IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 25199/2010

In the matter between

MONAGENG ABEL Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

EF Dippenaar AJ

[1] This is an action for damages sustained by the Plaintiff in a motor vehicle collision which occurred on 9 November 2007. The Plaintiff had been a passenger in one of the vehicles involved and had, *inter alia,* sustained a moderate to severe brain injury and permanent hearing impairment of the right ear in the collision.

[2] The Defendant has conceded the issue of liability and the parties have agreed that the Defendant is 100% liable for the proven damages of the Plaintiff.

[3] The parties have further agreed on general damages of R450 000.00 and Defendant has provided an undertaking in terms of section 74 of the Road Accident Fund Act, 56 of 1996, as amended ("the RAF Act"), in respect of past and future medical expenses.

[4] The issues to be determined in the current action are the Plaintiff's past loss of earnings and future loss of earnings and/or earning capacity due to the injuries sustained in the accident in question.

[5] Dr R Kellerman, an Industrial Psychologist, Dr MA Gibson, a Neuropsychologist and Mr G Jacobson, an Actuary, testified on behalf of the Plaintiff. The Plaintiff did not testify.

[6] The Defendant called the following witnesses: Mr A Lamprecht, an Industrial Psychologist, Ms N Sewpershad, a Clinical Psychologist and Mr Jele, the Recruitment and Operational Manager of the Plaintiff's current employer, CRD Security & Armed Response ("CRD").

THE EVIDENCE

[7] It was undisputed that at the time of the accident, the Plaintiff was employed as a cashier at Engen. As he had showed potential, he had been recruited from Steers as he showed potential for further advancement. Utilising the Motor

Industry Bargaining Council scales, the Plaintiff would have been able to earn substantially more as a cashier than in his current employment.

[8] It was further undisputed that after his recovery from the injuries sustained in the accident, the Plaintiff's position had been filled and he received a retrenchment package of R5 000.00. Plaintiff used these funds to qualify as a C grade security guard.

[9] It is common cause that Plaintiff was unemployed for a period of eight months.

[10] Plaintiff obtained employment as a grade D security officer at CRD, Jeppestown, a position he still holds and has held for the last three years. Since being thus employed, Plaintiff has been working night shift at a vacant property where his job is to patrol the grounds and a double storey house on the property. There have been no incidents on the property and Plaintiff's record remains unblemished.

[11] Dr Kellerman, the Plaintiff's Industrial Psychologist, testified that the Plaintiff is probably being employed sympathetically. He may have difficulties in performing his duties as he is prone to falling into a very deep sleep and may struggle to make decisions requiring judgment. In her view, his continued employment as security guard is tenuous as his employment as such constitutes a risk, both to himself and others.

[12] Dr Kellerman and Ms Sewpershad disagree on whether Plaintiff has proper insight into his condition. Dr Kellerman testified that Plaintiff has no real insight

into his condition, has difficulty in making decisions and cannot make accurate or appropriate judgments in unfamiliar and sudden situations. Ms Sewpershad was more positive that the Plaintiff had proper insight into his condition.

[13] Ms Gibson testified that due to his cognitive behaviour as a result of his brain injury, the Plaintiff's performance in life would spiral downwards. He suffers short term memory loss and will do exactly as he is told, rather than act on his own initiative. His own actions may be impulsive and inappropriate. He would function better in a repetitive environment, but would not function well in an environment where split second decisions are required or where a crisis may develop. Statistically only 4% of individuals with the type of brain injury suffered by the Plaintiff, successfully and permanently return to the open labour market. She testified that Plaintiff would not cope in his present position if he was required to make any plans, would never be able to be a supervisor and could never return to his previous employment as a cashier. In her view, the Plaintiff was a vulnerable person who required sympathetic, supervised employment with a significant loss of potential and capacity in his functioning.

[14] Defendant's Clinical Psychologist, Ms Sewpershad testified that the Plaintiff showed no initiative and that the tests she had performed were done without stress and without time constraints or pressure being applied. In her view, the Plaintiff could continue with his current employment. She could not however render any assistance regarding current positions in the labour market and did not motivate her opinion regarding his continued employment as a security guard on a logical or rational basis as she could not evaluate how the Plaintiff

would cope with a crisis or dangerous situation. She agreed that the combination of the Plaintiff's physical impairment, cognitive deficits and his depression would be likely to limit his efficiency at work and limit his promotional possibilities.

[15] Ms Sewpershad further testified that the Plaintiff had made good recovery from his moderate to severe head injury and that he would stand to benefit from a combination of psychotherapeutic and psychiatric therapy to face the reality of his changed circumstances. She however agreed that his current condition was unlikely to improve.

[16] Mr Lampbrecht based his view that the Plaintiff was not at risk of losing his employment on his conversations with the Plaintiff's current employer, CRD. He agreed that if the Plaintiff were to lose his current employment, he would struggle to cope or find alternative employment. He further agreed that the Plaintiff would be a vulnerable employee and that the combination of his cognitive deficits, depression and physical impairment would likely limit his efficiency and curtail his opportunities at promotion in the open labour market where he would have to compete with able bodied individuals.

[17] The aforesaid experts agree that Plaintiff has suffered cognitive impairment and that his present condition is permanent. He also has permanent loss of hearing in his right ear.

[18] The various experts ultimately agreed that the Plaintiff needs a stable, routined and structured environment in which to perform his duties. They were also in

agreement that the Plaintiff's functionality would be impaired in any unexpected or emergency situation, such as an armed robbery and that his reactions could be inappropriate and would be unpredictable.

[19] The parties' experts ultimately also agreed that, were the Plaintiff to lose his current employment, it is unlikely that he will successfully compete on the open labour market and that he is vulnerable to not finding alternative employment.

[20] The fact remains that the Plaintiff is presently in gainful employment as a security guard and has thus been employed for the past three years without incident and to the satisfaction of his employer. He is currently earning a salary of R3 000.00 per month. His pre accident income was about R2 100.00.

[21] The evidence of Mr Jele, the Operational and Recruitment Manager of CRD that the Plaintiff has promotional possibilities, seemed to be more of a general and theoretical nature in accordance with company policy to keep promotional opportunities within the company, rather than a positive endorsement of the Plaintiff or a directed comment aimed at the Plaintiff personally in his particular circumstances.

[22] On a conspectus of the evidence, it is in my view unlikely that the Plaintiff will ever be promoted. Moreover, his prospects of obtaining alternative employment were his current employment to be terminated, are slim.

[23] Mr Jele testified that at the time of applying for employment, the Plaintiff had not disclosed his disabilities to his employer, who only became aware of these

disabilities during the course of the trial and whilst Mr Jele was present in Court.

[24] Both Dr Kellerman and Ms Gibson had postulated the risk of Plaintiff's services being terminated and the risks involved in retaining the Plaintiff as a security guard, both to the Plaintiff, his employer and others. The issue which ultimately needs to be determined is whether there is a risk of the Plaintiff's current employment being terminated; and, if so, how great such risk is.

[25] Both Dr Kellerman and Ms Gibson were of the view that once the Plaintiff's employer discovered the truth and their shared view that the Plaintiff should not be employed as a security guard as his continued employment as such constituted a risk (both to himself and others), his employment would be in jeopardy. They were of the view that, having regard to the risks involved, it would be prudent for his employer to terminate his employment.

[26] This is however not the response received from Plaintiff's employer, CRD who became aware of the Plaintiff's condition and the aforesaid views during the course of the trial.

[27] I was informed by counsel representing Defendant that the issue of Plaintiff's continued employment had been raised by Mr Jele with the Managing Director of CRD who had authorised Mr Jele to deal with the matter as he saw fit. Mr Jele's approach was simple:

[27.1] The company had a policy of growth from within and wherever promotional opportunities arose; such post was advertised and current employees were invited to apply. Certain tests were given to the applicants for a particular post, and the applicant with the highest test results received the promotion. The Plaintiff would receive no special treatment, but would be treated like any other applicant.

[27.2] In relation to his continued employment, Mr Jele again emphasised that the Plaintiff would receive no special treatment.

[27.3] Although Plaintiff had not disclosed his medical condition on his application form prior to commencing his employment with CRD, it was still prepared to continue keeping Plaintiff in its employ. There had been no substantial difficulties regarding Plaintiff's work performance.

[27.4] Mr Jele emphasised that Plaintiff's continued employment was entirely based on his work performance. CRD's standard procedure was to offer an employee with performance difficulties whatever alternative options were available by, for example, exchanging night shifts for day shifts if an employee regularly fell asleep. Once all options were exhausted and performance problems were again encountered, such employee would face a disciplinary hearing and, if found guilty, could face dismissal. The Plaintiff's medical condition would not be taken into account in the evaluation of his performance and he would be treated on an equal footing with his co-employees.

[28] On the probabilities, it therefore appears that if the Plaintiff were to experience performance related difficulties, which on the evidence before me ultimately seems inevitable, his services may well be terminated as a result, as he would receive no special or sympathetic treatment from his employer.

[29] On behalf of the Plaintiff it was argued that Plaintiff is entirely unemployable and that his continued employment constitutes a safety risk, both to himself and others and that he is effectively unemployed.

[30] It was further contended that Plaintiff, upon a comparison of his pre-morbid and post-morbid career paths, has suffered a loss of earnings, as he could never again perform as a cashier or in a supervisory or administrative position.

[31] The Plaintiff's actuarial report was not challenged on its calculations, nor was Plaintiff's Actuary, Mr Jacobson, cross-examined extensively on these issues. His cross-examination rather focussed on the variables / contingencies taken into account in respect of future loss of earnings.

[32] Mr Jacobson postulated various scenarios, but ultimately left the issue of contingencies in the hands of the Court. In his view, a figure around the R600 000.00 mark would be an appropriate amount in respect of future loss of earnings.

[33] The Defendant on the other hand, contended that Plaintiff suffered only limited past loss of earnings in relation to the eight months period after the accident when he was unemployed.

[34] Defendant further contended that, in light of Plaintiff's current employment, he had suffered no future loss of earnings, nor had he suffered any future loss of earning capacity and had not succeeded in proving any such loss.

THE LEGAL POSITION

[35] The relevant principles applicable are usefully set out in *Union and National Insurance Co Limited v Coetzee*[1] and in *Santam Versekeringsmaatskappy Bpk v Byleveldt*[2].

[36] It is trite that there must be proof that a reduction in earning capacity gives rise to a pecuniary loss[3]. I have also been referred to a useful exposition of this issue and the necessity of a causal link between the damage suffered, i.e. loss of earning capacity and the diminution of a claimant's estate before such damage can be said to be compensable[4]. The upshot of the analysis is that a claim for future loss of earnings and loss of earning capacity are interrelated and dependent on each other and constitutes a single item of loss, provided of course that a resultant actual loss of future income is shown.

[37] On a conspectus of the evidence of the experts they are in agreement that the Plaintiff has suffered impairment in his functioning. The question arises whether he has proved an actual loss of future income and whether the requirements for such a claim have been met.

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1 1970 (1) SA 295 A
2 1973 (2) SA 146 A
3 *Rudman v Road Accident Fund*, 2003 (2) SA 234 SCA
4 *Riana Deysel v RAF*, Gauteng South Case Number 2483/09, judgment of Bizos AJ. See also *Prinsloo v RAF*, 2009 (5) SA 406 SE

[38] The only way in which the Plaintiff's performance may influence his patrimony is if there is a possibility that he could lose his current employment and/or be limited in the number and quality of his choices, should he be forced to find alternative employment. This is indeed the basis on which the Plaintiff's evidence was led. On a factual basis, this is the distinction with the *Deysel* case upon which the Defendant relies for its contention that no loss has been proved.

[39] In *Dippenaar v Shield Insurance*[5] it was held that "*If in our law earning capacity is to be considered an asset of a person's estate, it follows that the terms of contract of employment in a particular case, if relied upon, constitutes evidence of such earning capacity at the time the delict was committed*". It would accordingly be short sighted to only consider the monetary compensation earned by the Plaintiff at the time the accident occurred and not to also consider the type of employment he enjoyed and the future promotional prospects possible to him. It was not disputed that the Plaintiff had shown promise for future enhancement and managerial promotion, whereas at present he is employed as a grade D security guard where he must compete with all able bodied contenders for promotional prospects, if and when they may arise.

[40] The Plaintiff procured his current employment without disclosing the sequelae of his accident or the impairment of his faculties to his employer. He apparently initially procured the employment by completing and passing a simple test and without disclosing his physical impediments. Although his present employer is

[5] 1979 (2) SA 904 A

now aware of his condition and does not as a result intend to alter his employment, his continued employment remains performance based and if a problem occurred, he would be treated like any other employee.

[41] The Defendant contends that there is no appreciable effect on the Plaintiff's earning capacity and that he has sustained no loss under this heading.

[42] In my view, having regard to the inevitable risks involved in the Plaintiff's continued employment until the agreed relevant age of 65, it would be unreasonable to discount the possibility of the termination of Plaintiff's current employment. His current employer could not and did not guarantee Plaintiff's continued employment.

[43] The percentage of the claim allowed for contingencies and circumstances are dictated by the circumstances of each case. I have had regard to the principles enunciated in *AA Mutual Insurance v Maqula*[6]. All the relevant facts and circumstances must be taken into account, including that his injuries would continue to impact on his performance at work on a permanent basis[7] and I have sought to do so.

[44] To my mind the correct approach is to accept that the Plaintiff will be as gainfully employed as he will be gainfully unemployed, if only on the basis that any further pretence at rational prediction, will be complete guesswork. Accordingly I propose to apply a contingency of 50% to the Plaintiff's loss of

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[6] 1978 (1) SA 805 A; *Corbett & Buchanan*, 739, where a 50% contingency was applied

[7] *Allie v RAF*, [2003] 1 All SA 144 C

future income, although the Plaintiff urged me to accept a contingency of between 60 and 80%.

[45] I do not agree with Defendant's contentions that the only risks Plaintiff is exposed to are the normal risks of life such as the continued existence of his current employer.

[46] Regarding the quantification of Plaintiff's damages under this heading, Mr Jacobson postulated various scenarios which were not strenuously attacked in cross-examination. None of his calculations or assumptions have been strenuously attacked by the Defendant and his assumptions and calculations have been rationally and logically explained in his evidence, which I accept.

[47] I further accept a contingency of 15% in respect of the prospective loss postulated by Mr Jacobson. Of the three scenarios postulated by Mr Jacobson, I am of the view that the scenario based on a median to upper quartile unskilled worker is the most appropriate. On this basis, and after a contingency deduction of 50%, the Plaintiff's prospective loss amounts to R650 517.00.

[48] Having regard to the impairment of the Plaintiff's mental faculties, a further issue arises. In *Reyneke NO vs Mutual & Federal Insurance Company Ltd*[8] the Court, in a similar case, granted an Order declaring that the injured person was incapable of managing her own affairs; appointing a curatrix *bonis* to her estate; defining the powers of the curatrix *bonis*; directing that the appointment of the curatrix *bonis* and the exercise of her powers are subject to the control of the

[8] 1992 (2) SA 417 (T)

Master of the Supreme Court and that she be directed to furnish security to the satisfaction of the Master; and ordering that the undertaking in respect of future medical and other expenses furnished by the statutory insurer in that case, included the obligation on the part of the statutory insurer to compensate the injured person for the remuneration of the curatrix *bonis* in administering the estate of the injured person, according to the prescribed tariff and as taxed by the Master, and that the remuneration of and the costs incurred by the curatrix *bonis* in administering the undertaking given by the statutory insurer as and when those costs arise and subject to the taxation by the Master is included in the undertaking.

[49] In order to protect the Plaintiff's interests, I am of the view that a similar order should be made here.

[50] In the Plaintiff's heads of argument I was referred to a further calculation by Mr Jacobson relating to the additional capital required if a curator *bonis* is appointed to manage the monetary award which is made to the Plaintiff. The curator *bonis*' charges would be 1% plus VAT to be applied to the balance of the assets each year. The average additional costs for the curator would be 13.5% applied to the amount of the capital to be administered by the curator *bonis*.

[51] I was further referred to a consent of a Mr Gert Kruger of ABSA Trust, a nominee of that company authorised to accept appointments as trustee and curator *bonis*.

[52] The Defendant did not raise any objections to the appointment of a curator *bonis*. In view of the fact that this issue was however not fully argued at trial, an opportunity will be granted to the Defendant to make submissions regarding an amendment of the Order in this regard.

[53] I am of the view that, given the Plaintiff's current state and in light of the recommendations by the various experts, the Plaintiff should not have control over the funds awarded to him in this action, it would be prudent to have a curator *bonis* appointed to administer these funds, the costs of which is to be borne by the Defendant as part of its undertaking in terms of section 17(4) of the RAF Act.

[54] I am accordingly of the view that the following amounts should be awarded to the Plaintiff:

[54.1] Past loss of earnings (8 x R2 035.80) R16 286.40

[54.2] Future loss of earnings/earning capacity R650 517.00

[54.3] General damages as agreed R450 000.00.

[54.4] The total monetary amount which the Defendant is liable to pay Plaintiff, is accordingly the amount of R1 116 803.40.

[55] I accordingly grant the following Order:-

[1] Judgment is granted in favour of the Plaintiff against the Defendant for payment of the sum of R1 116 803.40 made up as follows:-

[1.1] Past loss of earnings R16 286.40;

[1.2] Future loss of earnings/ earning capacity R650 517.00;

[1.3] General damages R450 000.00;

[2] Interest on the sum in [1] above is granted at the rate of 15,50% per annum from 24 December 2011; being fourteen (14) days from date of this Order as referred to in section 17(3)(a) of the RAF Act, to date of payment.

[3] The Defendant is directed, in accordance with its undertaking, to provide a certificate of undertaking in respect of the Plaintiff's future medical expenses in terms of section 17(4) of the RAF Act, for 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 to him or the supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision that occurred on the 9th of November 2007.

[4] Abel Monageng, born on 28 May 1978, ID no 7505285871084 ("Monageng") is declared incapable of managing his financial affairs in relation to the proceeds of this action.

[5] Mr Gert Kruger of ABSA Trust is appointed curator *bonis* to the estate of Monageng, with the power of substitution.

[6] The curator *bonis* will have the following powers:

[6.1] to receive, take care of, control and administer the proceeds of this action;

[6.2] to let, exchange, partition, alienate and for any lawful purpose to mortgage or pledge any property which may be acquired by Monageng from the proceeds of this action or in which he may acquire an interest;

[6.3] to acquire, whether by purchase or otherwise, any property, whether moveable or immovable, for the benefit of Monageng;

[6.4] to exercise any power or give any consent required for the exercise of any power where such power is vested in Monageng for his own benefit, or where the power is in the nature of a beneficial interest to Monageng;

[6.5] to raise money by way of mortgage or pledge of any of Monageng's property for payment of his debts or expenditure incurred for his maintenance, or otherwise for his benefit or for payment of, or provision for the expenses of his future maintenance or for the improvement or maintenance of any of his property;

[6.6] to apply any money for or towards the maintenance or benefit of Monageng and to furnish him with a monthly allowance;

[6.7] to expend money on the improvement of any property of Monageng by way of building or otherwise;

[6.8] to expend any monies belonging to Monageng on the maintenance, education or advancement of any relative of Monageng, or any other person, wholly or partially dependent on him;

[6.9] to invest and reinvest monies for Monageng which may be available for investment and which are not immediately required for the purpose referred to in section 82(c) of the Administration of Estates Act 66 of 1965;

[6.10] to take any action which may be necessary in the interests of Monageng or for the due and proper administration of his property;

[6.11] additionally, such powers as are laid down in *Ex Parte Du Toit*, 1968(1) SA 33 (T).

[7] The appointment of the curator *bonis* and the exercise of his powers are subject to the control and prior consent of the Master of the High Court and he is to furnish security to the satisfaction of the Master.

[8] Should the curator *bonis* fail to furnish security within 30 days of date of this Order, or within such longer period as the Master may permit upon prior written application to him/her, or should he fail to apply for letters of curatorship in terms of section 71 of the Administration of Estates Act, 68 of 1965 within thirty (30) days of date of this Order, the Master is authorised to appoint a curator/curatrix *bonis* of his/her choice.

[9] The attention of the curator *bonis* is drawn to the provisions and implications of sections 71 and 28, and regulation 7 of the Administration of Estates Act, 68 of 1965.

[10] It is declared that the undertaking in terms of section 17(4) referred to above includes the obligation on the part of the RAF to pay for:

[10.1] the remuneration of the curator *bonis* in administering his estate according to the prescribed tariff and as taxed by the Master;

[10.2] the remuneration of and the costs incurred by the curator *bonis* in administering the undertaking in terms of section 17(4) of the RAF Act and when these costs arise and subject to taxation by the Master;

[10.3] the costs incurred by the curator *bonis* in furnishing security to the Master.

[11] The Defendant is directed to pay the costs of suit, including the costs relating to obtaining medico-legal reports and the qualifying, reservation and trial fees of the Plaintiff's expert witnesses:

[11.1.1] Dr R Kellerman;

[11.1.2] Ms MA Gibson; and

[11.1.3] Mr G Jacobson.

[12] The parties are afforded an opportunity to apply for leave to amend the Order in relation to [3] to [9] above, within sixty (60) days of date of this Order.

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E F DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	9, 12 & 13 September 2011
Date of judgement	:	9 December 2011
For Plaintiff	:	Adv DP Strydom
	:	Moss & Associates Inc
For Defendant	:	Adv SS Masina
	:	Maponya Inc