing I was informed by both legal representatives that all the disputes were settled between the parties and that the only issue the Court had to decide was, whether the Plaintiff left school as a result of the injuries sustained by him and as a result suffered future loss of income. Plaintiff's case was that it was as a result of the injuries sustained during the accident and Defendant's case was that it was purely for financial reasons.
- [4] Joint minutes were filed by most of the experts. The neuro surgeons' joint minutes reflects that they inter alia agree that:
- i) the Plaintiff sustained a moderately severe (mild) traumatic brain injury;
 - ii) they do not expect neurocognitive, neurophysical or neuropsychological sequelae because of the head injury;

- iii) he sustained multiple cuts and abrasions to the head and the body in the accident; and
- iv) that his life expectancy and retirement age have not been influenced by the accident.

[5] The joint minute by the clinical psychologists, Ms Cramer and Ms Tromp found *inter alia*: (a) evidence of some cognitive impairment; (b) that Plaintiff retained some mild symptoms of post traumatic anxiety; and (c) that his academic and occupational potential has been affected to an extent due to his neuropsychological difficulties.

[6] Plaintiff testified that he was about 10 years old when the accident occurred. He said that he only had a recollection of some of the things that occurred on that day. He sustained injuries on his head and back and lacerations on his legs. He lost consciousness and only woke up in hospital. Since the accident he has been struggling with headaches, pain in his right foot and he also experiences problems with his left eye. Before the accident he did not experience any of these problems.

[7] He was between grade four and five when the accident occurred. Since the accident he has been struggling to study. According to him he did well at school prior to the accident, but also conceded in cross-examination that he was an average student. He seemed to have become very sensitive to noise since the accident, which would trigger headaches and caused him to loose concentration. He said all of the

above forced him to leave school in grade ten. He repeated grade ten twice, but failed. He then decided to leave school. He also said that he did not have money as his father passed away during 2012. He was his parents' only child, but he has half brothers and sisters from his parents' previous relationships. His one sister is a teacher and his brothers are engineers. His other sister is presently in grade twelve.

- [8] Under cross-examination he said that he started noticing learning difficulties when he was in grade seven.
- [9] After leaving school during 2013, he enrolled at a Further Education Training College (FET) to study to become a boilermaker. He said he dropped out because of financial reasons. His mother wanted him to study, but despite her best efforts they could not afford it.
- [10] He said that school was free, but FET College not and therefore he could not remain in FET College and complete his course.
- [11] Plaintiff called Ms Van Jaarsveld, the industrial phycologist, she and Ms Nel, the industrial psychologist for the Defendant completed two sets of joint minutes. In their first joint minutes they *inter alia* agreed to defer to the opinion of the educational psychologists, regarding plaintiff's pre-accident academic outcomes, and stated that they noted that the clinical psychologists indicated that his pre-morbid intellectual

potential based on his educational background and family history was estimated to be average.

[12] Ms Nel reported in the joint minutes that Plaintiff told her, that he left school because of financial reasons. She stated that he would be categorised as an unskilled worker. Ms Van Jaarsveld on the other hand opined that he would probably have been able to complete matric as well as a post school qualification (NQF 5). Post-accident however she was of the view that he would only qualify to perform unskilled labour in the informal sector of the open labour market and that he will struggle to secure employment, as he would require constant supervision. She was of the view that if he secured employment he would be earning between the lower quartile and median of an unskilled labourer and will suffer from longer stints of unemployment that will increase with age.

[13] Ms Van Jaarsveld brought out an addendum report and subsequent to that, on 17 April 2019 Ms Nel and Van Jaarsveld brought out a further joint minute dated 17 April 2019. In this minute they agreed that:

- i) that Plaintiff was 9 years old when the accident occurred;
- ii) that they would defer to the educational and clinical psychologists' who indicated that plaintiff's pre-morbid intellectual potential was estimated to be average.

- [14] It was again noted in the joint minute that it was reported to Ms Nel that Plaintiff left school due to financial constraints and she noted that he would have been categorised as an unskilled worker.
- [15] Ms Nel also indicated in this joint minute that the Defendant should appoint an educational psychologist so that a joint minute could be prepared between the educational psychologists. She stated that only then could a pre and post-accident educational scenario be determined with likely earning levels. She was however of the view that both pre- and post-accident Plaintiff would probably have been employed as an unskilled labourer. Post-accident Ms Van Jaarsveld was of the view that Plaintiff will struggle to secure employment and will only qualify for unskilled labour. If he secures employment it will be with earnings between the lower quartile and median of an unskilled labourer and will suffer from longer stints of unemployment. Despite this the Plaintiff did indeed secure employment.
- [16] Ms Nel noted in this joint minute that the Plaintiff did find employment at Refemathla Cleaning Services on 2 February 2017 as a surface cleaner at Harmony Gold Mine in Orkney and earns R3 800-00 per month. She conceded that he has been compromised to an extent, but the magnitude can only be specified when the two educational psychologists deliver their reports and joint minutes. It must be noted that Defendant never obtained a report from an educational psychologist, despite Ms Nel's opinion.

- [17] Ms Van Jaarsveld testified and confirmed her reports and conclusions. She testified that the FET qualification are equivalent to grade twelve and that the Plaintiff, despite his view that he would have been able to complete this qualification, would not have been able to do so post-accident, even if he had the required financial resources. She said that young adults have a tendency to overestimate their abilities.
- [18] The possibility of Plaintiff becoming a miner like his father was raised. Ms Van Jaarsveld said that to become a miner one would require not only physical abilities, but analytical and other skills, and miners are regarded as semi-skilled labourers. Plaintiff could pre-morbidly have been able to become a semi-skilled labourer, but due to his cognitive and behavioural impairments will not be able to do so now.
- [19] Plaintiff then called the educational psychologist, Dr Van Der Ryst, who confirmed both her report and addendum thereto. She stated that school records confirmed that prior to the accident the Plaintiff was an average student. After the accident he remained a low average to average student. In 2011 his grades deteriorated but he managed to pass grade nine. In 2012 he failed two semesters in grade ten and his father also passed away. She stated that prior to the accident he would have had the potential to progress to grade twelve and he could have pursued further to a NQF 5 level, which is in line with his family members' education, this would however have depended on his social and economic circumstances.

- [20] She said that it appears as if the traumatic sequelae of the accident resulted in cognitive deficits, which was exacerbated by the death of his father. She concluded that he could still enrol at an FET college for practical vocational training, provided that he receives psychological support. She was however of the opinion that he will not perform according to his pre-morbid potential.
- [21] She testified that his challenges became more apparent later during his schooling from grade seven onwards, because the material got more difficult and as a result of this his cognitive impairment became more apparent.
- [22] That was the case for the Plaintiff.
- [23] Ms Nel, the industrial psychologist for Defendant testified. She confirmed that she was informed by the Plaintiff that he left school because of financial constraints and not because he was struggling. She conceded that she had to defer to the educational psychologist regarding his pre and post-morbid intellectual potential. It would seem that she based her opinion solely on the fact that she was informed by Plaintiff that he left school due to financial constraints.
- [24] A perusal of the expert reports clearly indicates a mild to moderate concussive brain injury and that Plaintiff's academic and occupational potential has been affected to an extent due to his neuropsychological

difficulties. The evidence indicated that his father's death must also have contributed to financial and emotional difficulties, but the injuries and sequelae of the accident seem on a balance of probabilities to be the primary reason for the limitation of his cognitive ability and his ultimate decision to leave school. One should also consider the fact that education at school was free and consequently finances could not have prevented him to complete his schooling. The financial impact was mainly felt when he wanted to enrol in the FET College. The primary reason for him leaving school, was due to the impairment of his cognitive abilities, which was caused by the injuries sustained during the accident.

[25] As a result of the Defendant's stance regarding the reason for Plaintiff leaving school, resulted in the Defendant's actuary concluding that Plaintiff suffered no future loss of income.

[26] The actuary for the Plaintiff, in Basis 1 of his calculation take into consideration that the Plaintiff obtained employment, as the evidence indicated. As a result the quantum of future loss of income must be determined on this basis. The actuary calculated the future loss of income from 1 February 2017, an income of R45 600 per year (R3 800-00 X 12 assumed April 2019 terms). Thereafter increasing with inflation until retirement at age 62½. The actuary applied a 20% contingency had the accident not occurred and a 40% contingency

having regard to the accident. He described the method of calculation as follows:

"Method of calculation:

I calculated the present value of income, had the accident not occurred, by discounting the net projected income discussed in 1.1 above, allowing for interest and Mr Nkanjeni's probability of survival. The present value of income, having regard to the accident, was similarly calculated by discounting the net projected income discussed in 1.2 above. The loss of income was taken as the difference between the above-mentioned present values, after allowing for the contingency deductions shown in 1.3 above."

- [27] It is trite that contingency is within the discretion of the Court. The contingencies proposed by the actuary seem to be reasonable, taking into consideration all the circumstances of the case. Basis 1 is calculated as set out hereunder by the actuary.

Basis 1	Past Income	Future Income	Total Income
Income if accident did not occur	207 923	3 868 554	4 076 477
Less contingency deduction	10 396	773 711	784 107
	197 527	3 094 843	3 292 370
Income given accident did occur	97 420	1 042 481	1 139 901
Less contingency deduction	-	416 992	416 992
	97 420	625 489	722 909
Loss of income	100 107	2 469 354	2 569 461

[28] In the light of all the facts I find that the Plaintiff left school due to the impact that his injuries had on him and as a result he suffered a future loss of income as calculated by the Plaintiff's actuary as set out above. As a result the future loss of income is calculated at R2 569 461-00.

[29] The following order is made:

1. It is declared that the primary reason for Plaintiff leaving school was as a result of the sequelae of the injuries sustained in the accident;
2. Defendant is ordered to pay to Plaintiff the amount of R2 569 461-00 for future loss of income;
3. Interest to be paid from 14 days of date of this order at a rate of 10.25% per annum to date of payment; and
4. Defendant to pay the costs of the Plaintiff.



R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING: 30 APRIL 2019

DATE OF JUDGMENT: 27 June 2019

ATTORNEY FOR PLAINTIFF: C J VAN RENSBURG ATTORNEYS

ADVOCATE FOR PLAINTIFF" ADV J HERSHENSOHN

ATTORNEY FOR DEFENDANT: RAMBEVHA MOROBANE ATTORNEYS

ADVOCATE FOR DEFENDANT: MR E MOGANE