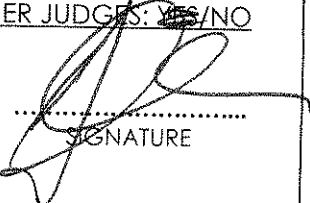


REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 12/09382

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>20/8/2013</u> DATE	
 SIGNATURE	

In the matter between:


CASTO, DELMAINE JACQUES


Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

TSHABALALA, J:

[1] The plaintiff was involved in a motor vehicle collision on 29 May 2011 as a result of which he sustained certain injuries. In this action, the plaintiff claims damages under different heads for the loss he has suffered as a result of those injuries and the collision.

[2] Prior to proceeding to trial, the following issues were settled:

2.1 The defendant shall pay the plaintiff:

2.1.1 80% of his proven damages;

2.1.2 R400 000,00 for general damages;

2.1.3 R173 160,00 for past loss of earnings; and

2.1.4 Furnish the plaintiff with an undertaking in terms of section 17(4) of Act 56 of 1996 limited to 80% of plaintiff's proven medical expenses for the costs of future treatment or of services rendered or goods supplied to him arising out of the injuries he sustained in the collision of 29 May 2011.

[3] The only issues I am called upon to determine are the plaintiff's loss of future earnings and the contingencies to be applied to arrive thereat.

[4] The evidence before me consists of the medico-legal reports of various experts on both sides, the joint minutes of some of them namely the occupational therapists, orthopaedic surgeons and industrial psychologists and the testimony of the plaintiff's clinical psychologist A Cramer.

[5] According to the experts and medical evidence, the plaintiff sustained the following injuries: head injury, cervical spine injury, fracture of the femur and chest injury with pneumothorax.

[6] Save for the experts who drew their joint minutes, the following experts also submitted medico-legal reports on behalf of the plaintiff viz a clinical psychologist (Annelies Cramer) and a neurosurgeon (Dr Percy Miller). No expert report was submitted on behalf of the defendant from their corresponding experts in these fields.

[7] It is also noted from the reports of the defendant's industrial psychologist (Dr W Pretorius) and the occupational therapist (Catherine Rice) that these experts were both only furnished with an RAF statutory medical report and Catherine Rice also with hospital clinical records.

[8] The industrial psychologist of the plaintiff and his occupational therapist were in possession of all the documents that the defendant's experts were in possession of including the orthopaedic report of Dr M de Graad and his Serious Assessment Report. The plaintiff's industrial psychologist had all the above including a neurosurgeon's report of Dr P Miller, the occupational report of M Spavings and a clinical psychologist report of Ms A Cramer.

[9] Having regard to this set of facts, I accept that the defendant's experts viz the industrial and occupational therapists were greatly disadvantaged in the preparation of their reports due to not being provided with any supporting documents.

[10] The following facts are either common cause or not challenged or agreed upon by the expert witnesses:

- 10.1 The plaintiff was 27 years old at the time of accident on 29 May 2011. Following the accident he was admitted to the Baragwanath Chris Hani Hospital where he remained until 1 July when he was discharged.
- 10.2 The orthopaedic surgeons on both sides agree that the plaintiff will continue to experience intermittent neck pain for the management whereof provision must be made.
- 10.3 They both defer to the neurosurgeon regarding his head injury and to the psychologist regarding the psychological consequences of such injury.
- 10.4 The injuries have resulted in a serious long-term impairment with severe depression resulting from post-traumatic disorder and giving rise to suicidal tendencies.
- 10.5 Both the occupational therapists agree that the psychological and cognitive difficulties that the plaintiff has experienced since the accident will impact negatively on his work and ability to complete his studies.
- 10.6 They both defer to the expertise of the neuropsychologist, psychiatrist, clinical psychologist and the industrial psychologist.

- 10.7 The industrial psychologists on both sides agree that the plaintiff, but for the accident, could have completed an apprenticeship and a diploma successfully and would have continued as a technician in his chosen field until the retirement age of 60 to 65 depending on the employer's policy or the plaintiff's health.
- 10.8 They also agree that he would have entered the open labour market at a LQ B3 level and progressed at intervals of 3 to 5 years to a career ceiling of LQ C1/2 level, whereafter the inflationary increases would apply.
- 10.9 According to Dr W Pretorius, the defendant's expert the plaintiff had:
- 10.9.1 incurred physical and neuropsychological/mood deficits;
 - 10.9.2 some physical limitation in bending forward, which will limit his work choice and performance;
 - 10.9.3 his neurocognitive deficits will limit his ability to learn and will cause him to struggle to structure his work and solve problems. His intellectual functioning has declined;

10.9.4 his career progress will likely be limited and be confined to employment in the smaller non-corporate labour market for semi-skilled workers.

10.10 According to Catherine Rice, also an expert of the defendant, the plaintiff scored a neck pain disability index of 25 which translates to a perceived severe disability and scored a cognitive ability below the normal range.

10.11 Annelies Cramer, a clinical psychologist whose findings remain unchallenged opines and testified that:

10.11.1 The plaintiff is expected to encounter difficulties in a formal work environment and is likely to struggle to obtain and sustain stable employment at the level he is qualified for.

10.11.2 His neurocognitive profile would render him occupationally very vulnerable due to fluctuations in concentration and work speed.

10.11.3 His low mood poor self-esteem could impact negatively for his level of motivation and drive.

10.11.4 He is unlikely to complete his apprenticeship due to his inability to learn and retain new information.

10.11.5 He is presently taking anti-depressant medication and consults a psychiatrist and psychologist on a monthly basis for his psychiatric problems.

10.11.6 He cannot sustain a job because of his inconsistency, proneness to make errors, inability to retain information and to revert thereto after interruption.

10.12 The plaintiff is incapable of being cured.

10.13 According to A Cramer the plaintiff completed a six months course after the accident because it was possibly not difficult, not abstract or due to being familiar with it.

[11] Taking all the above into consideration I am satisfied that the plaintiff does have a very limited residual work potential which in my view places him at the level of an unskilled labourer post-morbid in terms of earning capacity.

[12] But for the accident, I accept as conceded by Dr W Pretorius for the defendant, that the plaintiff would likely have completed an apprenticeship and possibly acquired a diploma, thus qualifying as a skilled worker.

[13] The plaintiff has not resumed work from the date of the accident and consequently suffered 100% past loss of earnings.

[14] The actuarial computations were accepted by both parties as R3 432 100 for prospective loss of earnings without deducting any contingencies.

[15] The plaintiff argued for a contingency deduction of 5% and the defendant argued for a deduction of 15%.

[16] In view of my finding that the plaintiff has a limited residual employability potential placing him at a salary bracket much lower than that of a skilled worker, I am of the view that a deduction much higher than 5% is called for.

[17] In the majority of cases that I have had sight of the normal/average contingencies applied for future loss of earnings is 15%. See Quantum of Damages – Quantum Yearbook 2012 p 102 of Robert Koch.

[18] The salary scale of an unskilled labourer according to Robert Koch's Yearbook 2013 for non-corporate workers is R47 300, which according to Dr W Pretorius could fluctuate to R120 000 per annum.

[19] I have, however, not been furnished with the loss of earnings for an unskilled labourer for the period that the plaintiff would have worked as such post-morbid. In the absence of such, I will deal with such income by applying

an appropriate and higher contingency than the one I would have applied had my finding been that the plaintiff is 100% disabled from resuming work.

[20] On both the post-morbid scenarios, being that of an unskilled and skilled plaintiff, I would apply a normal contingency deduction of 15%. I would then make a further 10% deduction to the plaintiff's income as an unskilled labourer due to the higher risk of his absenteeism and productivity post-morbid. This would then translate to an annual income of R35 955,00 for the unskilled plaintiff post-morbid.

[21] Having applied a normal contingency of 15% to the agreed loss of income of R3 432 100,00 I arrive at a figure of R2 917 280,00. To this figure I deduct, what in my view represents an annual income of R35 955 which in contingency terms translates to a further 12% deduction. This will then amount to a loss of earnings of R2 567 206,00.

[22] Having regard to all the above, the plaintiff's damages can be summarised as follows:

22.1	General damages	R 400 000,00
22.2	Past loss of earnings	R 173 160,00
22.3	Future loss of earnings	R2 567 206,00
	Less 20% apportionment	<u>R 628 073,00</u>
	TOTAL	<u>R2 512 292,00</u>

[23] Accordingly I make the following order:

1. The defendant shall pay the plaintiff an amount of R2 512 292,00.
2. The defendant is ordered to furnish the plaintiff with an Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, limited to 80%, of proven medical expenses for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her arising out of injuries sustained by her in the motor vehicle collision on 29 May 2011 after such costs have been incurred and upon proof thereof.
3. The defendant shall pay the plaintiff's party and party costs as taxed or agreed, which costs shall include preparation and reservation fees for the following experts, if any:
 - (a) Dr M de Graad – Orthopaedic Surgeon;
 - (b) Dr P Miller – Neurosurgeon;
 - (c) Ms Megan Spavins – Occupational Therapist;
 - (d) Ms Annelies Cramer – Clinical Psychologist;
 - (e) Ms S Behrmann – Industrial Psychologist;
 - (f) Mr I J Minnaar – Consulting Actuary.

and the costs for counsel, for 12 and 15 April 2013, together with the costs attendant upon the obtaining of payment of the amount referred to in paragraph 1 above.

4. In the event that costs are not agreed the plaintiff agrees as follows:

(a) The plaintiff shall serve the notice of taxation on the defendant's attorney of record; and

(b) The plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs.

5. Payment of the amounts referred to in paragraphs 1, 3 and 4 above shall be made by the defendant to the plaintiff's attorneys, A Wolmarans Incorporated, which details are as follows:

Name of Account Holder	-	A Wolmarans Inc
Bank Name	-	Absa Bank
Branch Name	-	Northcliff
Account Number	-	406680 3929 (Trust)
Branch Code	-	632005
Deposit Reference	-	C210

who shall retain same in an interest-bearing account in terms of section 78(2)(A) of the Attorneys Act, pending the creation of the trust referred to in paragraph 3 *infra* and the issuing of letters of authority.

6. The plaintiff's attorneys are ordered therefore:

6.1 to cause a trust (hereinafter referred to as "*the Trust*") to be established in accordance with the provisions of the Trust Property Control Act, 57 of 1988, within a period of two months from the date of this order to administer the estate of the plaintiff;

6.2 to pay all monies held in trust by them for the benefit of the plaintiff, to the trust after deduction of their fees, costs and disbursements.

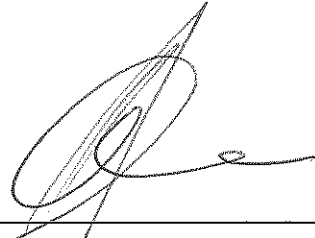
7. The trust instrument contemplated in paragraph 6.1 above shall make provision for the following:

7.1 that the plaintiff is the sole beneficiary of the trust;

7.2 that the first trustee(s) shall be Urban Castro or failing him, such employee of ABSA Bank Limited as they may nominate;

- 7.3 that the trustee(s) provide security to the satisfaction of the Master such provision for security to exclude Urban Castro;
 - 7.4 that the ownership of the trust property vests in the trustee(s) of the trust in their capacity as trustees;
 - 7.5 procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;
 - 7.6 the amendment of the trust instrument be subject to the leave of this Honourable Court;
 - 7.7 the termination of the trust upon the death of the plaintiff, in which event the trust assets shall pass to the estate of the plaintiff;
 - 7.8 that the trust property and the administration thereof be subject to an annual audit.
8. In the event of the trust not being created within two months from date of this order, the plaintiff and his attorney are directed to approach this Court within two months after the expiry of the first period of two months, to obtain further directions with regard

to the manner in which the capital amount should be further administered on behalf of the plaintiff.



**N.D. TSHABALALA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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