

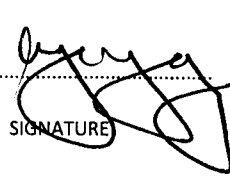


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE: 27/3/15
CASE NO: 27744/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

26/03/15 
DATE SIGNATURE

In the matter between:

WANDILE MZAMO CEDRIC MTHETHWA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KGANYAGO, AJ

- [1] The plaintiff in this matter is claiming damages for bodily injuries arising out of a motor vehicle accident. It is common cause that the accident occurred on 19 June 2009 wherein the plaintiff was a passenger in motor vehicle DRW319MP ("insured vehicle") when its driver (insured driver) lost control and it overturned.

[2] The merits of this matter have been disposed of and liability on the part of the defendant has been resolved on the basis of 100% in favour of the plaintiff. General damages has been resolved on the basis that the defendant has conceded to pay the plaintiff R500 000.00 (five hundred thousand rand). Future medical expenses have also been resolved by being catered for by an undertaking in terms of the section 17(4)(a) of the Road Accident Fund Act 56 of 1996. The plaintiff has abandoned the claim for past medical expenses.

[3] The only dispute remaining is the plaintiff's loss of earning capacity. The plaintiff has abandoned the claim for past loss of income and is only pursuing the claim for future loss of earning capacity. This is the dispute that I must decide upon. The parties have agreed to the admission of the following plaintiff's expert reports in evidence without the need for oral testimony from the expert witnesses themselves:

3.1 Dr F L Segwapa (Neurosurgeon)

3.2 Dr Conrad Visser (Psychiatrist)

3.3 Dr Jivan (Physician – RAF4)

3.4 M Sithole and H Solanki (Actuary)

[4] The plaintiff testified as the first witness. He testified that on 19 June 2009 he was involved in an accident whilst a passenger in a

motor vehicle. At the time of the accident he was in Grade 12. He completed his grade 12 in 2009. In 2010 due to financial constraints he could not continue with his studies. He registered for Public Relations Diploma at the University of Kwa-Zulu Natal. He completed his diploma in a record time. His performance at the University was fairly good as he has passed on merit.

- [5] When he was studying, he experienced problems as he lost concentration. Currently he is unemployed, but he is still looking for the job. There is nothing preventing him to get a job, but the problem is that jobs are scarce.
- [6] He is experiencing a lot of headaches. His finger is also painful when it is cold. When he is experiencing headaches, he will either sleep or take pain killers. He was never invited to a job interview.
- [7] The plaintiff was cross-examined, and he stated that he had obtained his diploma in a record time due to hard work.
- [8] The second witness for the plaintiff to testify was Dr Mokabane. She testified that she is a neurologist. She had assessed the plaintiff. The plaintiff had sustained significant traumatic brain injury. As a result of the accident, he is having poor insight, poor judgment and inappropriate behaviour due to frontal lobe dysfunction. He is also having a unilateral cerebellum dysfunction on the left showing injury to the cerebellum. The plaintiff's prospects of employment have been markedly reduced secondary to the frontal lobe dysfunction. As a result of the frontal lobe

dysfunction, the plaintiff will have a problem in a working environment. Even if he can be employed his prospects of progressing will be affected.

- [9] The witness was cross-examined and she conceded that in the process of preparing her report, she also referred to the reports of other experts.
- [10] The third witness to testify for the plaintiff was Dr Sekati. He testified that he is an occupational therapist. He had assessed the plaintiff. He assessed his range of motion, looked into his dynamic strength. His injury on the left finger was not a fracture and will not have much impact on his future work. He also found that in relation to manual labour he did not have a problem. The Plaintiff was able to pick up objects without problems. In relation to his physical condition, he does not foresee any problems in future.
- [11] The witness was cross-examined and he conceded that the plaintiff has well recovered from the accident, but that his life will not go back to his pre-accident status.
- [12] The plaintiff called Dr Dlakavu as their fourth witness. She testified that she is the industrial psychologist. She has assessed the plaintiff. Her first impression on the plaintiff was that he was of sound mind. He was able to present himself without problems. In compiling her report she also considered the reports of Dr Segwapa, Dr Sekati and Dr Dlukulu.

- [13] She is of the opinion that the plaintiff's future career options and earning prospects and career progression have been compromised by the accident. Due to the cognitive and behavioural deficits which he has sustained, his ambitions of pursuing a career in Public Relations have been curtailed by the injuries sustained in the accident. With his tertiary qualifications he will probably enter the labour market at a higher semi-skilled level of B1 Paterson scale progressing to a more senior supervisory level C4 Paterson level by the age of 45 years.
- [14] If he get employed, he will struggle with his work. He will need more time to complete his task. He will work slower than his colleagues.
- [15] The witness was cross-examined and he conceded that he cannot predict 100% whether the plaintiff in future will be employed or not but that he is merely postulating.
- [16] The fifth and last witness to testify for the plaintiff was Dr Dlukulu. She testified that she is the clinical psychologist. She knows the plaintiff. She has assessed the plaintiff, she found him to be independent, confident, flexible and articulate. He was also uncertain and disregarding instructions. At some stage, he can be deceiving when talking to him. She found the plaintiff to be intellectually impaired.
- [17] His intellectual impairment is due to, amongst others, his extremely poor inductive reasoning, extremely poor problem solving skills, extremely poor problem solving ability, planning ability and visual motor coordination.

- [18] He has passed his matric and university diploma because of fluctuations and mainly his working memory. He still believes that he is somebody who used to be before the accident but not that he is in denial. He is going to have a problem with his colleagues in a working environment. He will take time to grasp training in the new working environment and when frustrated, he will refuse to take instructions.
- [19] The witness was cross-examined and he stated that the plaintiff has fluctuations deficits and that you can talk to him now and the next minute he had forgotten what you were talking about.
- [20] That concluded the evidence of the plaintiff and they closed their case. The defendant closed their case without leading any evidence. Both parties submitted their closing arguments.
- [21] In *Goodall v President Insurance Company* 1978 1 SA 389 (W) 392H-393A MAGO J stated:

"In assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part for the art of science of foretelling the future, so confidently practised by ancient prophets and soothsayers and by modern authors of a certain type of almanac, is not numbered among the qualifications of judicial office. In De Jong v Gunther and Another 1975 4 SA 78 (W), Nicholas J said at p80 opposite the letter F: 'In a case where a plaintiff sues for his own loss of earnings it is only contingencies which affect him personally which have to be considered. In his judgment in Van Rensburg v President Versekeringsmaatskappy, (WLD) 21.11.68, quoted in Corbett and Buchanan, The Quantum of Damages Vol 2 at p65 Ludost J referred to the fact that it has become almost customary, at any rate in his division of the

supreme for the court to make a deduction for unforeseen circumstances of life of one fifth. That is, it is true, a rough and ready approach, but the nature of the problem is such that one can do no better than adopt a rule of thumb of this kind."

- [22] In *Southern Insurance Association v Bailey* NO 1984 1 SA 98 (A) 113F-114A NICHOLAS JA stated:

"Any enquiry into damage for loss of earnings capacity is of its nature speculative because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate which is often a very rough estimate of the present value of the loss.

It has open to it two possible approaches.

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 guesswork, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from strongly probable to speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non-possums attitude and make an award."

- [23] It is not in dispute that the plaintiff was a passenger in a motor vehicle that was involved in an accident. It is not in dispute that at the time when the accident occurred he was in grade 12. It is not in dispute that despite the accident, the plaintiff went on to pass his grade 12 the same year. He

went on to study at university of Kwa-Zulu Natal where he completed his diploma in a record time and having performed exceptionally well. It is not in dispute that the plaintiff has suffered moderate traumatic brain injury as a result of the accident.

- [24] The plaintiff have called several expert witnesses to testify for his case. The evidence of the plaintiff's expert witnesses are based on facts and are objective. Since they are the only expert evidence before me and there is no other expert evidence competing with it, I don't have any other alternative, but to accept their evidence as I have already found that they are based on facts and are also objective.
- [25] The plaintiff has also handed in an actuarial report by M Sithole and H Solanki. The counsel for defendant did not object to that report and has also not submitted any counter report from their side. The plaintiff's actuarial report has made their calculations on scenario 1 – ceiling at Paterson level C2 and scenario 2 ceiling at Paterson level C1.
- [26] In my view, the fact that the plaintiff did not struggle to complete his matric the same year he was involved in an accident and also went on to complete his diploma on a record time and on merit, is an indication that his case cannot be regarded as a worst case scenario. Physically he has fully recovered and will not anticipate problems in the future. However, as stated in *Southern Insurance Association v Bailey supra*, the court will not adopt a non-possums attitude and make no award. Taking into consideration the plaintiff's physical and mental recovery from the

accident, in my view scenario 1 –ceiling at Paterson level C2 is the most appropriate to apply in the plaintiff's case.

[27] The actuaries did not apply any contingencies and has left it open to the discretion of the court. The aspect of contingencies is a matter that falls within the discretion of the court. In *Bailey v Southern Insurance supra* the court of appeal amended the general contingency deduction in respect of a 2 year old child to 25%. In the case *Megalane v The Road Accident Fund* [2007] 3 All SA 531 (W), the court applied a 20% contingency deduction in respect of the loss of earning capacity to an 11 year old child.

[28] In this case the plaintiff at the time of the accident was 19 years old. His counsel has submitted that the court should apply 22% pre-morbid and 30% post-morbid. Counsel for the defendant did not object to this proposal or submitted his counter proposal.

[29] In exercising its discretion, the court will take into consideration the possibility that the plaintiff may in the result have less than a normal expectation of life, he may be unemployed due to illness or general economic conditions. The court should not only look at the adverse fortunes of life. Given the plaintiff's age, the fact that physically he had fully recovered and also the fact that he did not struggle to complete his grade 12 and tertiary qualification, in my view a fair and proper contingency deduction to be applied is 22% pre-morbid and 30% post-morbid as submitted by the plaintiff's counsel.

[30] In the result I make the following order:

30.1 The defendant shall pay the total sum of R2 110 063.54 (two million one hundred and ten thousand and sixty three rand and fifty four cents only) to the plaintiff's attorneys, Chuene Attorneys, in settlement of the plaintiff's claims:

General damages R500 000.00

Loss of earnings/Earnings capacity R1 610 063.54

30.2 The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) in respect of 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 19 June 2009.

30.3 The defendant shall pay to the plaintiff taxed or agreed party and party costs on the High Court scale, which costs shall include but not limited to the following:

30.3.1 The costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above; and

30.3.2 The preparation and reservation fees of plaintiff's experts, if any

(a) Dr F Segwapa – Neurosurgeon

(b) Mr P Sekati – Occupational Therapist

(c) Dr P Dlukulu – Clinical psychologist

(d) Dr c Visser – Psychiatrist

(e) Dr M Mokabane – Neurologist

(f) Dr M Jivan – Physician

(g) Ms Sandra Moses – Industrial psychologist

(h) G A Whittaker (Algorithm) – Actuaries

30.3 The plaintiff's attorneys shall only be entitled to recover from the plaintiff ordinary attorney and client fees which may be taxed but shall not exceed 25% of the capital awarded to the plaintiff.

30.4 Notice of taxation of the plaintiff's party and party bill of costs shall be given to the defendant's attorneys and payment of such taxed or agreed costs shall be made within fourteen days from the date of taxation or agreement as the case may be. Should payment not be made timeously defendant will be liable for the payment of interest at the rate of 9% per annum from due date of payment.


M F KGANYAGO

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 17 MARCH 2015

For the Plaintiff: Adv MR. D L RAINERFELT

Instructed by: CHUENE ATTORNEYS

For the Defendant: Adv MR. E B MAFOKO

Instructed by: CHAUKE ATTORNEYS

Date of Judgment: 27/03/2015