IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 4535/2005

In the case between:

S. E. NCANGISA	Plaintiff
and	
ROAD ACCIDENT FUND	Defendant

JUDGMENT:	RAMPAI, J
HEARD ON:	25, 26 & 28 NOVEMBER 2008
DELIVERED ON:	11 DECEMBER 2008

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[1] The matter came to court by way of action proceedings. The plaintiff, Sandile Ernest Ncangisa, sued the defendant, the Road Accident Fund, for the payment of the sum of R2 835 256,70. The action was defended. The aspects of the merits were settled on the 31 July 2007. The defendant conceded that the negligence of the insured driver was the exclusive cause of the accident.

[2] The plaintiff was involved in a road accident at Botshabelo on the 17 January 2001. The accident occurred in section J in the vicinity of Lerato Secondary School at or about 11:00. The plaintiff was a pedestrian at the time. He was struck down by a motor vehicle with registration number BGM521FS which was driven by a certain J M Qiba.

[3] In the accident the plaintiff suffered head injury, right upper leg injury and right forearm injury. Both the right hip injury and the right forearm injury were soft tissue injuries. The plaintiff has fully recovered from these injuries. The head injury was the most severe of the injuries. It consisted of a laceration of the skull, fracture of the base of the skull, depressed fracture of the skull and cerebral contusion. In short he sustained brain injury - Vide neurosurgical assessment report: Dr P. Repko, page 17:2 record.

[4] The plaintiff was born on the 23 June 1983. He was 17 years at the time of the accident. He was a grade 9 learner at Leratong Secondary School in 2001. The adverse

impact of the victim's brain injury was alluded to in various experts' reports relative to the aspect of quantum. Such reports include the following:

4.1 Dr P. Repko : neurosurgical assessment report

4.2 Ms Thea Zwiegers: psychological assessment report

4.3 Mrs Sune Minnaar: occupational assessment report

4.4 Mr Deon Ceronio: audiological assessment report

4.5 Prof E van Zyl: industrial assessment report

4.6 Dr R J Koch: actuarial assessment report

4.7 Ms Christa du Toit: industrial assessment report

4.8 Dr R J Koch: actuarial assessment report

[5] The parties have mutually settled the following components of the quantum according to Mr Jordaan and Mr Coetzer, their legal representatives:

5.1 General damages: R300 000

5.2 Future medical expenses: written undertaking

[6] The issue for determination has therefore been narrowed down to only two components of quantum, namely: past and future loss of earnings.

[7] At paragraph 4.6.6 of her industrial psychological assessment report, Prof E van Zyl state as follows on the 31 October 2008:

> "**Had the accident not occurred,** Mr Ncangisa would therefore probably have progressed to semi-skilled levels (B1 – B5: see notes p. 10). He probably would have started to work on a Paterson B1 level at about age 20 years and progressed at approximately 5 year intervals to Paterson level 5. The possibility of moving to higher levels (skilled levels: C1-C5 on the Paterson scale) is difficult to predict, but unlikely. The qualifications/job levels attained by his family members (see paragraph 3.20, should be taken in consideration here. **Currently**, he will not be able to compete in the open labour market."

[8] The defendant was unhappy about the scenario. Ms Christa du Toit was accordingly appointed at the instance

of the defendant to compile another industrial psychological assessment report. She did so on the 8 October 2008. On page 7 of her assessment report, the industrial psychologist stated:

> "It usually takes a school leaver 2-3 years to enter the formal labour market. Considering Ernest's family education and economic background, he would most probably have started in the more informal/semi-formal labour market earning on a Paterson level A1 or slightly lower. Usually jobseekers opt for whatever job is available. Approximately 5 years from then, he could successfully have secured himself a position in the semi-formal/formal labour market and could have grown towards a general matric scenario following the Paterson level A3 (Basic Salary) with growth towards Paterson level B3/B4 (Basic Salary) with 3-5 year intervals between levels towards age 40/45 years. The ceiling caters for growth in the formal sector or for alternative career options of a semi-skilled nature."

Vide p. 8, exhibit a.

[9] On the 17 November 2008 Dr R J Koch compiled the first certificate of value in respect of the victim's loss of earnings:

> "**Income now injured:** Assumed never to work again. State disability grant payments for 06/2005 to 11/2008 totalling R35600. Grant assumed to cease after compensation paid 11/2008.

Results	**Uninjured**	**Injured**	**NetValue**
	R	**R**	**R**
Past income:	364538	0	364538
Less contingencies (5%)			(18227)
Net value past			**346311**
Future income:	**2526117**	**0**	**2526117**
Less contingencies (15%)			(378918)
Net value future		**0**	**2147199**
Total for above items			**2494510**

Less State disability grant (35600)

Net value

2457910"

[10] On the 24 November 2008 Prof E van Zyl on behalf of the plaintiff and Ms C du Toit on behalf of the defendant held a pre-trial meeting of experts. The minutes were recorded as follows:

"MINUTE OF A TELEPHONIC PRE-TRIAL MEETING BETWEEN CHRISTA DU TOIT (CDT), COUNSELLING & INDUSTRIAL PSYCHOLOGIST, AND PROF. EBEN VAN ZYL (EVZ)

ON 24 NOVEMBER 2008 IN THE MATTER OF MR S E NCANGISA

The agreement was based on the documentation at hand and may be changed if further information is received, either before or at the trial.

1. PRE-ACCIDENT:

1.1 **We agree** on the facts regarding Mr Ncangisa's family background, education and career history as a matter of fact.

1.2 **We agree** that Mr Ncangisa would probably have entered the labour market on a Paterson Level B1 (lower quartile) (**EVZ**) from Jan 2004) (**CDT** from approximately 2008 with earnings approx. Paterson A1 for the first 4 years). We agree on progress to Paterson Level B3 median as a ceiling. **EVZ** – B2 and then to B3 with 3 years intervals. **CDT** gradual progress to B3 median towards age 40 years.

2. POST-ACCIDENT:

2.1 **We agree** that Mr Ncangisa is in all practical terms unemployable in the open labour market.

SIGNED:

____(SIGNED)_______

____(SIGNED)___ ___

CHRISTA DU TOIT EBBEN VAN ZYL"

[11] On the 25 November 2008 Dr R J Koch was called upon to compile the second certificate of value in respect of the

plaintiff's loss of earnings on the basis of the expert agreement reached between the two industrial psychologists. His second certificate appears on p. 12, "exhibit a" and reads:

> "**Income uninjured:** R55578 per year (A1 MED) from 01/2004; inflation increases only until R90391 by (B1 MED) from 01/2008; inflation increases only until R104189 py (B2 MED) from 01/2016; inflation increases only until R117614 py (B3 MED) from 01/2024. 2007 rand vaules. Escalation in line with inflation to age 65.
>
> **Income now injured:** Assumed never to work. State disability grant payments for 06/.2005 to 11/2008 totalling R35600. Grant assumed to cease after compensation paid 11/2008.

Results:	**Uninjured**	**Injured**	**NetValue**
	R	**R**	**R**
Past income:	275032	0	275032
Less contingencies(5%)			(13752)
Net value past			**261280**

Future income: 2312267 0

2312267

Less contingencies(15%)

(346840)

Net value future **0**

1965427

Total for above items

2226707

Less State disability grant (35600)

Net value

2191107"

Still the issue of quantum remained unresolved. On the 28 November 2008 the matter was argued before me.

[12] As regards past loss of earnings, Mr Jordaan informed me that the plaintiff was prepared to argue the matter on the strength of the industrial assessment report compiled by Ms Christa du Toit, the defendant's own industrial psychologist. He pointed out that the plaintiff obtained the second actuarial certificate on the strength of the industrial assessment report compiled by the defendant's expert.

Moreover, the plaintiff was prepared to go even further by raising the contingency level as applied by the actuary from 5% to 20%. I other words, instead of reducing the past income of R275 032 by R13 752 (5%) to R261 280 the plaintiff was prepared to decrease it by R55 006 (20%) to R220 025 net value past income.

[13] As regards future loss of earnings, the plaintiff was similarly prepared to readjust the actuary figure by raising the contingency level the actuary had applied from 15% to 30%. Instead of reducing the future income of R2 312 267 by R346 840 (15% thereof) he was willing to have it decreased by R693 680 (30% thereof) to R1 618 587 net value future income.

In the circumstances the net value of past loss of earnings viz R220 025 plus the net value of future loss, viz R1 618 587 add up to the total sum of R1 838 612.

[14] Mr Coetzer contended that in view of the plaintiff's low intellectual capability as evidenced by his poor scholastic track record and low educational achievements within his family unit as a whole coupled with his low socio-economic family background his claim for both past and future loss of earnings was unrealistically exaggerated. Although he conceded that the contingencies of 20% in respect of past loss and 30% in respect of future loss were quite generous, he submitted perhaps it is more appropriate to say he felt, rather than submitted, that the net value of the compensation package was excessive.

[15] It can only be that Mr Coetze felt this way because he implicitly questioned the very assumptive foundation of the actuary's quantification. The actuary's starting point was that had the plaintiff not been injured he would have earned an income of R55 578 per annum on A1 medium. Mr Coetzer felt that the basic salary level in this case should be much lower than the Paterson salary level A1. However, the two industrial psychologists were agreed that Paterson level A1 for the first four years could be accepted

as a realistic assumption. Therefore, I find that the net values as quantified by the actuary were realistic and informed by the expert views including those of the defendant's own expert.

[16] In **GRIFFITHS v MUTUAL AND FEDERAL INSURANCE COMPANY LIMITED** 1994 (1) SA 535 (AD) at 546f – h Vivier JA said:

> "In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess. (See *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 113G – 114E and the cases there cited.)"

[17] Mr Coetzer relied on this passage. There unlike here there were virtually no informed expert opinions to guide the court about the labour market earning trends, relative likely

to future earning patterns of a victim who was not yet employed at the time of the injury. Mr Jordaan's argument that the said decision does not apply to the facts of the instant case, is sound. I do not have to make an informed guess in this matter. In the circumstances I am inclined to award the plaintiff compensation along the lines as proposed by Mr Jordaan. There is sufficient expert evidence to justify the quantum of damages sought by the plaintiff in this matter.

[18] The opposite expert witnesses are of the common view that the plaintiff will never be gainfully employed. Since June 2005 to November 2008 he has received a disability grant totalling R35 600. The disability grant will cease once the defendant has paid him the third party compensation. Probably the plaintiff has already received his monthly disability grant for Desember 2008. However, I shall deal with the matter as if he has not yet received such a grant. The difference is quite minimum at any rate. The sum of the disability grant paid has to be deducted from the third

party compensation. From the cash component hereof the disability grant of R35 600 must be deducted.

[19] As regards costs, the parties are agreed that the defendant has to pay the plaintiff's taxed costs on the scale as between party and party for Tuesday, 25 November 2008, Wednesday 26 November 2008 and Friday 28 November 2008 which costs must include the qualifying professional fees of the plaintiff's expert witnesses as fully listed in paragraph 4 *supra*.

[20] To summarise, the whole compensation package is as follows:

20.1 general damages 300 000

19.2 future medical expenses + undertaking

19.3 past loss of earnings + 220 025

19.4 future loss of earnings + 1 618 587

19.5 disability grant -	35 600
Net value due to the plaintiff	2 103 012

[21] Accordingly judgment is granted to the plaintiff as follows:

21.1 The defendant is directed to pay the sum of R2 103 012 to the plaintiff in respect of the general damages plus future loss of income.

21.2 The defendant shall be liable to pay interest on the capital sum of R2 103 012 at the rate of 15,5% per annum from the fifteenth day of this judgment;

21.3 The defendant shall furnish the plaintiff with a written undertaking in respect of his future medical expenses;

21.4 The defendant is directed to pay the plaintiff's taxed costs on the scale as between party and party for Tuesday the 25 November 2008, Wednesday the 26 November 2008 and Friday the 28 November 2008.

21.5 The costs referred to in the aforegoing paragraph shall include the qualifying fees of the plaintiff's five expert witnesses as more fully listed in paragraph 4, *supra.*

M. H. RAMPAI, J

On behalf of the plaintiff:	Adv. A. F. Jordaan SC Instructed by: Honey Attorney BLOEMFONTEIN
On behalf of the defendant:	Adv. C. Coetzer Instructed by: Horn & Van Rensburg BLOEMFONTEIN ex Mohlala Attorneys JOHANNESBURG

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