IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

CASE NO.: 57635/2016

28/3/2018

In the matter between:

SIBUSISO NKOSINATHI MATSHILWANE

And

ROAD ACCIDENT FUND

JUDGMENT

MOSOPA, AJ

INTRODUCTION

[1] The plaintiff, who is currently 22 years of age, born on the 13 June 1996, was a pedestrian on the 01 .Ju ne 2014 when the motor vehicle collision occurred on the Gammakola road, Mpumalanga, driven by an unknown driver.

[2] The plaintiff was at the time of the motor vehicle collision a grade 8 learner at Makhosane Senior Secondary School, Mpumalanga.

[3] At paragraph 6 of the plaintiff's particulars of claim it is averred that;

6 "As a result of the aforesaid collision, the plaintiff sustained the following bodily injuries;

- 6.1Head injury;
- 6.2. Severe laceration to the occiput;
- 6.3. Abrasion on the nose, upper lip, chin and left wrist;
- 6.4. Mild swelling on the left shoulder;
- 6.5. Small wound in the big toe;
- 6.6. Fractured teeth 13 - 21;
- 6.7. Knee abrasion;
- 6.8. Abrasion on the toe."

ISSUES FOR DETERMANATION

[4] Mr Dredge on behalf on the plaintiff informed me at the commencement of the proceedings that the merits were settled 100% in favour of the plaintiffs proven damages.

[5] The general damages were also settled in the amount of R400, 000 (Four Hundred Thousand Rand) in favour of the plaintiff. The only outstanding issues are the contingencies to be applied, pre and post morbid for the loss of earning or earning capacity. It was further brought to my attention that the fund made an interim payment of R500, 000 (Five Hundred Thousand Rand) in November 2017 and such an amount is to be deducted from the amount arrived at after the deduction of the contingencies.

THE APPLICABLE LEGAL PRINCIPLES

[6] Nicholas JA said the following in the matter of **Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98 (A) at 114 C - D;** "In a case where the court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than the "informed guess" it has the advantage of an attempt to ascertain the value of what was lost on logical basis, whereas the trial Judges gut feeling (to use the words of the appellants counsel) as to what is fair and reasonable is nothing more than

a blind guess. **(Goldie v City Council of Johannesburg 1948(2) SA 913 (W) at 920**)"

[7] In the Southern Insurance Association Ltd (supra) at 116G to 117A the following was stated. "Where the actuarial method of computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has a "large discretion to award what he considers is right (per **Holmes JA in Legal Insurance Company Ltd v Botes 1963(1) SA 608 (A) at 611 F.** One of the elements of exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". That includes such matters as the possibility that plaintiff may as result have less than a "normal" expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or to the general economic condition.

The amount of any discount varies depending on the circumstances of each case. See **Van Der Plaats v South African Mutual and General Insurance Co Ltd 1980(3) SA 105 (A) at 114 - 115.** The rate of any discount cannot of course be assessed on any logical basis the assessment must be largely arbitrary and must depend upon the trial Judges impression of the case."

[8] In **AA Mutual Insurance Association Ltd Magagula 1978(1) 805 (A) at 813 D - E,** the following was stated "Having due regard to all these factors in the light of particular circumstances of the matter, I am of the opinion that it would be proper and correct to provide for contingency of 50 percent of past loss of income as well as future loss of income."

There is in principle no reason for distinguishing between the two categories of income for purposes of contingencies. Mr Munro merely for the sake of convenience in making his calculations, distinguished between loss of income before and after date of calculation on 10 December 1976. In my opinion the court erred in fixing a contingency of 10 per cent in respect of past loss income and 20 per cent in respect of future loss of income.

[9] In **Road Accident Fund v Guedes 2006(5) SA 583 at paragraph 8, Zulman** JA stated " It is trite that a person is entitled to be compensated to the extent that a 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 1992 (1) SA (1) A at 5 C- E).** The calculation of the quantum of a future amount such as loss of earning capacity is not, as I have 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, that is often a very rough estimate (see for example, **Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98(A).** The court necessarily exercises a wide discretion when it assess the quantum of damages due to the loss of earning capacity and has large discretion to award what it considers right.

Courts have adopted the approach that, in order to assist with such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then trial court has a wide discretion to award what it is just(see for example the **Bailey Case and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980(3) SA 105(A) at 1141150)"**

[10] Robert J Krech in his book The Quantum Year Book 2018 at page 114 under the heading "General Contingencies" provides the following, "When assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowances has been made on the actual calculation. The deduction is the prerogative of the courts. However, most matters do not go to court so the relevant deduction becomes a matter of negotiation. Even where matters

don't go to court some Judges seek advice from expert witnesses as regards the appropriate deduction to make.

General contingencies cover a wide range of considerations which may vary from case to case and may include taxation, early death; saved travel costs, loss of employment promotion prospects, divorce etc. There are no fixed rules as regards general contingencies. The following guidelines can be helpful. Sliding scale: % percent per year to retirement age, i.e.: 25% for a child claims, 20% for youths and 10% in the middle age (see **Goodall v President Insurance 1978(1) SA 389(W), for claim see Bailey v Southern Insurance 1984 (1) SA 98(A)"**

THE EVIDENCE OF NEUROSURGEONS

[11] The experts in their joint minutes dated the 06 November 2016 agreed that the plaintiff who was a pedestrian at the time of the motor vehicle accident was physically fit and healthy prior to the accident. He never suffered a head injury previously.

[12] As a result of the motor vehicle accident the plaintiff sustained a mild concussive brain injury, injury to the teeth, shoulder and knee injury.

[13] Post- accident the plaintiff complains of recurrent headaches and also complains of memory loss. He has no residual neurological deficits. He also complains of painful teeth and gums and also pains in his right leg. The plaintiffs risk for developing late post traumatic epilepsy is equivalent to that of the population. The plaintiffs longevity has not been affected by his injuries.

THE EVIDENCE OF THE EDUCATIONAL PSYCHOLOGISTS

[14] The expert in their joint minutes dated 18-19 January 2018 agreed that when the plaintiff was involved in the motor vehicle accident as a pedestrian on the 01 June 2014 he was 17 years and 11 months' old.

[15] The plaintiff sustained a mild concussive brain injury with associated facial bone fractures, injury to the teeth, shoulder and knee injury.

[16] The experts agreed that pre-morbid there was a normal pre-natal and

early childhood development. No notable head injury or loss of consciousness was reported. The plaintiff was never involved in a motor vehicle accident prior to the motor vehicle accident of the 01st June 2014.

[17] The plaintiff's parents have both attained grade 12. The plaintiffs mother is employed as a domestic worker and his father's occupation is unknown. The plaintiffs uncle and cousin have Grade 12 and 11 educations respectively.

[18] The experts agreed that the plaintiffs pre-morbid estimate was of average intellectual ability, which is consistent with functioning at a level where he could have progressed through mainstream school system, matriculated and progressed to obtain a tertiary qualification, at least a diploma(should they have the financial means or access bursaries in the form of NSFAS) considering that it is documented in recent studies that children are achieving better qualifications than their parents. The candidate would been a good candidate for the labour market

[19] Post-morbid learning potential the experts agreed that plaintiff has been dealing with substantial psychological and psychiatric sequelae caused directly by the motor vehicle accident. They further agreed that the plaintiff will not cope with the demands of his school work especially in the senior grades, where higher order of thinking and learning skills are required, particularly in view of scholastic, cognitive, behavioural and psychological difficulties.

[20] They also agreed that based on all available information, (such as depressed cognitive profile, behavioural difficulties including impulsivity, lapses of concentration and slow psychomotor speed which will serve as an added barrier to his studies, emotional trauma due to the accident and sequelae of his injuries) given an accident in question in all likelihood the plaintiffs highest qualification would be grade 11.

THE EVIDENCE OF THE INDUSTRIAL PSYCHOLOGISTS

[21] The experts in their joint minutes dated 08 February 2018 agreed that the plaintiff pre-accident upon completion of a diploma (assuming he would

have studied on a full time basis) he would have entered the labour market within 1-2 years on completion of a 2-year diploma earning a total package per annum in line with Paterson 84/85 median level according to the plaintiffs expert and Paterson: 83/84 medium according to the defendants expert. It was agreed by the experts that for purpose of settlement that they take the average.

[22] They further agreed that the plaintiff with further training and experience would have progressed to reach his career ceiling, by the age of 45. Upon reaching his career ceiling the plaintiff would have been earning a total annual package in line with the Paterson C4/C5 according to the plaintiff's experts and Paterson C3/C4 according to the defendant's experts.

[23] The plaintiff's expert suggested that the appropriate pre morbid contingency be applied to account for pre-existing cognitive vulnerabilities that may have caused a delay in his career progression. The defendant expert agreed that if the pre-existing cognitive difficulties are confirmed by the appropriate expert then the pre-morbid contingency should be applied.

[24] The experts agreed post-accident that there is no past loss of earning which has been incurred as the plaintiff was a scholar at the time of the accident. Further agreed that from a physical perspective based on the expert opinion, the plaintiff did not sustain serious injuries, he remains suited for sedentary light to medium natured work (Ms Burger, Occupational Therapist, did not comment on his ability to handle heavy loads it seems that the claimant ability to only handle up to medium natured work is due to his natural abilities and not due to reduced abilities due to his injuries)

[25] It must be noted that there was difference in opinion from the experts with regard to post accident calculations. The plaintiff's expert opines that the plaintiff has been rendered unemployable in the open labour market. It is unlikely that he will be placed in a sheltered employment factory (SEF) as there are only 12 nationally. Taking into account the extensive waiting list, the plaintiff's chances of being placed in such an environment are poor.

The defendant's expert opines that the application of an appropriate contingency must be considered due to the accident exacerbating/contributing to his psychological cognitive difficulties. Such difficulties will negatively impact on the plaintiff's ability to compete for employment and also sustain employment, his ability to interact with others and will likely be dependent on an accommodating employer, he will likely struggle to secure employment and may be at risk to experience extended periods of unemployment in future as a result.

The defendant's expert recommends that appropriate apportionments should be applied considering the pre-existing difficulties mentioned by Ms Jonker. It was further the opinion of the defendant's expert that the plaintiff will enter open labour market in an unskilled/semi-skilled position.

CONTINGENCY ALLOWANCES

[26] In the present matter the calculations were made by R IMMERMANN , FIA; of Geraci Jacobson Consulting Actuaries on the 12 February 2018. The calculations were based on the joint minutes of the industrial psychologist MS Talia Talmud for the plaintiff and industrial psychologist for the defendant Ms Leanie Coetzer.

[27] Two bases were laid in the actuarial report, Basis I, based on Mrs Talmuns opinion and Basis 11, based on Ms Cotzers opinion. Mr Smit for the defendant in his informative and helpful heads of argument and oral submissions, submitted that they admit that the calculation and underlying actuarial assumptions are correct and that the defendants accepts the "value of income but for the accident" in Basis II as correct.

[28] It is common cause in determining the correct deduction to be made with regard to contingencies that the court will follow the calculations as contained in Basis II. The only contention raised by the defendant with regard to basis II is the contingency deduction of 20% and contends that a higher deduction of 40% should be effected.

[29] The calculation of future loss of income was tabled as follows by the actuary.

29.1.	Value of Income but for the accident	R 7, 859,472
	20% contingency deduction	R 1. 571.894
		R 6. 287,458
	Value of income having regard to the accident	R1, 304,458
	30% contingency deduction	R 391.337
		R 913. 121
		R5, 374,457

[30] The plaintiff at the time of the motor vehicle collision was only 18 years of age and a scholar. From the expert reports it is clear that the plaintiff failed grade 2 level of education and grade 8 level of education, meaning that the plaintiff in his scholastic career failed twice. Both educational psychologists agreed that the plaintiffs pre-morbid estimate was that of average intellectual ability. The experts agreed that there is no loss of income as the plaintiff was a scholar at the time of the incident. The court's focus as consequence will be on future loss of income.

[31] However, they further agreed that the plaintiff could have progressed through the mainstream school system, matriculated and proceeded to obtain a tertiary qualification, at least a diploma (should they have financial means or access to bursaries in the form of NSFAS) considering that it is well documented in recent studies that children achieve better qualifications than their parents. He would have been considered a candidate for the open labour market.

[32] I must also take judicial notice of the announcement that was made by the government declaring higher education to be free for household earning a combined salary of R350, 000, 00 or less. The plaintiff's mother is a domestic worker and if it was not for the accident, based on the expert opinion, the plaintiff could have qualified as a beneficiary of free higher education.

[33] Mr Smit on behalf of the Fund strongly argued that the plaintiff failed grade 2 and grade 8 and he was lazy student and as a result was not

academically inclined as he also mentioned that he wanted to become a traffic officer. A higher contingency should be deducted in the region of 20% to 40%. However, he did not have an issue with the post-morbid contingency deduction of 30% as indicated by the actuary.

[34] On the other hand, Mr Dredge contended that the pre-morbid 20% contingency deduction is too low and submitted that 25% contingency is a reasonable deduction. Mr Dredge further contented that every 5% increase means that the plaintiff loses 10 years based on the concept of %% per year to the age of retirement. He then recommended 30% of the contingency deduction, with regard to the post-morbid contingency deductions; he suggested that we start with same contingency as in the pre-morbid of 25% or 30% and look at the risk factors that the plaintiff would face.

Mr Dredge submitted that the overall contingency deduction in the region of 40% - 50% will be reasonable looking at the fact that the plaintiff is currently unemployed and was a young man who could have competed in the higher echelons of the labour market, also taking into account the attitude of the employers that they cannot employ somebody who they will have to accommodate.

[35] It is trite that contingency deductions are within the discretion of the court and depend upon the Judge's impression of the case (see **Southern Insurance Association v Bailey NO (supra).** We were provided with the contingency deductions in the actuarial report but it seems that both parties have placed in dispute the contingency deductions for the pre-morbid. Mr Dredge is in favour of 25% - 30% deduction, whereas Mr Smit favours the 40% contingency deduction.

[36] I agree with Mr Dredge's contention which is also supported by the Education Psychologists that the plaintiff could have competed in the higher echelons of the labour market as he could have progressed to obtain a diploma qualification but for the accident. The plaintiff remains unemployed and it will be very difficult for the plaintiff to compete in the

open labour market as employers are not willing to accommodate employees with risk factors as the plaintiff.

[37] It is therefore my considered view that it will be fair, just and reasonable if the following contingencies are ordered.

37.1. Value of income but for the accident 25% contingency deduction;

37.2. Value of income having regard to the accident 30% contingency deduction

[38] A further amount of R500 000 (Five Hundred Thousand Rand) must also be deducted from the capital amount arrived at after the contingency deductions.

ORDER

I therefore grant the following order

1. Draft order marked X is made an order of court.

M.J. MOSOPA

ACTING JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF: MR C.M. DREDGE

Instructed by: EHLERS ATTONEYS

FOR THE DEFENDANT: ADV AM. SMIT

Instructed BORMAN DUMA ZITHA ATTORNEYS

DATE OF JUDGEMENT: 28 MARCH 2018

<u>IN THE HIGH COURT OF SOUTH AFRICA</u>

<u>GAUTENG DIVISION, PRETORIA</u>

Case No: 57635/16
23/3/2018

On 28 March 2018, before the Honourable Justice Mosopa AJ

In the matter between:

S B MATSHILWANE **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

DRAFT ORDER

Having heard Counsel

IT IS ORDERED THAT:

1. Merits are settled 100% in favour of the Plaintiff.
2. The Defendant pay the Plaintiff an amount of R 4 481 483.40 (Four Million Four Hundred Eighty One Thousand and Four Hundred and Eighty Three Rand and Forty Cents) in full and final settlement of the Plaintiff's claim for

Loss of Earnings, payable into the Plaintiff's attorneys of record trust account with the following details:

Account Holder : Ehlers Attorneys

Bank Name : FNB

Branch Code : 261550

Accou Number:[….]

3. The Defendant will not be liable for interest on the above mentioned amount, save in the event of failing to pay on the due date, in which event the Defendant will be liable to pay interest on the outstanding amount at a rate of 10.25%per annum.

4. The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court scale, subject to the discretion of the Taxing Master, which costs will include, but will not be limited to the following:

    4.1 The reasonable taxed fees for consultation with the experts mentioned below, together with delivery of expert bundles including travelling and time spent travelling to deliver such bundles, preparation for trial, qualifying and reservation fees (if any and on proof thereof), including the costs (fees and disbursements) of all consultations (inclusive of telephonic consultations) with Counsel and/or Plaintiff's attorney and the costs (fees and disbursements) of all consultations between the Plaintiffs and Defendant's experts, as well as costs of the reports, addendum reports, joint minutes and addendum joint minutes and full day fees for court attendance (if at Court) of the following experts:

        4.1.1 Dr P Engelbrecht - Orthopaedic Surgeon;

        4.1.2 Dr. Smuts - Neurologist;

        4.1.3 Dr. Moja - Neurosurgeon;

4.1.4 Ingrid Jonker - Neuropsychologist;

4.1.5 Dr. M Naidoo - Psychiatrist;

4.1.6 Dr.Pienaar - Plastic Surgeon;

4.1.7 Dr. S Naidoo - Maxilla facial Surgeon;

4.1.8 M Sisisson - Clinical Psychologist;

4.1.9 Prof-J Seabi - Educational Therapist;

4.1.10 4.1.10N September - Occupational Therapist;

4.1.11 Jacobson IP's - Industrial Psychologist;

4.1.12 Dr. Fredericks - Disability and Impairment Assessor;

4.1.13 G Jacobson - Actuary

4.2 The costs for accommodation and transportation of the injured as well as a family member, with JT Transportation Services or any alternative transport provider, to the medical legal examination(s) arranged by Plaintiff.

4.3 The costs incurred for appointment of an Interpreter to attend the medical legal examination(s) arranged by Plaintiff.

4.5 The costs for accommodation and transport with JT Transportation Services or any alternative transport provider, for the injured as well as a family member, to attend Court on the 7th of November 2017 and the 13th of February 2018 .

4.6 The costs of the interpreter for attending court on the 7th of November 2017 and the 13th of February 2018.

4.7 The costs for the Plaintiff s attorney travelling to and spending time travelling to pre-trial conferences and attendance at pre-trial conferences by the Plaintiffs attorney.

4.8 The costs for preparation of Plaintiffs bundles of documents for trial purposes, as well as the travelling costs and time spent to deliver these bundles.

4.9 The costs for preparation of Plaintiffs bundles of documents for experts, as well as the travelling costs and time spent to deliver these bundles.

4.10 The costs of Caleb Dredge a senior attorney briefed for Trial, including but not limited to the following:

4.10.1 Preparation for Trial;

4.10.2 Consultation with Plaintiff s Attorneys in respect of preparation for Trial;

4.10.3 Consultation with Plaintiffs Experts in respect of preparation for Trial;

4.10.4 Consultation with Plaintiff and a family member in respect or preparation for Trial;

4.10.5 Drafting of the Final Pre-Trial minutes;

4.10.6 Dayfeesfor7 November2017 and 13 February 2018;

5. The Defendant i ordered to pay the Plaintiffs taxed and/or agreed party and party costs within 14 days from the date upon which the accounts are taxed by the Taxing master and/or agreed between the parties.

6. Should payment of taxed costs not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10.25% on the taxed or agreed costs from date of allocator to date of payment.

Counsel for the Plaintiff: Caleb Dredge: 083 271 8350

Counsel for the Defendant: Adv Smith 078 622 6276

BY ORDER
REGISTRAR