REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 58320/2011

DATE: 7 AUGUST 2015

In the matter between:

SICEBI MLUNGWANA MATHABA PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

J U D G M E N T

MALI AJ

[1] The plaintiff, a twenty two year old male student, sued the defendant, the Road Accident Fund for damages resulting from injuries he sustained in a motor vehicle accident.

[2] The claim in respect of general damages was settled in an amount of R600 000.00 for general damages. The defendant further agreed that to furnish the plaintiff with an undertaking in respect of future medical expenses in terms of **section 17(4)(a) of the Road Accident Fund Act 56 of 1996("section 17(4)(a))**.Consequently, the only issue for determination in this trial is the quantum in respect of future loss of earnings in ***particular the contingency deductions as applied in the plaintiff's actuarial report.***

FACTUAL BACKGROUND

[3] On 21 April 2001 the plaintiff who was 9 years old then and a pedestrian was hit by a motor vehicle with registration numbers [NU 7……..]. The accident occurred at or near Malokane Area at Mthunzini in Kwa Zulu Natal ("KZN"). After the accident he was admitted at Ngwelezane Hospital in KZN and was discharged in the beginning of May 2001.

[4] According to the medical reports the plaintiff suffered bodily injuries described as follows:

(i) Head injury with loss of consciousness;

(ii) Neck and upper limb injuries;

(iii) Soft tissue injury of the neck, left arm, chest, lower back and legs;

(iv) Severe pelvis injury;

(v) Broken left humerus;

(vi) Injury to the urethra;

The details of the accident are common cause between the parties.

CASE LAW PLAINTIFF'S EVIDENCE

[5] The plaintiff testified that he was injured at the age of 9 year and he resides at Empangeni in KZN.

[6] He further stated that he sustained injuries to the head, fractured left arm and had difficulties in passing urine. He was fitted with catheter since the time of accident until 2007 to assist him to pass urine. He still experiences a lot of pains when he passes urine especially on cold days. Sometimes he passes blood as he suffers from serious bladder pains. He suffers from headaches during hot weather which lead to difficulties when reading, as well as loss of concentration. His left arm becomes painful especially when lifting heavy objects.

[7] He is currently repeating grade 12 for purposes of improving his marks to enable him entry to pursue a course in Electrical Engineering at University. The Higher Certificate pass did not even qualify him to be accepted at Colleges to pursue his desired field of study.

[8] He stated that that he is not coping as he easily gets tired and looses concentration.

EXPERTS EVIDENCE

MR MAHOME WILLIAM KHUMALO-EDUCATIONAL PSYCHOLOGIST

[9] Mr Mahome William Khumalo an Educational Psychologist testified that when compiling his report he took into consideration the opinion of the Clinical Psychologist, MrTromp. MrTromp is of the opinion that

"he is at risk for developing severe psychological and neuropsychiatric difficulties. It is evident that he is currently presenting a depressed mood, underlying anger,

feelings of guilt, irritability and anxiety. This signifies post-accident changes in his psycho-emotional functioning".

[10] He concluded that severe psychological difficulties interfere with the plaintiff's attention span and concentration at school. The sequel shows that he has memory problems. He might not be able to better the results although he will get some level of pass. He is not aware of anything he will do differently in the current grade 12 to improve his ability to pass. He further stated that with the neuropsychological problems the plaintiff is faced with no chances of passing matriculation with better marks than in 2012.

[11] He said that the plantiff failed grade 2 after the accident and also failed grade 10. The reason for failing grade 2 is that after the accident he stayed out of school for 6 months. The plaintiff's failure of grade 10 may be attributed to the fact the work has become more demanding and he had reasoning deficiencies and because of the demanding syllabus.

[12] Regarding the plaintiff's desire to enrol for Electrical Engineering at University; Mr Kumalo stated that the evidence points to the contrary because the cognitive results show that he is below average. The possibility of him coping with Post Matriculation studies is limited. He can study Electrical Engineering at Further Education College (FET) where standard 9 or grade 11 is the requirement. The FET qualification is less equivalent than the University qualification.

[13] The FET qualification will disadvantage the plaintiff in the labour market. Although the chances of the plaintiff in the FET are far better than coping in University but he could not say he will pass well and get a qualification. Chances of him getting the job with FET qualification are slim. He emphasised

that he will be disadvantaged.

He further stated that Electrical Engineering requires more physical strength something which is compromised by the plaintiff's left arm injury.

[14] The Educational Psychologist further stated the following:

"there seems to be some evidence that his capacity to learn well may also have been affected by the accident as the areas of memory and concentration seemed to have been affected specifically. There is clear evident of impairment in all aspects of memory".

MS RHIRHANDZU LOWANE MAYAYISE- INDUSTRIAL PSYCHOLOGIST

[15] Ms Mayayise the Industrial psychologist referred to page 10 of her report bundle 4(1) wherein her findings are based on the opinion of the clinical psychologist, Mr Tromp. She therefore concluded that the injuries sustained by the plaintiff have had a major restrictive impact on his level of physiological, behavioural, cognitive and scholastic functioning. He cannot perform at the same level as before the accident. Her view is that apart from the financial constraints related with furthering his education, the plaintiff will most likely no longer cognitively cope with further education and training ventures.

[16] She stated that based on the reports of the Clinical and Educational Psychologist if it was not for the accident the plaintiff would have passed grade 12. She testified that financial constraints are not an issue for the plaintiff not to further his studies. In support of this opinion she indicated that due to persistence the plaintiff has shown he would have got employment post matriculation and then finance his studies. He would have studied on a part-time basis to complete a Diploma. Whilst still studying the plaintiff would have entered the labour market with a matriculation as an unskilled- semi-skilled worker with earnings ranging between a Paterson Grade A2/B1 and this would have been a career physiologically demanding in nature.

[17] She further stated a post matriculation Diploma qualification obtained while employed would have afforded him opportunity to advance his career initially as a semi-skilled worker earning on a Paterson Grade B2/B3 upper quartile total cost to employer and reaching his career ceiling at Paterson Grade C4/C5 upper quartile total cost to the employee by the age of 45. Thereafter a straight line approach increase with inflationary growth would be applicable.

[18] Ms Lowane- Mayayise further stated the following at page 13 , paragraph 2 of bundle 4.1:

"with a poor matric qualification Sicebi will most likely initially suffer a period of unemployment as a result of the high unemployment rate of both unskilled and skilled individuals. A period of 3-5 years is herein

considered most likely in this regard. As a job seeker with a poor grade 12 certificate (NQF4) it is likely that he will enter the open labour market as an unskilled labourer i.e. general worker earning with the lower quartile on a Paterson A1 level. Thereafter his career will progress via a straight line approach through a ceiling on a Paterson grade A3/B1 median range basic salary by the age of 45. Thereafter yearly increase based on the consumer price index is recommended until normal retirement. It is however noted that Elfriede Tromp (Clinical Psychologist) stated that from a neuropsychological point of view. Mr Mathaba suffered loss of intellectual potential and can therefore be expected to function at a significantly lower level than a pre-morbid intellectual potential. He furthered that neuropsychological assessments findings show that Mr Mathaba has many indications of Neuro-cognitive difficulties and neuropsychological seguel and that it can be concluded that from a neuropsychological point of view his cognitive dysfunction is of such a nature that he could find tasks that demand sustained attention and concentration difficult. His attention and concentration challenges will evidently render him error prone and as such perceived as in competence and a poor performer. This will always pose a challenge towards his ability to maintain employment as well as achieve career advancement as postulated above. A considerably higher than normal post- accident contingency deduction is therefore recommended on the above postulated amounts in light of the high risk of loss of employment translating into long and frequent periods with no income

as a *result of the behavioural and cognitive challenges which will manifest as incompetence and poor performance in the workplace".*

MR I.J. MINNAR- ACTUARY

[19] Mr Minnar confirmed that his actuarial calculations are based on the report of the Industrial Psychologist. The said calculations were made on the 26th of

May 2015. His calculation is based on two scenarios; *viz* age 60 and 65. He submitted that the revised figures, updated to 1 June 2015 , for the value as at 26 May 2015 of the plaintiff's future loss of income are as follows, without allowance for contingencies:

[20] Retirement at age 65 Retirement at age 60

R R Had the accident

not occurred 6 991 093 6 531 288

Now that the accident has occurred 1 780 054 1 677 518

Net Prospective Loss 5 211 039 4 853 770

[21] The plaintiff's counsel indicated that it will be fair and reasonable that age 60 be considered as his retirement age. He concluded an award of R4, 209 580.40 is appropriate. The said amount arrived at as follows:-

[22] Income had the accident not occurred R6 531 288.00 Less 15% contingency R979 693.20 Subtotal **R 5 551 594.80** Income now that the accident occurred R 1 677518.00 Less 20% contingency R 335 503.60

Therefore income pre-accident R 5 551 594.80

Minus income now the accident occurred R 1 342 014.40 Total loss of earnings

R 4 209 580.40

[23] The plaintiff's counsel finally submitted that the total monetary compensation should be **R4 809 580.40;** made of R600 000 agreed General Damages plus **R4 209 580.40** as indicated above.

DEFENDANT'S CASE

(a) The defendant did not call any witnesses and it neither submitted any actuarial report. However the defendant's case is centred on one aspect of the plaintiff's actuarial report; i.e. percentage applicable for contingency, had the accident not occurred scenario.

[24] Mr Mabaso, Counsel for the defendant argued that the plaintiff did not produce pre-accident school reports; accordingly the contingency applicable pre-accident of 15% should be increased to 40%. He relied on **Patuleni and others v Road accident Fund[1] [295/2010] ZAECGHC** ("Patuleni") wherein the significance of school reports was emphasised. In my view court placed emphasis on school reports because it was the evidence placed before it. I do not understand Patuleni to mean that the absence of school reports is a dead end apart from the court remarking on comparisons found in the produced school reports. However it would have been of much assistance to the court if the defendant had requested same from the plaintiff at the appropriate moment. It would seem as though little, if any, preparation had been given to the defendant's case, despite the matter proceeding to trial; in particular that on 28 May 2015 the defendant requested the matter to stand down for trial to 3 June 2015 fully aware of the status of its case.

[25] He further submitted that the Educational Psychologist testified that despite learning difficulties that the Plaintiff encounters, he can still manage to obtain an FET engineering qualification. Counsel did not dispute evidence that the FET qualification presents serious limitations. For example the Educational Psychologist stated the following:

[26] *"The FET qualification will disadvantage the plaintiff in the labour market. Chances of him getting the job with FET qualification are slim. Electrical*

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[1] **r295/20101 ZAECGHC**

Engineering requires more physical strength something which is compromised by the plaintiffs left arm injury. "

[27] From the above it is clear that the plaintiff is more at risk in the injured state than he was before injury.

[28] Counsel for the defendant further criticised the Industrial Psychologist's report on the bases that when she compiled her report she was not in possession of the report of the Educational Psychologist. During cross examination the Industrial Psychologist referred to her joint minutes with the Educational Psychologist which had been admitted.

[29] Counsel further stated that the report of the expert should not be so biased to leave crucial information to show how they arrived at certain conclusions. Mr Minaar gave reasons as to why he did not use Dr Fourie's report, the defendant's Industrial Psychologists. He stated that Dr Fourie did not set out clear career path in the joint minute and it lacked sufficient information to assist him to come to a conclusion. I have no reason not to accept this submission.

CONTINGENCY

[30] Contingencies have been described as the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned AA MUTUAL INSURANCE v VAN JAARSVELD.[2] In his book *The Quantum Yearbook,* Koch states that 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 allowance has been made in the actuarial calculation. The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of

[2] 1974(4) SA 729 (A)

employment, promotion prospect, divorce etc.

[31] Koch refers to the following as some of the guidelines a regards contingencies:

- "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.
- Sliding scale: 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on **Goodall v President Insurance[3].**
- Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[32] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[33] Having regard to the above I am of the view that deductions of 20% contingency but for the accident presents a fair value and 30% having regard to the accident will fairly compensate the plaintiff for the loss suffered as a result of the accident. My calculation is as follows:

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[3] 1978 (1) SA 389

[34]		Income had the accident
not occurred		R 6 531 288.00
Less 20% contingency	R 1 306 257.60	
Subtotal	**R 5 225 030.40**	
Income now that the accident occurred	R 1 677 518.00	
Less 30% contingency	R 503 255.40	
Therefore income pre-accident	R 5 225 030.40	
Minus income now the accident occurred		R 1 174 262.60
Total loss of earnings	**R 4 050 790.80**	

ORDER

I accordingly make the following order:

1. **The defendant is to pay the plaintiff a sum of R 4, 050 790.80 being in respect of loss of earnings plus R 600, 000.00 in respect of general damages) which gives rise to a net award of R 4,650 790.80**
2. **The defendant is to provide the defendant with a section 17**

(4) (a) undertaking in respect of future medical expenses.

3. **The defendant is to pay the plaintiff his taxed or agreed party and party costs of 17 February 2015, 28 May to 3 June 2015, which costs should also include the preparation , reservation and attendance fee of the following plaintiffs experts for the above dates as well as their costs for preparing the medico legal reports:**

(i) Education Psychologist- Mr Mahome William Khumalo;

(ii) Industrial Psychologist- Mr Rhirhandzu Lowane- Mayayise;
(iii) Actuary - Mr I. J. Minnar

MALI AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION PRETORIA

Counsel for the Applicant: Adv. T.C. Maphelela Instructed by: Dreyer & Dreyer Attorneys

Counsel for the Respondent: Adv. N.D. Mabaso Instructed by: T.M. Chauke Incorporated

Date of Hearing: 03 June 2015

Date of Judgment: 07 August 2015