

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

CASE NO.: 3890/2015

In the matter between:

BONGINKOSI MVANDABA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BESHE J:

[1] The plaintiff, a forty five (45) year old male person, is suing the defendant for damages arising from a motor vehicle (bus) accident that occurred on the 20 December 2013 between Queenstown and Cofimvaba in the Eastern Cape.

[2] On a previous occasion when the matter was on the roll for trial, the 28 of June 2017, the merits of this action were settled and by agreement between the parties the following order was accordingly

issued:

“1. That Defendant shall pay to the Plaintiff’s attorney of record by means of electronic transfer within 14 (fourteen) days of the date of receipt of this Order the sum of **R450 000.00** (Four Hundred and Fifty Thousand Rand) in respect of the Plaintiff’s general damages.

2. That the Defendant shall provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (“the undertaking”), to compensate Plaintiff for the costs relating to 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 the said Plaintiff for his benefit arising from the collision on 20 December 2013, after the costs have been incurred and on proof thereof.

3. That Defendant shall pay the Plaintiff’s taxed or agreed costs on an Party and Party scale, which costs shall include:

3.1 Any costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

3.2 The taxed or agreed fees of all Plaintiff’s expert witnesses listed hereunder, which includes all reasonable and necessary costs attached to the procurement of the expert reports, as well as other related costs such as X-rays, namely;

3.2.1.1 Dr Theo le Roux (Orthopaedic Surgeon);

3.2.1.2 Bergman, Ross & Partners (Radiologists);

3.2.1.3 Liane Durra (Clinical Psychologist);

3.2.1.4 Marinda Stander (Occupational Therapist);

3.2.1.5 Munro Forensic Actuaries (Actuaries).

3.2.1.6 Dr. Richard Hunter (Industrial Psychologist)

3.3 The reasonable costs incurred by Plaintiff in travelling to and from and attending all medico-legal examinations and/or assessments and/or X-rays/CT/MRI scans and the like;

3.4 The costs of one firm of instructing attorneys as well as attorneys at the seat of the Court.

3.5 The taxed or agreed fees of Plaintiff's Counsel;

4. That Defendant shall pay the Plaintiff's wasted costs occasioned by the postponement of the trial set down on the 28th June 2017, on an Attorney and Client Scale, which costs shall include:

4.1 The taxed or agreed fees of Plaintiff's Counsel, such costs to include Counsel's preparation and trial fees and all consultations with Plaintiff's expert witnesses as well as the drafting of Plaintiff's heads of argument;

4.2 The travel and accommodation costs incurred by the Plaintiff, Plaintiff's Counsel and Dr R Hunter to attend the trial in Grahamstown (which includes flights and vehicle hire);

4.3 The costs of one firm of instructing attorneys as well as attorneys at the seat of the Court.

4.4 The taxed or agreed qualifying expenses of Dr Richard Hunter (Industrial Psychologist).

5. That payment of the taxed or agreed costs shall be effected directly into the Trust Account of the Plaintiff's attorneys of record within fourteen (14) days of the date of the Taxing Master's *allocator* or agreement.

6. That Plaintiff shall serve a notice of taxation on the Defendant's attorneys of record and shall afford the defendant fourteen (14) days to effect payment of the taxed of agreed costs.

7. That should any of the amounts referred to in the preceding sub-paragraphs not be paid on the respective payment dates as scheduled above, the Defendant shall be liable for interest thereon at the prescribed rate of 10.50% per annum from the date hereof until date of payment.

8. That the aforesaid payments shall be effected by means of an electronic transfer of the funds into the Trust Account of the Plaintiff's attorneys of record, details whereof are as follows:

Account holder: SOHN AND WOOD ATTORNEYS

Bankers: First National Bank

Branch: Adderley Street

Branch Code: 201409

Account Number: [...]

9. The Defendant admits the Plaintiff's Expert Reports, including the Actuarial Methodology in the Report of Munro Forensic Actuaries, save for the Expert Report of Dr Richard Hunter is not admitted.

10. The trial in respect of the Plaintiff's past and future loss of earnings is **postponed** to **Wednesday 8th November 2017.**"

[3] The matter is before me for purposes of determining plaintiff's past and future loss of earnings.

[4] Orthopaedic surgeons **Drs Makan** and **Le Roux** agree that the plaintiff sustained the following injuries:

Abrasions on both elbows, fracture of the left scapula, soft tissue injury to the right shoulder which involves damage to the rotator cuff as well as a compound fracture of the left ankle.

[5] It appears to be common cause that in addition to the abovementioned physical injuries, plaintiff also sustained psychological injuries consisting of:

Major Depressive Disorder;

Chronic Post Traumatic Stress Disorder; and

Pain Disorder associated with General Medical Condition or chronic duration.

[6] At the time of the accident the plaintiff was self employed, freelancing as a Production Assistant in the film industry.

[7] The parties are *ad idem* that he has suffered loss of income in the past and will suffer loss of income in future. Where the parties diverge is as regards the extent of that loss / losses. Defendant contends that the plaintiff's claim is overstated.

[8] The parties' experts are in agreement that plaintiff would have progressed from being a production assistant to being a Second Assistant Director within the film industry, and that he will no longer progress to the level of Second Assistant Director as a result of the injuries he sustained. They also agree that plaintiff's employment prospects in the open market have been adversely affected as a result of the accident.

[9] The parties are not in agreement as to when plaintiff would have progressed to the position of Second Assistant Director. According to plaintiff's expert, this would have taken place in 2017. Whereas defendant's expert opined that it would have occurred by 2023. There is also an issue as to the number of days plaintiff would have worked and what he would have earned. To assist the court to determine these issues, plaintiff as well as two witnesses testified in support of his claim – **Ms Tracy-Lee Peterson** and **Dr William Johannes Fredrick Hunter**. Defendant called one witness **Ms Angelique Rademeyer**.

[10] **Ms Peterson** is a booking agent at Pulse Crew which is an agency that finds work for technical crew that is used in the Film Industry. Her company finds jobs for the plaintiff as a production assistant. Plaintiff is an independent contractor or freelancer. The agency books him out for jobs, manages his diary as well as his billing. According to **Ms Peterson**, plaintiff was a popular hard working production assistant who would be available even if called up at the last minute. He was reliable and prepared to work long hours. Production companies would ask for him specifically not just any Production Assistant. She also testified that these are the attributes that enable a Production Assistant to prove themselves to be ready to progress to the position of Second Assistant Director. She testified that plaintiff has

succeeded in proving that he was ready to take up the next position in line, that of Second Assistant Director. She was of the view that nothing would have prevented plaintiff from ascending to position of Second Assistant Director in 2014, explaining that Production Assistant is only an entry level position and that to progress from Production Assistant to Second Assistant Director takes three to five years. She was in disagreement with the defendant's expert that plaintiff would only have been promoted in 2023. She explained that that would have made him the oldest Production Assistant and that at that age he would not have been able to keep up with work as a Production Assistant, a job that is physically demanding. She also testified that there is steady flow of new young recruits coming and that she has never come across a forty five (45) year old Production Assistant.

[11] **Ms Peterson** testified that after the accident, plaintiff was off work for about a year. Upon his return he appeared to have lost his confidence. He was no longer available as he used to be before the accident. He turned down jobs as he became selective about the jobs he accepted. He also limped at times. In her view it was unlikely that he would be promoted to an Assistant Director.

[12] According to **Ms Peterson**, the daily rate payable to Second Assistant Directors until August 2017 ranged between R1 000.00 to R1

850.00 which increased to maximum of R2 200.00 in September. This was the gross amount before the deduction of the Agency fee and UIF. Rates for Production Assistants as at time **Ms Peterson** testified were R750.00 to R1 350.00. She also testified that film industry personnel / technical staff would be occupied or have jobs not for the full twelve (12) months of the year but for \pm ten (10) months.

[13] Asked why plaintiff remained a Production Assistant for seven (7) years in his previous job at Ground Glass, **Ms Peterson** explained that Ground Glass did not have in-house Directors, there he could not be promoted to a position Ground Glass did not have.

[14] Next to testify in support of plaintiff's case was **Dr Hunter**. **Dr Hunter** is an Industrial Psychologist. Subsequent to compiling a report on his assessment of the plaintiff, he together with defendant's expert, who also like **Dr Hunter**, is an Occupational Therapist favoured the court with a joint minute. In the said joint minute they were in agreement about *inter alia* the extent and sequelae of plaintiff's injuries based on reports at their disposal. They agreed that plaintiff was a Production Assistant in the film industry at the time of the accident. That he did not work for a period of time, but that he has since returned to work but has to be selective. That the plaintiff is best suited for a sedentary, semi-sedentary to light physical demand, work with reasonable

accommodation for mobility difficulties. That he does not fully meet the criteria of a Production Assistant in the film industry. On a subsequent date the two (2) therapists agreed that the plaintiff would have progressed to the position of Second Assistant Director. According to **Ms Rademeyer** in 2023. Whereas according to **Dr Hunter** this would have occurred in 2017 based on collateral information that he obtained. **Ms Rademeyer** based her projection on *inter alia*, the fact that future progressions may also be delayed or stilted. They were however in agreement that plaintiff will no longer progress to Second Assistant Director.

[15] In his *viva-voce* evidence, **Dr Hunter** testified about two post-morbid career scenarios that are envisaged based on *inter alia* figures placed at his disposal regarding plaintiff's pre-morbid earnings schedule of work etc. **Ms Rademeyer** was in agreement with the first scenario: that is one where plaintiff works as a Production Assistant until retirement age. Scenario two projects a scenario where within a few years from now, plaintiff's leaves the film industry and works at a semi-skilled level thereby suffering a significant future loss of earnings. **Dr Hunter** was questioned at length by *Mr Miller* for the defendant about his projections and the basis thereof. It transpired from **Dr Hunter's** evidence that he was provided with ITA34 documents pertaining to **Mr**

Mvandaba's earnings. The said documents reflect that plaintiff's earnings were as follows:

2012	R73 000.00.
2013	R111 509.00.
2014	R56 724.00.
2015	R86 683.00.
2016	R 71 570.00.

In his testimony, plaintiff recounted how the accident occurred and the aftermath thereof. How he is struggling to cope with his responsibilities as a Production Assistant due to the pain he suffers, worry that he will fall and break expensive equipment that is used in the film industry. Basically confirming what the experts say - that he no longer meets the demands of being a Production Assistant. How he turns down jobs and makes excuses about not being available. He also now lacks confidence. How at the time of the accident he felt that he was ready to progress to position of Second Assistant Director. He had been used as one and was planning to speak to **Ms Tracy Raubenheimer** of Pulse Crew Agency to designate him as a Second Assistant Director in the new season on the books of the Agency. He was involved in the accident before the start of the new season. He testified that the work of an Second Assistant Director was also very physically demanding. That one could be on his feet the whole day. He estimated that he worked approximately ten (10) months a year, up to five (5) days a week. He

would also have work in winter although there was lesser work in winter. Especially “international” work but would still have local work which mostly involved advertising as opposed to shooting for *inter alia* international movies.

[16] As indicated earlier, defendant’s expert **Ms Rademeyer** is of the view that plaintiff would have only have been promoted to the position of Second Assistant Director in 2023. This, she bases on the 2011 National Census of gross earnings of persons in the Western Cape with Grade 11 education – plaintiff’s highest level of education is Grade 11. She was of the view that the suggestion that plaintiff would have been promoted to Second Assistant Director in 2017 was overly optimistic. That her view that plaintiff could carry on working until retirement and be promoted in 2023 was also based on **Dr Le Roux**, an Orthopaedic Surgeon, who opined that it would take four (4) months for plaintiff to recuperate and return to work. This period would have ended in April 2014.

[17] We do know however that has not been the case. Evidence reveals that plaintiff has still not completely recovered even though he has continued working. Even though he did go back to work.

[18] **Ms Rademeyer** also conceded that she did not consider medical opinions of **Ms Stander** (Occupational Therapist) and **Ms Liane Durra** (Clinical Psychologist). She subsequently conceded that plaintiff will be unable to continue working as a Production Assistant in the film industry. Both **Durra** and **Stander** opined that plaintiff was no longer suited to work as Production Assistant in the film industry.

[19] I am inclined to agree with plaintiff's counsel's submissions that the methodology used by **Ms Rademeyer** is flawed. Reliance cannot be placed on the National Census she referred to as a basis for her conclusions. Not where there is direct, incontrovertible evidence pertaining to the plaintiff personally and circumstances pertaining to a specific industry (the film industry).

[20] I see no reason why I should not accept plaintiff's and **Ms Peterson's** evidence. Experts also agree that plaintiff is no longer suited for working as a Production Assistant. I am therefore satisfied that plaintiff will not be able to continue working as a Production Assistant in the film industry. I am satisfied that he is unlikely to have carried on as Production Assistant until the year 2023. Based on the fact that Production Assistant is an entry level position. Is a stepping to higher positions. There are hardly any Production Assistants who are forty five (45) years old. The position is held by younger recruits to the

technical staff in the film industry. Evidence also reveals that plaintiff was doing well as a Production Assistant. A preferred Production Assistant. Even though plaintiff and **Ms Peterson** testified that plaintiff would have been promoted to Second Assistant Director when the new season started in 2014, **Dr Hunter** took a conservative approach and put the date /year at 2023 providing for five (5) years in the position of Production Assistant (2012 - 2017). This to me appears to make sense if one considers **Ms Peterson's** evidence about the age factor and plaintiff's performance as a Production Assistant. I am also of the view at worst he would have been promoted at the latest by 2017.

[21] What is left for determination is the question of the loss of past earnings as well as future loss of earnings – the actual amounts of such losses.

[22] Based on plaintiff's and **Ms Peterson's** evidence it is clear that plaintiff is no longer able to cope with the demands of work in the film industry – be it as Production Assistant or Second Assistant Director. That in a few years – realistically after the next season (2019) he will stop working because he is struggling to cope. As indicated, **Dr Hunter** envisages two scenarios:

1. Plaintiff working as a Production Assistant until retirement age.

2. Leaving the film industry a few years from now and working as a semi-skilled worker.

[23] I have already stated why I am not convinced that the plaintiff will continue working as a Production Assistant until retirement age.

[24] The defendant assails plaintiff's evidence on the basis that it is riddled with discrepancies and therefore unreliable as regards the following aspects:

(i) The time that he was away from work after the accident recuperating. Whether it was one (1) year, three (3) months or whether he resigned from work.

Plaintiff explained that he did go back to work after four (4) months thinking that he had recovered but reality soon dawned on him that he could not cope. Worked until December that year and did not work the following year for about ten (10) months. He went back to work in October 2015. He attributed the discrepancies that appeared from **Dr Hunter's** and **Ms Rademeyer's** reports as being due misunderstanding during consultation. Plaintiff's evidence in this regard appears to be confirmed by records provided by his agent.

[25] The second aspect that was assailed by defendant is plaintiff's evidence that he worked five (5) days a week, ten (10) months a year

as being overly optimistic. In this regard **Dr Hunter** conceded that given the fact that it was not guaranteed that there would always be work available it would be difficult to say exactly how many days the plaintiff would have worked. That five (5) days a week, ten (10) months of the year may be optimistic due to variables in the nature of the work involved.

[26] It was argued on behalf of the defendant that evidence regarding number of days plaintiff worked in a year was exaggerated. So was evidence that plaintiff would have been promoted to Second Assistant Director by the year 2017. *Mr Miller* argued that based on ITA34 document relied upon by **Dr Hunter**, the plaintiff did not work five (5) or even four (4) days per week. The same applies to plaintiff's gross income figures provided to **Ms Rademeyer**. A limited number of plaintiff's payslip was made available to the experts. These suggest that the plaintiff at some stage – 8 November 2013 to 27 November 2013 worked continuously except for one (1) day. From 3 December to 11 December 2013. **Ms Rademeyer** used the tax year / financial year to calculate plaintiff's earnings / income.

[27] As indicated earlier, evidence revealed that some periods during the year would have more work than others with November and December usually having more work. But we also know that there would

be jobs during the winter as well, *albeit* different jobs (local advertising assignments).

[28] However, in my view the evidence from the available records of plaintiff, **Ms Peterson's** evidence as well as plaintiff's evidence, it appears more likely that plaintiff could have worked four (4) days a week for ten (10) months of the year on average before the accident / in his pre-morbid state.

[29] In my view the days contended for by the defendant are not realistic in regard to the evidence before court. Especially in view of the fact some of the payment schedules relied upon related to plaintiff in his injured state. In respect of the period after the accident when according to plaintiff and **Ms Peterson** he was turning some of the jobs down. Reliance on the income schedules will therefore not paint an accurate picture of what pertained prior to the accident. **Ms Rademeyer** conceded to have made mistakes in some of her calculations. For an example, she spread plaintiff's earnings over twelve (12) months instead of ten (10) months. According to the evidence plaintiff's year consisted of ten (10) months as opposed to twelve (12) months.

[30] The compensation that plaintiff should get in respect of loss of past and future income / earnings was re-assessed in light of the

concessions made by the experts as well as points where they agreed, by an actuary – **Jacobson**.

[31] Based on the understanding that plaintiff was unable to return to work for twelve (12) months, he is not expected to progress to the position of Second Assistant Director and he might suffer higher chances and longer chances of unemployment, the actuary quantified his loss of income as follows:

Past loss of income R127 185.00.

Future loss of income R2 613 070.00.

Contingency of 5% and 15% to the past and future loss of earnings were applied to the above figures by the actuary.

[32] These amounts accord with the evidence before me regard the rates payable to Production Assistants and Second Assistant Directors. I also do not see any reason why a higher percentage of contingency should be applied to the amounts to be awarded in respect of plaintiff's past and future loss of earnings / earning capacity. The reasons alluded to by *Mr Miller* when calling for a higher contingency – as high as 50%, will be catered for by the normal contingency application of 5% and 15% respectively. Those being the fact that the film industry is capricious or fickle, based on a person's popularity, that there were many variables, plaintiff's work is not regular and other eventualities.

[33] I am inclined to agree with the actuarial calculations as set out above as to the value / extent of losses plaintiff has and will suffer in respect of his income as a result of the accident that occurred on the 20 December 2013.

[34] Accordingly the following order will issue: (as proposed in plaintiff's draft order).

1. That Defendant shall pay to the Plaintiff's attorney of record by means of electronic transfer within 14 (fourteen) days of the date of receipt of this Order the sum of R2 740 255.00 (Two Million Seven Hundred and Forty Thousand Two Hundred and Fifty-five Rand) in respect of the Plaintiff's past and future loss of income.

2. That Defendant shall pay the Plaintiff's taxed or agreed costs on a party and party scale, which costs shall include:

2.1 Any costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

2.2 The taxed or agreed fees and qualifying expenses of all Plaintiff's expert witnesses listed hereunder, which includes all reasonable and necessary costs attached to the procurement of the expert reports, as well as other related costs such as X-rays, namely:

2.2.1.1 Dr Theo le Roux (Orthopaedic Surgeon);

2.2.1.2 Bergman, Ross & Partners (Radiologists);

2.2.1.3 Liane Durra (Clinical Psychologist);

2.2.1.4 Dr. Richard Hunter (Industrial Psychologist)

2.2.1.5 Marinda Stander (Occupational Therapist);

2.2.1.6 Munro Forensic Actuaries (Actuaries).

2.3 The reasonable costs incurred by Plaintiff in travelling to and from and attending all medico-legal examinations and/or assessments and/or X-rays/CT/MRI scans and the like;

2.4 The taxed or agreed fees of Plaintiff's Counsel, such costs to include Counsel's preparation and trial fees, including Counsel's day fees, and all consultations with Plaintiff's expert witnesses and lay witnesses, as well as the drafting of Plaintiff's heads of argument;

2.5 The reasonable travel and accommodation costs incurred by the Plaintiff, Tracy Petersen of Pulse Crew, Plaintiff's Counsel and Dr R Hunter to attend the trial in Grahamstown (which includes flights and vehicle hire);

2.6 The costs of one firm of instructing attorneys as well as attorneys at the seat of the Court.

3. That payment of the taxed or agreed costs shall be effected directly into the Trust Account of the Plaintiff's attorneys of record within fourteen (14) days of the date of the Taxing Master's *allocator* or agreement.

4. That Plaintiff shall serve a notice of taxation on the Defendant's attorneys of record and shall afford the Defendant fourteen (14) days to effect payment of the taxed of agreed costs.

5. That should any of the amounts referred to in the preceding subparagraphs not be paid on the respective payment dates as scheduled above, the Defendant shall be liable for interest thereon at the prescribed rate of 10.50% per annum from the date hereof until date of payment.

6. That the aforesaid payments shall be effected by means of an electronic transfer of the funds into the Trust Account of the Plaintiff's attorneys of record, details whereof are as follows:

Account holder: SOHN AND WOOD ATTORNEYS

Bankers: First National Bank

Branch: Adderley Street

Branch Code: 201409

Account Number: [...]

NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff	:	Adv: WS Coughlan
Instructed by	:	SOHN AND WOOD ATTORNEYS C/o DOLD AND STONE INC. 10 African Street GRAHAMSTOWN Tel.: 046 – 622 2348 Ref.: Mrs Wolmarans
For the Defendant	:	Adv: TS Miller
Instructed by	:	NONGOGO GUZANA INC. C/o NOLTE SMIT ATTORNEYS 115 High Street GRAHAMSTOWN Tel.: 046 – 622 7209 Ref.: Arisha Moodley
Dates Heard	:	8 to 11 December 2017
Date Reserved	:	11 December 2017
Date Delivered	:	27 February 2018