

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

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

5170/2016

16/3/2018

In the matter between

GUNTER: TIAAN

Plaintiff

and

Road Accident Fund

Defendant

JUDGEMENT

A. INTRODUCTION

1. The Plaintiff was severely injured on 3 April 2012 when a motor vehicle, in which he was a passenger, overturned.
2. Action was instituted against the Defendant on 6 March 2017 and the following orders was made:
 - 2.1 Merits were conceded;
 - 2.2 Defendant was ordered to pay R600 000.00 to the Plaintiff in respect of general damages; and 1
 - 2.3 An undertaking in terms of section 17(4)(a) of the Road Accident

Fund Act, was ordered.

3. At the pre-trial conference held on 16 November 2017, the Plaintiff decided not to persist with this claim for past hospital and medical expenses.
4. The matter was enrolled for hearing on 22 November 2017 in respect of quantum future loss of earnings only. There were 9 expert reports filed in terms of Rule 36(9)(b) in respect of the Plaintiff's quantum claim. The Defendant filed 5 expert reports to counter the 9 reports filed by the Plaintiff. These reports were from the neuro surgeon, educational psychologist, occupational therapist; industrial psychologist and actuary.
5. In terms of the minutes of the pre-trial held on 16 November 2017, the Defendant was requested to admit the balance of Plaintiff's expenses reports and revert to the Plaintiff by noon on 20 November 2017 and failed to do so by the registered date; as a result thereof the Plaintiff's reports would be deemed to be admitted. These reports that were deemed to be admitted were the following:
 - 5.1 Independent Medical Examiner (Dr. T.J. Enslin)
 - 5.2 Orthopedic surgeon Dr. I Liebenberg
 - 5.3 Ophthalmologist (Dr. N. Cornelius); and
 - 5.4 Mr B. Mallinson (neuropsychologist).
6. Joint minutes were obtained from:
 - 6.1 the neurosurgeons (De Klerk on behalf of Plaintiff and Dr. Mazwi on behalf of the Defendant;
 - 6.2 the educational psychologist (Mr Prinsloo on behalf of Plaintiff and Ms Sepenyane on behalf of Defendant;
 - 6.3 the occupational therapists (Ms Pretorius on behalf of the Plaintiff and Ms Hudson on behalf of Defendant; and
 - 6.4 the industrial psychologists (Mr. Prinsloo on behalf of Plaintiff and Ms

Ratala on behalf of Defendant).

7. The parties agreed that the joint experts minutes of the neuro-surgeons would form part of the evidence.
8. At the hearing of this matter, the Defendant's legal representative had not reverted to the Plaintiff's legal representative about the admission of the balance of Plaintiff's experts reports. The agreed date by which this admission had to be done was 20 November 2017, failing which the Plaintiff's expert's reports was to be deemed to be admitted.
9. The experts reports that are deemed to be admitted are as follows:
 - 9.1 Dr TJ Enslin (Independent Medical Examiner);
 - 9.2 Dr F Liebenberg (Orthopedic Surgeon);
 - 9.3 Dr N Cornelius (Ophthalmologist); and
 - 9.4 Mr B Mallison (Neuropsychologist).
10. Joint minutes of the pre-trial conference were obtained from:
 - 10.1 the neurosurgeons (Dr. de Klerk on behalf of Plaintiff and Dr. Mazwi on behalf of Defendant);
 - 10.2 the educational psychologist (**Ms.** Prinsloo on behalf of Plaintiff and Ms. Sefenyane on behalf of Defendant);
 - 10.3 the occupational therapists (Ms. Pretorius on behalf of Plaintiff and Ms. Hadson on behalf of Defendant); and
 - 10.4 the industrial psychologists (Ms. Prinsloo on behalf of Plaintiff and Ms. Ratala on behalf of Defendant.)
11. The parties have agreed that the joint expert minutes of the neurosurgeons would form part of the evidence.
12. The Plaintiff abandoned the past loss of income, as a consequence, only future loss of income would be agreed. In this regard, Plaintiff's legal counsel submitted that the appropriate award for future loss of income

should be the same of R4 459 155.00 (four million four hundred and fifty-nine thousand one hundred and fifty-five rand). On the other hand, the submission made on behalf of Defendant is that the sum of R2 973 096.00 {two million nine hundred and seventy-three thousand and ninety-six rand) for future loss of income to the Plaintiff would be appropriate under the circumstances.

B THE EVIDENCE

13. Recording for the admitted reports, the following injuries were submitted by Plaintiff:

- 13.1 a mild diffuse traumatic brain injury;
- 13.2 a mandible fracture, a comminuted fracture of the anterior and lateral wall of the left maxillary sinus;
- 13.3 as injury to the left shoulder and right foot, and abrasions and lacerations.

14. Plaintiff was admitted in hospital on 3 April 2012 and discharged on 4 April 2012. It is common course that the following injuries were suffered by the Plaintiff:

- 14.1 a mild diffuse traumatic;
- 14.2 a mandible fracture;
- 14.3 a zygomatic arch fracture;
- 14.4 a comminuted fracture of the anterior and lateral wale of the left maxillary sinus;
- 14.5 as injury to the left shoulder and right foot; and
- 14.6 abrasions and lacerations.

15. According to Dr Theo Enslin's report, Plaintiff had loss of consciousness for approximately 20 minutes⁴ after accident. He was treaded conservatively for his head, mandible fracture, zygomatic arc fracture, left

shoulder and left boot. The CT scan of the brain reported as normal according to the reports by Dr De Klerk.

16. When the neuropsychologist Mr. Mallinson ("Mallinson"), inspected the doctor's notes of Waterfall City Hospital's records, the doctor's notes were not included therein and as such no GCS records existed. Based on the CT Scan of the brain the radiologist noted, according to Millinson, that "despite severe facial bone fractures is intracranial bleeds or raised intracranial pressure is identified".
17. Mallinson recorded that although Plaintiff condition has stabilized and that he is functioning again, although not nearly at the same level as before the accident, he was still suffering from the following *sequelae* as a result of the injuries sustained in the collision:
 - 17.1 He complains of daily intense headaches which lasts all day and result is him becoming irritable;
 - 17.2 A definite decline in his short-term memory;
 - 17.3 He has become slightly intolerant and aggressive at times;
 - 17.4 He has pains in his lumbosacral region, which is aggravated by standing, walking, running, negotiating stairs, including and uneven terrain.
18. Mallinson is of the view that in future, Plaintiff would still require various forms of treatment as therapy, such as:
 - 18.1 Psychotherapy;
 - 18.2 Occupational therapy;
 - 18.3 Physiotherapy; and
 - 18.4 Scar revision surgery.
19. Mallinson assessed Plaintiff making⁵ use of the tests detailed in his report,

as being the least and appropriate measures available, given Plaintiff's age, language group and level of education. He believes neuropsychological test results should be interpreted against the benchmark of the individual's estimated level of pre - accident functioning, which is usually determined by examining the individual's highest level of functioning prior to the accident. In this instant case, Mallinson used Plaintiffs senior certificate results. He is of the opinion that Plaintiffs pre- accident level of functioning is estimated to have been in the superior range.

20. Mallinson also assessed Plaintiffs attention and working memory making use of the tests mentioned in his report. According to his, Plaintiffs variable performance results suggest auditory attention difficulties. Plaintiffs performance was marginally below the level expected and indicates poor auditory attention difficulties. Plaintiffs performance was marginally below the level expected and indicated poor auditory attention and difficulty with working memory. Mallinson opines that the poorer than expected performance on some of the least was probably due to the following neuropsychological difficulties:

- 20.1 poor auditory attention;
- 20.2 difficulty with working memory;
- 20.3 psychomotor slowing;
- 20.4 poor visual attention;
- 20.5 poor incidental visual memory;
- 20.6 poorer than expected acquisition of information into vital memory.

21. Mallinson furthermore opines that the aforesaid neuropsychological difficulties fall into the mild-to moderate category. He concluded that while Plaintiff has been able to complete his professional qualification and find employment he is not functioning at the level he would have had the accident not occurred. His neuropsychological difficulties will result in a decrease in efficiency in the work place.

22. Mallinson furthermore testified that the brain injuries were subtle at a cellular level and were organic in nature. Having regard to the fact that MMI (maximum medical improvement) has been reached, the injuries are permanent with improvement not likely to occur. He also testified that the neuropsychological difficulties which he found to exist could not be improved by treatment. He concluded that his scientific evidence exist to support the proposition that the neuro-psychological difficulties could be improved by treatment. His evidence was uncontroverted.
23. Ms. Elmarie Prinsloo ("Prinsloo"), an Educational Psychologist was the best witness to testify for Plaintiff. She testified about the impact of the accident on Plaintiffs education and training possibilities. She also provided opinion on Plaintiff's correct cognitive functioning and as opinion on the influence of the sequelae of the accident on his pre accident and post-accident education and training opportunities.
24. Prinsloo supported the findings of Mallinson based on the own tests administered. She testified that she and her counterpart, Ms. Sepenyane ("Sepenyane") concluded a joint expect minutes. She stated that the joint minutes was initialed by both of them on each page and signed at the end thereof. She confirmed the content of the said joint minutes as being correct.
25. The joint minutes of the Educational psychologists have agreed in all reports except for Sepenyane's view that the neurocognitive deficits could be improved by treatment. Prinsloo disagrees with Sepenyane that although MMI has been reached the, medical treatment will not improve Plaintiff's deficits. Prinsloo was a credible witness and Sepenyane's version was not put to her during cross examination.
26. The next witness to testify for Plaintiff was Mr. Kobus Prinsloo ("Kobus") and Industrial Psychologist He testified based on his addendum reports and compared Plaintiffs pre - and post morbid positions in respect of Plaintiffs employability and caring capacity. His evidence was credible and not challenged under cross examination and what his counterpart Ms. Manoko Ratala would come and testify.

27. Kobus testified that over and above the one year agreed delay in respect of Plaintiff completing his honours degree, that he is of the opinion that Plaintiff would also have an additional one year delay, because, even as a specialist, Plaintiff still have deficits if compared with as abled - bodied competitor. This aspect of his evidence was also not challenged in cross-examination.
28. Kobus opines that Plaintiffs competitiveness in the open labor market has been materially affected. He concludes that Plaintiff would damming his career lifespan be at risk with regards to his occupational functioning and that he would need to exert more effort, vigor, motivation and persistence to sustain his personal productivity out post. He is furthermore of the view that a lighter post- morbid contingency deduction that the pre - morbid contingency should apply.
29. He testified that both he and Ratala, his counterpart concluded a joint export minutes which was initialed by both of them on each page and signed at the end thereof. He confirms the contents of the said joint minutes as being correct. It is clear from the joint minutes of the Industrial Psychologist, that they agree in all respects save for the retirement age. Kobus was not challenged in cross-examination in respect of the contents of the joint minute.
30. Kobus and Ratala agree on Plaintiffs pre-morbid career scenario and the applicable relevant salary scales. They agree that Plaintiff would have worked with normal retirement at 65 years of age but Kobus asked a possibility of Plaintiff working until 70 years of age. They both agree that the normal pre-morbid contingency deduction be considered.
31. Kobus and Ratala agree that Plaintiff is a vulnerable individual in terms of identified cognitive process deficits. They also agree that Plaintiff will continue to function as junior Quantity Surveyor and that he will react a ceiling of junior partner and function in that capacity until normal retirement. The Educational Psychologist further agree that Plaintiff be compensated for loss of income which represents the difference between the projected pre and post- morbid earnings until normal retirement.

B. ISSUES FOR DETERMINATION

32. The issue to be determined is the quantum to be awarded for contingency allowance for future loss of income given the injuries sustained by the Plaintiff.

C. LEGAL PRINCIPLES

33. In **Shield Insurance Co Ltd v. Booysen**¹ it was held that the determination of contingency allowances involves a processes of subjective impression on estimation rather than objective calculation, in other words, allowance on which judicial opinions vary appreciably.
34. In **Southern Insurance Association v Bailey NO**² the Court adopted the approaches that can be used to determine the future form of earnings. Nicholas JA said the following *"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 guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and this may vary from strongly probable to speculative. It is manifest that either approach Involves guess work to a greater or lesser extent."*
35. It is also trite that in a case where the Court has it before if material on which an actuarial calculation can usefully be made, that the first approach offers any advantage over the second. While the result of an actuarial computation may exist, they may be no more than an informal guess and have an advantage of a logical basis³.
36. In **Goodall v President Insurance Co LTD**, Margo J held, as follows⁴:
- "In the assessment of a proper allowance for contingencies, arbitrary*

¹ 1979(3) SA 953 (A) at 965 G-H

² 1984 (1) 98 (A) at 113

³ See Smit NO v the Road Accident Fund, the Quantum of Damages, Corbett and Honey, Vol 5, 84 -251

⁴ 1978(1)SA 389 (WLD) at 392+1-393A

considerations must Inevitably play a part, for the act or science of foretelling the future, so confidently practiced by ancient prophets and soothsayer, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office."

37. The relevant contingency deductions are dependent upon the circumstances of each case⁵. The determination of the percentage contingency deduction to be applied, falls within the discretionary powers of the trial judge and depends on the circumstances of each case⁶.
38. There is no fix rule on the percentages of the contingency deductions in the different case. Each matter is assessed on its own merits with the court exercising its discretionary powers.
39. In the instant case, Mr Greg Whittaker, an actuary, testified on behalf of Plaintiff. His calculations were based on the joint minutes of the Industrial Psychologist. He concluded that "Cap" finds no application (based on the contingencies used) and that Defendant's actuarial calculations is not based on the joint minute of Industrial Psychologist.
40. Plaintiff in the instant case is seeking damages for future loss of earnings.
41. Mr Maritz submitted that base on the actuarial calculations , by an award of R4459 155.00 (four million four hundred and fifty-nine thousand one hundred and fifty-five rand) in respect of future loss of earnings in fair and reasonable base on the evidence.
42. I have considered the evidence by all experts on behalf of the Plaintiff, the expert reports and the submissions made on behalf of the parties by both counsels.
43. I am of the view that a determination of an award of R3 716 125.50 (three million seven hundred and sixteen thousand one hundred and twenty five rand) is fair and reasonable base on the evidence.
44. The last issue which needs determination is the punitive costs prayed for by the Plaintiff.

⁵ See *Nochomowtz v Santam Insurance Co Ltd* 1972 (1) SA 78(T)

45. The underlying principle in consideration of the award of costs on an attorney-and-client scale is whether or not special circumstances exist to warrant such order in favour of the winning party⁷.
46. The basis of such an award of costs is by reason of special considerations arising either from the circumstances which gave rise to the action or from the conduct after losing party. This type of the costs award is considered as a way to ensure more effective means that a successful party will not be out of pocket of the expense caused by xxx litigation⁸.
47. In this case this Court has a discretion in the special circumstance to consider such application.
48. The Defendant refused to consent that the joint experts' minutes could form part of the evidence. The refusal according to the joint minutes, was based on the fact that Defendant intended to call its own experts. At the trial of this case, no experts were called by the Defendant to testify on its behalf. The refusal to consent to the joint minutes leads to an inescapable conclusion that it was done in bad faith.
49. Following such refusal, the Plaintiff was compelled to call his own expert witnesses who all testified. These experts were not challenged in cross-examination by the Defendant and no version of the Defendant's case was put on them to be supported by its own expert witnesses. This has led to the Plaintiff incurring unnecessary costs on the hearing of this matter.
50. The Defendant closed its case without calling any of its own expert witnesses.
51. In the light of these circumstances, I am of the view that the Defendant acted in bad faith. As a consequence I agree with the Plaintiffs counsel that an appropriate punitive costs order would be justified under these circumstances.

52. **ORDER**

⁶ See Van der Plaats v SA Mutual Fire of General Insurance Co Ltd 1980 (3) QOD1

⁷ See Nel v Waterberg Land Touwer s Ko-operatiewe Vereeniging 1946AD 597

⁸ See SA Druggists LTD v Beecham Group pie 1987 (4) SA 876 (T) at 882 HJ

The following order is made: -

- a) Payment of R3 716 125.50 (three million seven hundred and sixteen thousand one hundred and twenty-five rand fifty cent) for damages, being loss of earnings, following injuries sustained by the Plaintiff in a motor accident on 3 April 2012;
- b) The amount set out in(a) shall be payable within14 {fourteen) days of the judgment and be deposited into the Plaintiffs attorneys of record's trust account details of which are as follows:-

Account holder: : MacRoberts Inc
Bank : Standard Bank
Account number : [...]
Branch : Pretoria
Branch Code : 01-00-45
Ref number : 2040142

- c) The Defendant's claims handler is ordered to request payment of the capital amount set out in (a) above within a period of (seven) days from the date upon which this court order has been served on Defendant and/or Defendant's claims handler and to provide Plaintiffs attorney with written confirmation that payment has been requested.
- d) Should Defendant fail to make payment of the capital amount within 14 (fourteen) days of judgement by this court, Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10,25% (ten comma two five percent) per annum as from the date of this to date of final payment.
- e) Defendant is ordered to pay Plaintiffs attorney and client's costs on High Court scale which costs will include, but will not be limited to:-
 - i. The costs of all experts reports, medico- legal reports, actuarial reports, radiological reports, addendum reports and combined

reports of all experts of whom notice has been given and/or whose reports have come to the knowledge of Defendant and/or their possession and/or contained in their Plaintiff's bundle of documents.

- ii. The full fees of Mr. NC Maritz Senior Counsel for preparations consultation, pre-trial conferences, heads of argument and day fees for 22, 23 and 24 November 2017.
- iii. The reasonable travelling subsistence and transportation costs, including e-toll fees incurred by and on behalf of the Plaintiff for attending the medico- legal examination of both parties.
- iv. The costs relating to Plaintiff's trial bundles, experts reports, pleadings and notices, all indexes, documents bundles, witness, including the costs of six full copies thereof, costs of holding all pre-trial conferences, round table meetings between the legal representatives for both Plaintiff and Defendant and counsel's charge in respect thereof to all reasonable travelling costs incurred by Plaintiff's attorneys and counsel to attend such pre-trial conferences.

SENYATSI AJ

For the Plaintiff:

Mr NC Maritz

Instructed by MacRoberts Attorneys, Pretoria

For the Defendant:

Mr Maphellelela

Instructed by Marivate Attorneys, Pretoria