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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2581/2017

In the matter between:

P M

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 13, 14 and 16 AUGUST 2019

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 19 SEPTEMBER 2019

- [1] The Plaintiff in this action sustained serious injuries in a car accident on 19 November 2016 near the town of Thaba Nchu in the Free State Province. At the time of the accident, he was earning a nett salary of R 21 819-88 per month as a cost accountant with a company by the name of Saint-Gobain Abrasives. Presently the Plaintiff is 34 years of age, and he has a national Diploma in cost accounting and a B.Tech degree in the same field of learning. After he qualified as such, he first worked for Nokia as a cost accountant for some three years, and then for Saint-Gobain as from 2014.
- [2] The injuries sustained by the Plaintiff appear from the joint minutes by the two orthopaedic surgeons handed in during the course of the trial. According to the minutes, he sustained the following injuries: a head injury with a base skull fracture, a left femur fracture, a chest injury with contusion of the lungs, and an injury of the left elbow/forearm, with injury of the ulnar nerve. The doctors further agreed that the Plaintiff is suffering a loss of amenities due to the accident, and loss of earning capacity and a disfigurement of his body.
- [3] In the summons, the Plaintiff claimed a total amount of R 8 794 671-00 damages for his injuries and the consequences thereof. This total amount is calculated as follows: R 50 000-00 for post medical and hospital expenses, R 350 000-00 for estimated future medical treatment, R 7 594 671-00 for past and future loss of income, and R 800 000-00 for general damages. This Court has already ordered on 6 February 2018, by

agreement between the parties, that the issue of merits and quantum be separated and that the defendant is liable to pay hundred percent of the Plaintiff's proven or agreed damages. The trial therefore concerned only the quantum of damages.

- [4] The first witness to testify in the trial was the Plaintiff himself. His evidence was not contested by any cross-examination at all, with the result that it has to be accepted as common cause between the parties. The Plaintiff testified that he had to use crutches for a period of 10 months after the accident due to a metal pin that was inserted to his left femur from the hip downwards. As a result of the pin, he cannot run anymore, he cannot kneel down, he cannot stand for long periods of time and he has problems with climbing stairs.
- [5] Worst of all, he testified that his head injury had the profound effect of impairing his mental abilities at the workplace. Whereas the position he held requires the ability to concentrate, be accurate and to calculate, he is now unable to perform sufficiently on such a level. He has become forgetful, even to such an extent that he cannot even recall a formula on Excel that he has created himself. Although he continued with his employment with Saint-Gobain after the accident his concentration was severely affected, he made many errors in his work, and his overall performance became reduced. At some point he was even issued with a written warning pertaining to his work performance. This warning did not have the desired result, and after approximately one year the Plaintiff lost his job through restructuring and retrenchment. He then remained unemployed during 2018, but at the beginning of

2019 he found employment on a six months contract, again as a cost accountant. The contract was not renewed after the period of six months, and he is now unemployed again. Although he went for many interviews for employment, he was not successful.

- [6] The evidence of the Plaintiff is confirmed by joint minutes between industrial psychologists on both sides. They agreed that after the accident the performance of the Plaintiff declined drastically as he struggled to pay attention to detail and as a result, made errors. Referring also to a report of Dr. J.H. Kruger, they came to the conclusion that the Plaintiff would in all probability no longer be suited to work as a cost accountant anymore. The report of Dr. Kruger indicates that the Plaintiff showed signs of a moderately severe to severe traumatic brain injury, consisting of, inter alia, fractures of the lateral walls of the left orbit and anterior maxillary sinus. Dr. Kruger is a neurosurgeon, and his report was handed in without any objection from the defence.
- [7] Mr. Ben Moodie, one of the industrial psychologists, testified that in his opinion, the Plaintiff is, realistically speaking, not employable anymore. His head injury and the consequences thereof, may cause him big problems in future interviews for a job. He will be impaired by his forgetfulness in whatever he does. I pause here to mention that when the Plaintiff testified, the Court observed him closely to see for itself whether he showed any signs of the moderately to severe brain injury. At first glance, the Plaintiff appeared to be a friendly and presentable young man, but after a while it became apparent that he was having difficulties concentrating and recalling detail. He often repeated himself and

sometimes appeared confused when responding to specific questions. In this respect it needs mentioning that the evidence of Mr. Moodie was also not placed in dispute by the defence.

- [8] Mrs. Lindelwa Grootboom, a clinical psychologist, was one of the last witnesses called to testify on behalf of the Plaintiff. In short, she found that the Plaintiff lacked cognitive flexibility. Someone can, for instance, have a so-called blank because of an overburdened brain. In the case of the Plaintiff, he has a mental block of the same kind. When asked to recall a story read to him, his performance was far below the average. His word fluency is inadequate, and it is the frontal lobe functioning of the brain which affects the word fluency of a person. She concluded that it is likely that the personality and behavioural changes of the Plaintiff are permanent in nature, possibly due to the frontal or temporal lobe brain injury. The evidence of this witness was again not challenged in cross-examination.
- [9] The joint minutes of the two occupational therapists on both sides were also presented to the Court. They agree that the Plaintiff is best suited for sedentary work, but that he will remain vulnerable in the open labour market and may experience difficulty finding and sustaining new employment.
- [10] In view of the evidence tendered, and on the basis of the Courts own observations, I have to find that the Plaintiff is not likely to be employed as a cost accountant again. In circumstances where thousands of able-bodied persons are without jobs in our country today, I also find that the prospects of the Plaintiff securing any

other kind of job in the future are also not good. His physical and mental impairment will become evident during any job interview, and will in all probability cause him to be found an unsuccessful candidate.

[11] The last witness called by the Plaintiff, was Mr. JJ.C. Sauer, an actuary. He issued an actuarial certificate indicating the future loss of capital income of the Plaintiff, without calculating the total package, and taking into account the applicable RAF cap, as an amount of R 6 598 914-00. In coming to this figure, Mr. Sauer applied a contingency deduction of 35% in order to provide, inter alia, for a much lower income than before the accident. He explained that such deduction was also done to provide for increased employment vulnerability, for labour incapacity, uncertainty, possible long periods of unemployment and early retirement. Adding the Plaintiff's past loss of income to the above figure (calculated on a contingency basis of 5%), the total loss of income amounts to R 6 831 934-00, he testified. The evidence of Mr. Sauer was not seriously challenged by the defence.

[12] No witnesses were called to testify on behalf of the Defendant. Mrs. Sander, appearing for the Defendant, submitted in final argument that the Plaintiff's future loss of income should be calculated on a 35% contingency deduction, as the actuary had done. As for the amount of damages, she informed that she is instructed to suggest an amount of R 200 000-00, but she added that she could take that argument not any further. Mr. Steenkamp, appearing for the Plaintiff, referred the Court to a number of

authorities where general damages to the current value of between R 700 000-00 and R 900 000-00 were awarded in cases where brain injuries were sustained. One of those cases is **Tobias v Road Accident Fund (unreported Case No. 4934/09 North Gauteng High Court)**, which appears to be on all fours with the present case as far as the injuries and likelihood of employment are concerned. In that case, the court granted an amount of R 722 000-00 (present value) for general damages.

- [13] When it comes to the final awards to be made, I am mindful of the view expressed by the orthopaedic surgeons that the Plaintiff would need further surgery and treatment in the future. The order I intend making, will take care of this aspect. As for the claim for general damages, I am mindful of the pain and suffering the Plaintiff had to cope with, and of the emotional trauma caused by the reality that he will never be able to work as a cost accountant again, or possibly for any employer in any other capacity for that matter. In my view, an amount of R 650 000-00 general damages would be fair in the circumstances.
- [14] As far as the contingencies are concerned, I find no reason to question the calculations of the actuary. Although it was already found that the prospects of the Plaintiff finding any employment are slim, the possibility must be considered that he would somehow manage to generate some income for himself by way of a business at home or somewhere else, and maybe with assistance of others. This is so, because the Plaintiff has shown in the past that he is driven by ambition. After all, he has attained a diploma and a university degree to secure his future. His post-accident efforts to

find a job, is further evidence of his ambition to become financially active again. I cannot imagine for a moment that he would be content just to sit back in future without doing anything. In my view, the 35% contingency applied by the actuary, is appropriate.

[15] In making an award for the total loss of income, I will also make provision for the income generated by the Plaintiff during his six-month contract. The certificate signed by the actuary is dated before that period of six months. I make no award for the past medical and hospital expenses, because no evidence pertaining thereto has been presented.

[16] Only one issue remains. Mrs. Sander has raised the question whether the amount awarded to the Plaintiff should not be protected in a trust, due to the possible large amount of the award. Her concern is probably founded on a suggestion by Dr. Kruger in a letter dated 9 October 2019, that the money be protected in a trust. No evidence was placed before the Court, however, that the Plaintiff is unable to manage his own affairs. It was also not the impression of the Court, having questioned to and having seen the Plaintiff during his testimony, that he would not be able to manage his own affairs. There is no indication that he has become irresponsible or careless after the accident. Should it appear later that I am wrong in this respect, the mechanisms provided for in Court Rule 57 may be invoked.

[17] In the premises I make the following order:

1. The Draft Order attached as “X”, and as amended, is made an Order of Court.

P.J. LOUBSER, J

For the Plaintiff:

Instructed by:

Adv. M.J. Steenkamp

VZLR Attorneys, Pretoria

c/o Du Plooy Attorneys

Bloemfontein

For the Defendant:

Instructed by:

Adv. I. Sander

Maduba Attorneys

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