IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 20217/2013

In the matter between:

GOUWS DIVAN GERHARD **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction:** The Plaintiff's claim arises from a motor vehicle collision that took place on 24 February 2012. The Plaintiff was riding a motor bike which collided with another motor vehicle causing him some serious bodily injuries. The Defendant conceded the merits of the action to the extent that the Plaintiff would be entitled to 75 % of the liability so proved. The matter is therefore before this court for the quantification of the Plaintiff's claim. This entailed a determination on whether the plaintiff suffered any loss of income/earning capacity as a result of the concussive head injury he suffered from the collision,

and the calculation of the said loss. Other liabilities, including general damages, were left to be dealt with in "another forum."

2. The Plaintiff submitted that the loss of earning capacity was as a result of a frontal lobe brain injury which affected his moods and causes him to be aggressive and forgetful. These, it was submitted, compromised him vocationally and he suffered a loss of income/earning capacity. The Defendant submitted that such an injury did not cause any loss in income/earning capacity.

3. **Absolution from the instance.** After leading four witnesses and handing in few expert reports, the Plaintiff closed his case. Upon closure of the Plaintiff's case the Defendant brought an application for absolution from the instance, which application was opposed by the Plaintiff. This is a judgment on that application. In order to determine whether the Plaintiff succeeded in discharging his onus, it is apposite to consider the factual matrix upon which the matter is predicated. Facts of the case would be considered and then weighed against the prerequisites for absolution from the instance to be granted.

4. **Summary of Evidence**: The Plaintiff's case comprised of four witnesses, being the Plaintiff, his mother, the Clinical Psychologist and the Industrial Psychologist.

5. The following experts' reports were handed in by agreement between the Plaintiff and the Defendant: *Exhibit B* (Combined Neurological Report by Dr Townsend – Neurologist & Dr Van Heerden – Neurosurgeon). In it, they refer to accident related injuries as "fracture of the right femur and mild concussive traumatic brain injury." They further noted that the patient complained of personality and mild memory problems, which could be consistent with the mild head injury. They also noted that physically, the patient had no neurological deficit. The patient also had no increased risk for the development of post traumatic epilepsy. *Exhibit D*, pages 2-4 (joint minutes of the occupational therapists), *Exhibit D* page 1 (joint minutes

of the Orthopaedic Surgeons) and *Exhibit F*, pages 61 to 66 (Psychiatrist report by Prof. Voster) were also handed in. Prof. Voster concluded that the Plaintiff was not a candidate for psychiatric treatment and that he sustained no loss of employment potential. The following reports were handed in by agreement between the Plaintiff and the Defendant: *Exhibit B* (Combined Neurological Report by Dr Townsend – Neurologist & Dr Van Heerden – Neurosurgeon). In it, they refer to accident related injuries as "fracture of the right femur and mild concussive traumatic brain injury." They further noted that the patient complained of personality and mild memory problems, which could be consistent with the mild head injury. They also noted that physically, the patient had no neurological deficit. The patient also had no increased risk for the development of post traumatic epilepsy. *Exhibit D*, pages 2-4 (joint minutes of the occupational therapists), *Exhibit D* page 1 (joint minutes of the Orthopaedic Surgeons) and *Exhibit F*, pages 61 to 66 (Psychiatrist report by Prof. Voster) were also handed in. Prof. Voster concluded that the Plaintiff was not a candidate for psychiatric treatment and that he sustained no loss of employment potential.

6. Divan Gerhard Gouws: He is the Plaintiff. He testified that he was involved in a motor vehicle collision that left him with a broken leg and head injury on 24 February 2012. His head injury was above his eye and was a result of the damage to the helmet he had on. Whereas he does not recall how the collision took place, he remembered driving straight before the accident. He also remembered taking off the helmet after the collision, how he was placed on a stretcher, part of the journey to the hospital, being admitted and seeing his mother there. He testified that he has since recovered from his leg injury and walks well although he suffers some pain on cloudy days. He also suffers from headaches on a rate of about twice a week.

7. He testified that his moods have changed since the date of the collision in that he is irritable and he is too forgetful. He was involved in two road rage incidents in which he swore and challenged the other motorists who did not drive well, ending up banging the side mirrors of their motor vehicles. He testified that he also swears at his mother. He testified when this happens he becomes unable to control his temper. He also gave an example that illustrated his forgetfulness saying he once forgot his driver's licence on a scanner at work. He realised this after he had left and he had to telephone a colleague to take it and keep it for him. He was a student at the time of the accident, studying for a diploma in bookkeeping. He proceeded to complete his diploma after the accident. He could tell that the accident had no impact on his academic performances, for he went on to register and complete two more qualifications, being diplomas in the IT, one of which was completed with a distinction.

8. He testified that prior to the collision; he could not handle stress well. He testified about how he dropped out of school after completing his grade 10 in 2008 after his friend at school had committed suicide. In 2009 he registered for HIGCSE which is equivalent to A levels or international Grade 12 through Damelin, offered by Cambridge University and passed. Although the University of Johannesburg had offered to admit him, he could not register owing to lack of funds and as a result, he could not study for two years. He once aspired to study and have a University degree, but he has since given up because he believes he is too old to study now. He was aged 21 when he gave evidence and 19 at the time of the collision. He testified that after the collision, his social life is low since he disengages from friends and neighbours.

9. His first job was as a Graphic Designer and lasted from May to August 2013. He left that job in order to start another one which was relevant to what he had studied, which is bookkeeping. He left his second job because he was not in good

terms with his employer. He proceeded to work as a store man before joining the company he is currently working for. He is happy with his current employment and his work related stress levels are very low. In fact, a letter from his employer reflects that his working hours were increased to full hours per day which also increased his income. His salary in all the four jobs he held, including the current one has always been between R3000 and R4000 per month. Under cross examination, he agreed that the road rage incidents were the result of him being more protective so as to prevent the collision from recurring.

10. Linda Gouws: She is the Plaintiff's mother. She stayed with him from the age of 4 until he was 18. At the time of trial, she was not staying with him. She gave evidence to the effect that she noticed some behavioural change in the Plaintiff since his involvement in the collision. She testified that in her observation, he has become more arrogant and stubborn and is more irritable than before. She described the Plaintiff as a go-getter who would stop at nothing in achieving what he wants. She knew that the Plaintiff was saving money to study for a Bachelor of Science degree. This, she said was what he told her. She also confirmed having told a certain Ms. Swart that the Plaintiff's arrogance was due to his frustration in that he wants to study but cannot do so owing to lack of funds. She testified that he also told her that he was frustrated in that after the accident, he had no car to drive so he could look for a job.

11. She testified that she is the one who paid for the Plaintiff's grade 12 tuition fees through Damelin which was around R35 000. When asked as to why she did not leave him at a normal school so as to save for tertiary fees, she indicated that the Plaintiff was difficult in that he wanted to do things on his own than to be taught with other kids. She also testified that the Plaintiff always wanted to be the first and that if he was second, he would be angry the whole week. She believed that

the Plaintiff blamed her for the divorce she went through with his father when he was still young.

12. Melissa Fernihough: She is a Clinical Psychologist employed at the Weskoppies Hospital and also in private practice as a Neuropsychologist. It was in her later capacity that she prepared a report on the Plaintiff – see *Exhibit C* (Plaintiff's Expert Bundle 2 – pages 110 to 135). She confirmed the contents of her report and also testified that the frontal lobe injury was difficult to detect through scanners. To establish if there was any, she relied heavily on the Plaintiff's assessment and interviews with people who knew him prior to the collision. The said assessment took about four and a half hours. It is very clear from the report as a whole that she placed a lot of emphasis on reported aggressiveness and irritability on the part of the Plaintiff. Her findings were to the effect that the Plaintiff's decreased energy levels and motivation would likely render him less productive and ambitious when compared to his pre-morbid levels of functioning.

13. She also confirmed that she and Mr. Sampson, the Defendant's Clinical Psychologist, prepared a joint minute in which Mr. Sampson differed with her – see *Exhibit D* pages 5 to 7. He found no evidence of a frontal lobe injury whereas she did. She was of the view that this was because Mr. Sampson focused on the cognitive effect whereas she focused on the emotional behaviour.

14. Under cross examination she testified that the Plaintiff told her that he did not remember his mother arriving at the scene of the accident and his own arrival at the hospital. The Plaintiff did not tell her that he remembered taking off the helmet or being given medication. On the other hand the Plaintiff's mother did not tell her that the Plaintiff had been arrogant before the collision and that he became worse thereafter. Whereas the reason she was given for the Plaintiff leaving school in

grade 10 was that he wanted to avoid the constant reminder of his friend who had died, she was not informed of the other reason given to the court to wit, that he wanted a better studying environment since he could not handle the environment of being taught in a class. She insisted that these differences would not make her alter her report.

15. She admitted under cross examination that the irritable nature could be caused by the pain associated with the leg injury. She however, indicated that frontal lobe injury could also cause this, making it one of the possibilities. She was referred to a number of the Defendant's experts who did not agree with her findings, and she indicated that she differed with them. She also conceded that there was no literature or recorded study to back up her assumption that those who score low in COWAT (Controlled Oral Word Association Test) do so because of a frontal lobe injury. She made this assumption based on what the Plaintiff reported as his performance in grade 12. She also noted in her report that the Plaintiff's performance was low post the collision.

16. Samantha Behrmann: She in an Industrial Psychologist. She confirmed having prepared a report on pages 75 to 109 – see *Exhibit E* (Plaintiff's Expert Bundle 1). Her opinion was to the effect that the Plaintiff suffered a loss in earnings. Her conclusion was based on the report by the Clinical Psychologist Ms. Fernihough. She and Mr. H Van Blerk, the Defendant's Industrial Psychologist, prepared a joint minute (see *Exhibit A*) which reflects her disagreement with him. She attributed the disagreement to the fact that Mr. Van Blerk concentrated on the cognitive aspect whereas she focused on the emotional behaviour of the Plaintiff.

17. She also confirmed what appears on page 1 of the joint report (*Exhibit A*), that whereas Mr. Van Blerk had access to all the experts' reports including the Plaintiff's, before preparing a joint minute; she had not had access to any of the

Defendant's expert reports including the Defendant's Clinical Psychologist. She only had access to the joint minutes prepared by the expert witnesses. She conceded that she had prepared her report based on the assumption that the reports at her disposal were correct since she believed that if there were other reports to the contrary, they would have been made available to her. She also admitted that it would have been prudent for her to prepare the report after hearing from both sides, but her concern was that had she done so, her report would not have been made available in time for trial.

18. It is this evidence, that the Defendant argues that it does not warrant a response from its side, hence the application for the absolution from the instance. Harms JA conveniently set out the definitive approach to an absolution application in *Gordon Loyd Page & Associates v Riviera and Another* 2001 (1) SA 88 (SCA) as follows:

> "The test for absolution to be applied by a trial court at the end of a Plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G - in these terms:
>
> '(W)hen absolution from the instance is sought at the close of Plaintiff's case, the test to be applied is not whether the evidence led by Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)'
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> This implies that a Plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the Plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the Plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the Plaintiff' (Gascoyne (*loc*

> *cit*)) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a Plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.

See also *De Klerk v ABSA Bank LTD and Others* 2003 (4) SA 315 (SCA).

19. **Evaluation.** Ms. Fernihough's evidence makes the backbone of the Plaintiff's case because it is her evidence that the Plaintiff had a frontal lobe injury which changed his emotional behaviour. It is very important that this conclusion was reached through assessment and interviews of both the Plaintiff and his mother. This court also had the privilege to hear from the Plaintiff and his mother. For purposes of this judgment, I have noted material differences between the information conveyed to Ms. Fernihough and the evidence led before this court.

20. From the interview the Plaintiff had with Ms. Fernihough, he attributed the road rage incidents to be the direct consequences of the injury he sustained in the motor vehicle collision. It however appears from the evidence he told this court that the road rage incidents were the result of his attempts to protect himself so as to avoid another motor collision. The Plaintiff's mother also told the court that her son's levels of frustration were very high after the accident because he could not study for a university degree due to lack of finances. According to her, he also got frustrated when he found himself with no motor vehicle to drive around when looking for jobs, due to the accident. Unlike what was conveyed to the Clinical Psychologist, the Plaintiff had been a stubborn child even before the collision. His mother described him as a go-getter who would be angry the whole week if he

became second in his class; for he wanted things to be done his way. It is this attitude, that according to her, contributed to him leaving the school after grade 10.

21. There are some discrepancies between the evidence of the Clinical Psychologist and that of the Plaintiff. It is necessary to zoom into this since the evidence of the Clinical Psychologist comprised mainly of what she was told by the Plaintiff. Although the Clinical Psychologist spent more than 5 hours with the Plaintiff, she remained in the dark as for the other reason the Plaintiff dropped out of school which is that he wanted to register for grade 12 through Damelin, the correspondence college. The only reason for dropping out of school that was conveyed to the Clinical Psychologist, that he wanted to avoid the constant reminder of his late friend, signifies the Plaintiff's inability to handle stress even before the collision.

22. Whereas the Clinical Psychologist believes that the Plaintiff's academic performance dropped after the accident, the Plaintiff told the court that it did not. It is also clear that the Clinical Psychologist was under the impression that the Plaintiff was unconscious and could not remember much of what happened shortly after the collision. But this proved to be incorrect since the Plaintiff remembered taking off the helmet, being attended to by the paramedics, his mother being there, being lifted on a stretcher and being taken to the hospital. The importance of these assertions and concession cannot be undermined given their persuasive role in the conclusion sought regarding the frontal lobe injury – see *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ)

23. This distortion of facts suggests to the court that the Plaintiff may not have been an honest client to the Clinical Psychologist or a credible witness to the court. His credibility is not only questionable when comparing his evidence with that of the Clinical Psychologist, but also with that of his mother. He portrayed a picture of a young man who, at 21, already feels too old to study for a university degree and

that he has no such ambitions whatsoever. This is contradicted by his mother who alleged that he is a go-getter and has plans to register for B. Sc degree. She testified that he is even saving for that. Contrary to what the Plaintiff portrayed, his mother further paints a picture of a person who was frustrated at not being able to study owing to lack of funds. The frustration at not being able to drive around was only disclosed to this court by his mother. Lack of credibility on the Plaintiff cannot be taken lightly especially because it was mainly through his word that a conclusion was reached by the Clinical Psychologist that he may have suffered a frontal lobe injury to his brain.

24. To demonstrate his forgetfulness, the Plaintiff cited an incident in which he forgot a driver's licence on a scanner. It must be mentioned that the said licence card was not lost. He remembered it himself after he had left the office and sent someone to collect it. I do not see how this incident can be said to be uncommon, especially when it is being compared to a pre-accident era, a period during which the Plaintiff was not subjected to any assessment.

25. There are however, other grounds for holding against the Plaintiff. The Clinical Psychologist conceded that her conclusion that the "alleged behaviour" by the Plaintiff could be traced to the frontal lobe injury was just one of several possibilities. One other possibility was that the Plaintiff could have been reacting to pain in his leg. There is no basis upon which the court can give more weight to one possibility over another.

26. The last ground is the absence of the actuarial report. From the particulars of claim and the pre-trial minutes, it is recorded that the Plaintiff would want the loss of earnings to be awarded as per the actuarial calculations. The Plaintiff closed his case without handing in the actuarial report or leading such evidence.

27. It is clear that the Plaintiff served a notice to the Defendant in terms of Rule 36 (9) regarding his intention to lead the evidence of actuarial calculations. No such evidence was led and that notice has no evidential value – see *Mkhize v Lourens and Another* 2003 (3) SA 292 (T) at p. 299 and *Moholi v Road Accident Fund* (unreported case no. 37401/2013) GPJ.

28. It was argued for the Plaintiff that in the absence of the actuarial evidence, and if the Plaintiff managed to discharge the causation, the court would have to use the "informed guess" as held in the *De Klerk* judgment (*supra*) in calculating the loss. It is clear from the above that the onus on causation was not even discharged. But even if it was, the circumstances would be different in that actuarial evidence was just left out deliberately by the Plaintiff, for reasons not disclosed to the court, whereas the premise has always been to have the actuarial evidence led. In *De Klerk* (*supra* at p. 332), Schutz JA held,

> "I do not think, however, where the available evidence established a likelihood of some fact, situation or event as a consequence of the collision which is incapable of quantification within narrow limits, that I am obliged, because the onus is on the Plaintiff, to act on the possibility least favourable to her. Causation is one thing and quantification is another, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my knowledge and experience, been the approach of our Courts, when charged with the assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the Plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like *Turkstra Ltd v Richards* 1926 TPD 276, in which the Plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the quantum of damage. The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the "informed guess" referred to by Holmes JA in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A)." [*own emphasis*].

29. The question now is whether there is evidence upon which a Court, applying its mind reasonably to the evidence, could or might (not should, nor ought to) find for the Plaintiff. Has the Plaintiff made out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim? Such elements would be whether he sustained a frontal lobe brain injury, which injury resulted in the sequelae he alleges causing him loss of earnings which loss was adequately proved and calculated. In my view, the submission lacks factual support from the evidence before the court. Failure to lead the actuarial report, which was available, is in my view, fatal.

30. In the result, I make the following order:

1.1 The application for absolution from the instance is granted.

1.2 The Plaintiff is ordered to pay the costs of the action.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Dates of hearing: **19, 20 & 21 AUGUST 2014**

Date of judgment: **29 AUGUST 2014**

For the Plaintiff:	**Adv. Maxwell**
Instructed by:	**Faber & Allin Inc Attorneys** **Johannesburg**
For the Defendant:	**Adv. Cajee**
Instructed by:	**Mayat, Nurick Langa Inc** **Johannesburg**