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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 72734/2017

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

DATE

SIGNATURE

In the matter between:

LOUWIS MAKTHUTLE NAWÉ

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: Sardiwalla J

Motor vehicle Accident -

Quantum – plaintiff under a statutory duty to satisfy the requirements as contemplated in S 17(1) of the Road Accident Fund Act 56 of 1996 that there must be negligence of the insured vehicle in order to establish liability of the Road Accident Fund

JUDGMENT

SARDIWALLA J:

[1] The plaintiff instituted a claim for damages in terms of the Road Accident Fund Act 56 of 1996 (*"the Act"*) against the defendant. This claim arises from the injuries the plaintiff sustained in a motor vehicle collision which occurred on 31 July 2016 at the intersection of Bok and Thabo Mbeki Streets in Polokwane when the motor vehicle with registration number [...] driven at the time by Mohale Raliyatji (*"the insured vehicle"*) collided with the plaintiff who was a pedestrian.

[2] The defendant admitted full liability for the proven or agreed damages suffered by the plaintiff in the accident. The defendant has tendered an undertaking in terms of section 17(4)(a) of the Act in settlement of future hospital, medical and ancillary expenses which the plaintiff has accepted.

[3] The remaining heads of damages for determination are the plaintiff's past and future loss of earnings or earning capacity and general damages. The plaintiff contends that he has suffered a loss of earnings or earning capacity and that a contingency deduction of 15% for past loss and 100 in respect future loss should be applied.

COMMON CAUSE FACTS

[4] The parties have agreed to the following common cause facts and circumstances between them:

4.1 That the plaintiff was 22 years old and was employed as a financial management intern at the time of the accident. He is currently 25 years old and is unemployed. He never returned to employment other than completing his internship.

[5] The parties have further agreed that as a result of the collision the plaintiff sustained the following injuries:

5.1 A traumatic brain injury described by the neuropsychologist as a mild severity with significant neuropsychological *sequelae* including depression and anxiety;

- 5.2 Left knee dislocation with instability;
- 5.3 An open book fracture of the pelvis;
- 5.4 A fracture of the left radius;
- 5.5 A fracture of the right radius;
- 5.6 A supracondylar fracture of the left humerus (upper arm);
- 5.7 A popliteal artery injury to the right leg which resulted in an amputation of the knee for vascular insufficiency on 9 August 2016;
- 5.8 Psychological shock and trauma with psychological *sequelae*.

[6] They further agreed upon the following *sequelae* resulting from the injuries:

- 6.1 The plaintiff was hospitalised and admitted to the Polokwane hospital from 31 July 2016 to 19 September 2016. He had an amputation of his right leg;
- 6.2 In addition, he underwent surgery to both forearms and his left elbow consisting of open reductions and fixations;
- 6.3 The plaintiff mobilises with crutches due to his amputation and due to a poor fitting of a prosthesis and a left drop foot (neurological injury) which requires a splint;
- 6.4 His WPI has been calculated at 46% from an orthopaedic perspective only and will not be able to engage in activities of daily living such as prolonged walking, standing, heavy lifting of weights and the use of both lower limbs;
- 6.5 The plaintiff suffers stiffness in his right and left elbow as a result of the use of crutches. These difficulties are compounded by the pain in both forearms and in the elbows;
- 6.6 He has prominent large scars on his right and left forearms, left elbow and right thigh;
- 6.7 The fixatives in both his forearms still require surgical removal and he may also need surgical revision of his stump due to neuromas;
- 6.8 The plaintiff's occupational records various debilitating difficulties such as dressing himself and exhibits poor balance. He has limited use of his arms and was unable to meet the lowest range set for his age and gender in respect of hand function in both hands.;
- 6.9 Plaintiff experiences phantom pains;
- 6.10 His cognitive, behavioural and affective/mood difficulties are likely to be permanent and suffers from depression and anxiety.

[7] The plaintiff's combined whole person impairment (" WP/") rating for all the disciplines is 51%.

[8] The Plaintiff admitted the reports of the following experts:

- 8.1 Dr Kumbirai, Orthopaedic Surgeon;
- 8.2 Dr Mureriwa, Clinical Psychologist;
- 8.3 Dr W.M Kumalo, Educational psychologist;
- 8.4 Dr Doran, Occupational Therapist;
- 8.5 K Ramusi, Industrial Psychologist;
- 8.6 Mr RJ Koch, an actuary (in so far as it relates to the correctness of the calculations and the basis thereof, not that the amounts are what the plaintiff is entitled to).

[9] The defendant did not submit any expert reports.

[10] The legal position relating to a claim for diminished earning capacity is trite. The mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Alternatively, it does not follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity.¹

[11] In *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) the principle was articulated in the following terms:

"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:

¹ *Union & National Insurance Co Ltd v Coetzee* 1970(1) SA 295 (A) at 300A; *Santam Versekering Maatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A); *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A); *Krugell v Shield Ins. Co Ltd* 1982 (4) SA 95 (T) at 99E; *Rudman v RAF* 2003 (2) SA 234 (SCA); *Prinsloo v RAF* 2009(5) SA 406 (SE).

“In later Roman law property came to mean the universitas of the plaintiff’s rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland.”

[12] A person’s all round capacity to earn money consists *inter alia*, of an individual’s talents, skill, including his/her present position and plans for the future and of course external factors over which a person has no control. In *casu*, the court must calculate the total present monetary value of all that the plaintiff would have been capable of bringing into his patrimony had he not been injured, and, the total present monetary value of all that the plaintiff would be able to bring into his patrimony after sustaining the injury. The difference between the two (if any) will be the extent of the patrimonial loss.

[13] At the same time the evidence may establish that an injury may in fact have no effect on earning capacity, in which event the damage under this head would be nil. In order to determine therefore whether, as a result of the injury sustained, the plaintiff’s earning capacity has been compromised the evidence adduced needs to be considered and evaluated in order to decide whether the onus has been discharged.

[14] The plaintiff relies on the evidence of the several expert witnesses. A court’s approach to expert testimony was succinctly formulated in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*² where the court stated-

“[36] . . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1997] UKHL 46; [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.

² 2001 (3) SA 1188 (SCA)

[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached ‘a defensible conclusion’ (at 241G-242B). . . .

*[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express prospects of an event’s occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingly v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D-E that*

‘(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.’ (emphasis added)

[15] Dr Peter T. Kumburai, an Orthopaedic Surgeon is of the view that the plaintiff’s injuries resulted in serious long-term impairment/loss of body function and permanent serious disfigurement due to the above knee amputation on right lower limb. He noted that the plaintiff would not be able to compete fairly for a job on the open labour market and deferred his opinion to the occupational therapist and Industrial psychologist. He further confirmed that the screws and plates in the left and right radius would need to be removed to prevent them from acting as a focus for sepsis should the claimant become immune-compromised. In respect of the knee amputation he recommended that the plaintiff be evaluated by an orthoptist for provision of a prosthetic leg. His calculation of the plaintiff’s WPI is 46% and therefore will not be able to engage in normal activities such as prolonged walking, standing, lifting of heavy weights and the use of both lower limbs.

[16] The Clinical Psychologist opined that the plaintiff's overall performance on the neuropsychological tests was low with several scores on the average range. The normal performance on many subtests suggested that the plaintiff was of at least average pre-accident neurocognitive capacity. The plaintiff's worst performance was on tests of speed. The poor performance on these tests suggest that the injuries sustained have given significant rise in slowing of responses. The overall slightly impaired test performance and the below average performance test for speed, is consistent with a mild traumatic brain injury which the plaintiff has sustained. The clinical features of his injuries place the plaintiff in class 2 (15% WPI) which when combines with the 46% WPI calculated by Dr Kumbirai becomes 51% WPI.

[17] The Educational Psychologist Mr M Kumalo stated that psycho-educational testing revealed persisting difficulties with slowed mental processing speed, sustained attention difficulties, memory difficulties, and visuo-motor coordination difficulties and abstract reasoning. He stated that it is possible that the identified emotional difficulties such as Post Traumatic Stress Disorder and depression affected his cognitive functioning considering that he did not sustain a head injury. He deferred his opinion to the Occupational Therapist and Industrial Psychologist.

[18] The Occupational Therapist, Ms M Doran noted that the plaintiff in relation to the Right and left upper extremities the plaintiff was unable to meet the required rates set for the open labour market and falls below the indicated standard. She observed that he cannot stand upright without the use of external assistance even with the prosthetic device on. Therefore, his accommodation would need to be adequately adapted to suit his needs.

[19] Regarding the plaintiff's loss of earning capacity, Ms Doran concluded that the plaintiff's future work prospective has been affected. According to her, the injuries suffered by the plaintiff has led to subsisting consequences, affecting Mr Nawe's general functioning in daily life, inclusive of affecting amenity, enjoyment and capacity for earning a viable income. Further that he would be better suited for work that falls mainly within the parameters of a sedentary physical range and that does not require bilateral manual dexterity. He would need to avoid work environments with slippery surfaces, cluttered areas, stairs which will aid in reducing risk for stump complications and will keep him employed for longer periods. She confirmed that the plaintiff does retain the physical capacity for his trained profession as a Financial Manager in supply chain, as it requires exertion of a mainly

sedentary physical nature but accepts that the he is slower at the current time and that pain, discomfort and emotional response could significantly contribute to poor performance. Therefore, extra time for re-integration and a case manager to assist with employment and re-integration is necessary and may still suffer periods of absence from work to undergo further surgical interventions for removals of the plates and screws.

[20] This brings me to the report of Mr K B Ramusi, the Industrial Psychologist. He is of the view that the plaintiff would have been able to reach his normal retirement age pre-accident employment but that post-accident he is likely to remain unemployed for the remainder of his work life unless he is able to find a sympathetic employer in which case he will not likely attain his premorbid career objectives. He has lost capacity for both physical and cognitive premorbid occupational prospects. He concludes that the plaintiff should be compensated for past and future accident related treatment, pain and discomfort.

Plaintiff's claim for pass loss of earnings

[21] As a result of the uncontested evidence of the Industrial Psychologist, there are only two remaining issues, the first is whether the plaintiff suffered any past loss of earnings and the second is whether there is evidence substantiating the plaintiff's loss of earnings or earning capacity. In my view there is no use raising the second issue without leading evidence to counter. The evidence of the plaintiff is unchallenged in this regard. After the accident the plaintiff returned to work only to complete his internship but has remained unemployable as he could no longer return to his pre-accident functionality because of the difficulties he experienced as a result of his injuries. He did not receive a stipend during his recuperation and earned a mere R 1200 per month during his internship. The period of his internship had to be extended to accommodate his recuperation and therefore instead of completing the training in 18 months he completed it in 21 months. However, the plaintiff would likely have been permanently employed at the end of his training and therefore on the basis of this information I find that the plaintiff has suffered past loss of earnings.

Future loss of earnings and/or loss of earning capacity

"But for" the accident

[22] The plaintiff holds a Grade 12 school qualification and an N6: Financial Management. He was expected to have graduated with a National Diploma in Financial Management (NQF Level 6) and indicated that he intended registering for a B.com Accounting degree (NQF

level 7) some year or two after graduating. Considering the findings Mr Kumalo was of the opinion that he would have likely registered and passed his desired qualification.

"Having Regard" to the accident

[23] According to Dr Kumirai, the Orthopaedic Surgeon, the plaintiff will not be able to fairly compete in the open labour market. His loss of work capacity in this type of work at the moment is in the region of 9% and is not expected to improve over time. Ms Doran is of the view that the plaintiff does meet the demands of his pre-accident employment. According to her, although the plaintiff's employment is mostly sedentary, his pain and emotional responses could result in poor performance. It is Ms Doran's view that the plaintiff's reduced upper limbs functioning; reduced co-ordination and discomfort could impact on his work speed and productivity. Regarding the plaintiff's loss of earning capacity, Ms Doran concluded that the plaintiff's future work prospective has been affected. I am persuaded by the reports that the plaintiff cannot perform daily activities such as prolonged walking, standing without external assistance despite the use of a prosthetic and that the plaintiff presents with cognitive or perceptual problems. Mr Kumalo's conclusion that the plaintiff suffered slow mental processing is consistent mild traumatic brain suffered by the plaintiff is in line with all other expert opinions of depression and anxiety.

Conclusion re loss of earnings

[24] Actuarial calculations were made on the basis of the opinion and postulations made by the plaintiffs Industrial Psychologist who relied on the reports of the plaintiff's other experts. The defendant admitted the assumptions used by the plaintiff's actuary. On the basis of the information provided and on the basis that overtime and allowances would have averaged 5,37% of the plaintiff basic salary had the accident not occurred the actuary assumed a marginal rate of taxation for the Tax year ending 2018/2019 until the calculation date arriving at a net past loss of R178 938 with no application of a contingency allowance.

[25] For purpose of calculating the plaintiffs claim for future loss of earnings regard must be had to the report of the plaintiff's actuary dated 18 September 2018, more particularly the that the plaintiff is assumed to never work again. The plaintiff's uninjured earnings amount to

R182 538.00 and his injured to R3 600.00. This is before the application of any contingencies. It is trite that contingency deductions are within the discretion of the court and depend upon the judge's impression of the case. Contingencies are the normal consequences of life, which beset every human being and which directly affect the amount which the plaintiff would have earned. See *Southern Insurance v Bailey* 1984 (1) SA 98 (A). General contingencies cover a wide range of consideration which may vary from case to case and may include early death, loss of employment and promotion prospects.

[26] Having taken into consideration the usual factors to be considered it is my view that the evidence in this case supports the grant of a 15% contingency application resulting in the plaintiff's net future loss of R3,302,683. The grant of 5% contingency application for net past loss which is R169 991.00 with a total net loss of R3,481 621.00.

GENERAL DAMAGES

[27] It is clear on a consideration of all the evidence before Court that the plaintiff suffered pain, discomfort and loss of amenities of life. There is no doubt that the plaintiff sustained a mild brain injury and various orthopaedic injuries of some significance as stated by the Orthopaedic Surgeon. His injuries require prolonged treatment. Multiple forms of future medical and surgical treatment regimens are foreseen (including removal of the fixatives in both upper arms, plastic and reconstructive surgery for scars with partial improvement).

[28] The plaintiff has suffered and will continue to suffer severe impairments and losses in terms of amenities of life including severe curtailments in his participation in physical activities. The plaintiff's combined whole person impairment ("WPI") rating for all the disciplines is 51%.

[29] The plaintiff was hospitalised for almost two months and underwent a number of surgical procedures to his upper limbs, right femur amputation and pelvis fracture. All the experts agree that the plaintiff should be compensated for the injuries he sustained in the accident. For all the reasons stated above the plaintiff now has to be compensated adequately and fairly in the form of general damages.

[30] In determining general damages the court is called upon to exercise its discretion to award what it considers to be fair and adequate compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries he sustained

including their nature, permanence, severity and their impact on his lifestyle. In *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 the court held:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[31] That still remains the legal position. The award of general damages is trite; there is no hard and fast rule of general application requiring the court to consider past awards. Such awards are seldom on all fours with the facts of the case under consideration. It therefore becomes necessary that each case must be considered on its own merits.

[32] Based on the above principles I have assessed what I consider to be a fair compensation of the plaintiff in this case. I have also taken into consideration that whilst the plaintiff must be sufficiently and properly compensated for the injuries he sustained in the accident, the defendant should not be unnecessarily burdened with an inordinate high award despite the recent tendency by courts to pitch the awards higher than in the past. See *De Jongh v Du Pisanie NO (2004) All SA 565 (SCA)*. The injuries sustained by the plaintiff in the accident and the *sequelae* thereof have been stated above. Whilst the plaintiff's brain injury is classed as mild, all the experts highlighted the severity and permanency of the results, all of which are not disputed.

[33] The plaintiff has claimed the sum of R1,700 000 to R 1 900 000 whilst the defendant argued that the plaintiff's general damages should be assessed at R900 000,00. In this regard both have referred me to various decided cases on the subject dealing with past awards made in comparable cases.

[34] Counsel for the plaintiff especially referred me to the following cases with regard to a mild to moderate brain injury with orthopaedic injuries:

[35] *Mofokeng v Road Accident Fund 2014 (784) QOD 12 (GSP)*. In this case an amount of R700 000, 00 was awarded for soft tissue injuries of the back and neck and a moderately severe brain injury. This is worth R940 000 in the current value. In my view, the plaintiff's orthopaedic injuries and the permanent *sequelae* thereof are distinguishable from those of the plaintiff in the case of *Mofokeng*.

[36] In the unreported case of *Mofulatse v Road Accident Fund* (Case Number 77/2010) in the North Gauteng High Court Molefe J awarded R1, 2 million as general damages in June 2014 (now worth R1 416 923, 00) where the plaintiff suffered a brain injury with various fractures to the legs, of which resulted in fairly severe neuropsychological *sequelae* and likely knee replacement surgery in the future. The plaintiff in that case also sustained a fracture of the left wrist.

[37] The defendant referred the court to the following case:

Mthetwa v Road Accident Fund V1, E2-15 where the plaintiff was awarded R800 000 for general damages in 2010 equivalent to R 1 271 000 in 2019. The plaintiff in this case sustained an amputation of the upper part of her left tibia and fibula. She also underwent amputation of her upper arm and lower leg, was fitted with ill-fitting artificial limbs and walked with difficulty using crutches. She also experienced phantom pains sustained with neurocognitive and neuropsychological *sequelae*. It is my view that this case is the most comparable to that of the plaintiff in that she sustained mild to moderate brain injury with serious *sequelae*.

[38] Whilst there may be certain similarities between some of the cases and the present, fact of the matter is each decision differs on the facts and the considerations raised therein from the present. Past awards serve no more than to give some indication or guidance as to what sort of awards are appropriate on the facts of a particular case. To the extent that guidance may be derived from these matters, I have given careful consideration to them.

[39] Whilst the plaintiff's brain injury is classified as mild, each expert highlighted the severity of the result thereof. The plaintiff suffers pain in several areas as described and will suffer such pain in all likelihood for the rest of his life. His scarring on several places is very severe and can only partially be addressed by plastic surgery. He suffers and will continue to suffer depression with a poor prognosis to treatment. He has permanent severe neuropsychological *sequelae* which will impair his ability to further his education.

[40] On a consideration of all the facts of the present matter and previous awards made in similar matters it is my considered view that an award of R950 000,00 is a fair and reasonable compensation.

[41] In the result the following order is made:

41.1 The defendant shall pay the sum of R4 431 621.00 (FOUR MILLION FOUR HUNDRED AND THIRTY ONE THOUSAND SIX HUNDRED AND TWENTY ONE RAND) to the plaintiffs' attorneys, in full and final settlement of the plaintiffs claim;

41.2 The defendant shall furnish plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for 100% of the costs of the future accommodation of the plaintiff in a hospital or treatment or rendering of a services to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision that occurred on 31 July 2016 after such costs have been incurred and upon proof thereof;

41.3 The defendant must make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include, but not be limited to, the following:-

41.3.1 The cost of Senior Counsel on the High Court Scale, and;

41.3.2 The reasonable taxable costs of obtaining all expert/medico-legal RAF4 Serious Injury Assessment ratings and actuarial reports from the Plaintiff's experts which were furnished to the Defendant;

41.3.3 The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the experts witnesses;

41.3.4 The reasonable taxable accommodation and transportation costs incurred by or on behalf of the plaintiff in attending medico-legal consultations with the parties' experts, consultations with the legal representatives and the court

proceedings, the quantum of which is subject to the discretion of the Taxing Master;

[42] The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

42.1 The plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

42.2 The Plaintiff shall allow the defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

42.3 Should payment not be effected timeously, plaintiff will be entitled to recover interest at applicable statutory rate on the taxed or agreed costs from date of allocation to date of final payment.

SARDIWALLA J

JUDGE OF THE HIGH COURT

For the Applicant : Advocate W P DE WAAL SC
Instructed by : VZLR INC
For the Respondent : Advocate T M MALATJI
Instructed by : Moduka Attorneys.
Date of hearing : 20 August 2019
Date of Judgment : 12 February 2020