REPUBLIC OF SOUTH AFRICA

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

CASE NO: 11/34117

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

18/3/2014
DATE

Mahalelo
SIGNATURE

In the matter between:

XOLANI HLUTHWA Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

MAHALELO, AJ

[1] The plaintiff instituted action against the defendant for damages suffered due to injuries he sustained as a result of a collision which took place on 17 May 2009 where he was a passenger.

[2] The merits of the matter were settled with the defendant accepting liability for 100% for the plaintiff's proven damages. The defendant has agreed to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to the plaintiff.

[3] At the inception of the trial the plaintiff abandoned its claim for past hospital and medical expenses.

[4] The defendant at the commencement of the trial conceded to the injuries suffered by the plaintiff however put the *sequelae* of the head injury in dispute.

COMMON CAUSE FACTORS

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

5.1 The plaintiff worked for Bhekisiswe Cleaning and courier company from January 2006 till accident.

5.2 As a result of the accident the plaintiff sustained the following injuries:

5.2.1 Soft tissue injuries of the axial skeleton.

5.2.2 Injury to the left knee.

5.2.3 Fracture of the right tibia and fibula.

[6] The following medico-legal reports are common cause and accepted in evidence:

6.1 Dr Read – Orthopaedic Surgeon.

6.2 Dr White – Plastic and Reconstructive Surgeon.

6.3 Dr Fine – Psychiatrist.

[7] The following joint minutes are common cause and accepted in evidence:

7.1 Dr Lewer-Allen and Dr Earle – Neurosurgeons.

7.2 Ms Lemmer and Ms Gibson – Psychologists.

7.3 Ms Motake and S de Freitas – Occupational Therapists.

ISSUES FOR DETERMINATION

[8] It is in dispute as to whether the plaintiff was unable to continue to work for the remaining years until he reaches retirement age of 65. The court is

called upon to decide on the issue of the plaintiff's past and future loss of earnings as well as general damages.

THE EXPERTS

[9] Dr Lewer-Allen and Dr Earle, the Neurosurgeons, are agreed that the plaintiff sustained a concussive injury to the head. Dr Earle is of the view that plaintiff suffered a mild traumatic brain injury. According to him such an injury seldom has long-term problems such as post-concussional syndrome or intellectual deficit. He is further of the view that the head injury has no ill-effects and plaintiff is functioning well mentally and physically although his knee hurts and sometimes his back. Dr Earle opined that physiotherapy over a year would enable the plaintiff to manage better although heavy work may not be within his abilities.

[10] Dr Lewer-Allen is of the view that the plaintiff suffered a severe brain injury. He attributed the plaintiff's inability to lay down continuous memory for three days and his significant loss of cognitive functions such as deterioration of memory and concentration as well as personality or behavioural changes to an injury to the frontal lobes or their deep connections.

[11] Ms Lemmer and Ms Gibson, the Psychologists, are agreed that the plaintiff was of average intellectual functioning pre-injury, which was limited by him not having achieved matric and a disadvantaged background. They are of the view that as the plaintiff was 23 years at the time of the accident, he had

time on his side to make positive steps to improve on his situation. They are agreed that difficulties consistent with brain injury were found on assessment. They are further of the view that plaintiff suffered from lack of sustained concentration, attention, double tracking, retroactive and proactive interference, visual scanning, verbal fluency, visuo-spartial organisation and concept formation. They are both agreed that these difficulties extend to plaintiff's executive functions. According to both of them the plaintiff was found to have significant psychological *sequelae* and that plaintiff suffered from posts-traumatic stress and depressive symptoms.

[12] Both Psychologists are further agreed that plaintiff's failure to return to work after the accident suggests that he has lost drive or ambition to obtain work and this was consistent with the effects of brain injury. Furthermore they are agreed that there has been significant life-changing *sequelae* and the plaintiff's condition was permanent. According to them the plaintiff would benefit from exposure to various therapies and interventions, but that he has essentially lost potential to improve substantially on his situation to any appreciable degree.

[13] Ms C Motake and Ms S de Freitas, the Occupational Therapists, are in agreement that the plaintiff was largely dependent on his physical abilities to earn a living. The plaintiff had no formal education or training. The plaintiff's work consisted mainly of unskilled work of medium to heavy physical demand. They are also in agreement that the plaintiff had the ability to meet the physical requirements of work at medium level and aspects of heavy work

with reasonable accommodation, but that in the light of degenerative aspects in the condition of his spine, they both recommend that the plaintiff should refrain from work of a heavy physical demand. Ms Motake was of the view that should the plaintiff undergo further required surgery that would limit his work capacity. They both deferred to the Neuropsychologist and Industrial Psychologist.

[14] Dr Read was of the view that the plaintiff was moderately disabled by symptoms resulting from the accident. The plaintiff required conservative treatment consisting of analgesics, anti-inflammatories and physiotherapy. According to him there was 30% chance that plaintiff would require an arthroscopy of his left knee as well as further surgery due to considerable pain and suffering as a result of symptoms emanating from his axial skeleton and both lower limbs. Dr Read was further of a view that should the plaintiff return to any form of gainful employment he would be better suited to a more sedentary type of work which placed minimal strain on his axial skeleton and lower limbs. According to him the plaintiff required 8 to 12 weeks in order to attend to the treatment recommended. He deferred to an Industrial Psychologist and/or Occupational Therapist.

[15] Dr Bruce White noted and confirmed multiple small scars on the occipital region of the scalp, a small scar on the dorsum of the right little finger, a small scar on the radial aspect of the right wrist, a healed scar on the right knee and a scar on the lumbar region. He was of the view that the scarring on the lumbar region of the back could be improved by surgery.

[16] Dr Fine (Psychiatrist) was of the view that the plaintiff suffered from Accident Traffic-Travel-Related Anxiety Disorder together with depression where the latter was due to unresolved grief due to the loss of his brother and the results of his physical injuries on his ability to perform his normal activities of daily living, and on life amenities, occupationally, financially and recreationally. He recommended psychiatric treatment extending over two years, consisting of medication and psychotherapy.

PLAINTIFF'S EVIDENCE

[17] Ms Kellerman and Nosidima Hlutwa Mabaso testified in support of the plaintiff's case.

[18] Ms Kellerman, (Industrial Psychologist) testified that pre-accident the plaintiff would have remained gainfully employed on an unskilled level in the open labour market until at the age of 65. Post-accident the plaintiff's physical injuries coupled with his neuro-cognitive *sequelae* would leave him vulnerable and he would have to compete with an oversupply of the people in the labour market who did not have his challenges. Nobody would want to employ him and therefore plaintiff was unemployable in the open labour market on the same or similar unskilled level.

[19] In terms of the plaintiff's future loss of likely earnings she suggested that the median of the annual earning level of R47 300 when the plaintiff turns 40 years and R120 000 at the age of 50 be used until retirement age of 65.

[20] Nosidima Hlutwa Mabaso testified that the plaintiff was working for her company as a general cleaner and a supervisor from January 2006 until the date of the accident, he was earning R1500,00 per month. The plaintiff worked 8 hours a day and sometimes more. His work entailed general cleaning, shifting of furniture as well as lifting of machines used for cleaning.

[21] She explained that the plaintiff is her sister's son, they all stayed together when the plaintiff was still attending school. According to her the plaintiff failed Grade 12 and could not go back to school because he had to work for his mother and siblings.

[22] On the day of the accident she visited the plaintiff at Natal Spruit hospital at around 02:00. According to her the plaintiff could not talk or recognise her. She went back home and at around 05:00 she was called back to the hospital because the plaintiff was restless, he was shouting and screaming. The plaintiff could still not say anything to her even at that stage. Only on the third day could he start recognising her and talking to her.

[23] She stated further that the plaintiff could not go back to his employment after the accident because he could not perform his duties as before. Post-accident the plaintiff was forgetful, aggressive and his physical injuries

prevent him from working as before. According to her she could not employ the plaintiff again.

[24] This brings me to the evidence of Dr Earle. He disagreed with the views expressed by Dr Lewer-Allen that the plaintiff suffered a severe brain injury. The plaintiff urged me to disregard Dr Earle's conclusion as he applied a very stringent test in determining the severity of the head injury.

[25] Dr Earle has not enquired from the plaintiff if he still had any complaints at the time of assessment. He completely disregarded the fact that the plaintiff had informed him that he had lost consciousness and only regained it in hospital. No attempts were made by Dr Earle to establish what the duration of unconsciousness was. Dr Earle notes that the shouting and screaming by the plaintiff on the day of his admission in the hospital was as a result of being mildly sedated. Dr Lewer-Allen expressed the view that the plaintiff was sedated because of these actions and this was indicative that the plaintiff was not himself at that stage. Dr Lewer Allen testified that according to the Russel Criteria the true severity of the brain injury should be measured against the severity of the neuro-cognitive and neuropsychological deficiencies ultimately proven to exist after a period of two years, rather than according to a criteria of assessment in the casualty. He testified further that if one were to rely on the criteria of the duration of unconciousness and the Glascow Coma Scale as the only method by which to determine the severity of the head injury and

to prognose whether or not there would be long-term neurological *sequelae* and having in mind that plaintiff was said to have been unable to lay down continuous memory for about three days then plaintiff fits in the category of severe brain damage.

[26] I am unpersuaded by the evidence of Dr Earle in this regard and must therefore disregard it..

[27] In relation to the plaintiff's earnings, having regard to the injuries he sustained in the collision, it is clear from a consideration of expert reports that the plaintiff is not suited to his current employment and is unemployable in the open labour market at the unskilled level he was employed in prior to the accident.

[28] An actuarial report has been handed in by agreement. The Actuary's method of calculation as well as the assumptions on which the calculations were based has not been disputed. I accept the basis for calculations set out in the Actuary's report before contingency deductions.

[29] In respect of the plaintiff's loss of earnings the Actuary accepted that the plaintiff would have worked until retirement age of 65 in the position he held pre-accident earning an amount of R47 300 per annum at the age of 40 and at age 50, he would have progressed to the upper quartile wage of a semi-skilled worker earning R120 000 per annum where he would have

reached his ceiling. Plaintiff's earnings would have increased in line with inflationary rates only until his retirement at age 65.

[30] As for the plaintiff's earnings and having accounted for certain assumptions the final figures the actuary arrived at are R88 418 for past loss and R1 313 795 for future loss of earnings.

CONTINGENCIES

[31] I turn to deal with the contingency allowances to be made in respect of both scenarios. In respect of plaintiff's pass loss his counsel suggested an allowance of 5% and 18% for his future loss of earnings resulting in a total net loss of R1 161 309,00.

[32] The allowance to be made in respect of contingencies falls within the court's discretion. That the court has a wide discretion is clear from the often quoted case *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) at 116G-117A where Nicholas JA quoted with approval an Australian case where it was said:

> "*It is a mistake to suppose that it necessarily involves a scaling down. What it involves depends not on arithmetic, but on considering what the future may have held for the particular individual concerned….*
>
> [The] generalisation that there must be a 'scaling down' for contingencies seems mistaken. All ' contingencies' are not adverse; All ' vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some, it may seem

> that the chance of good fortune might have balanced or even outweighed the risk of bad."

[33] In *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) a 20% contingency deduction was substituted for the deduction of 10% that had been allowed by the court *a quo* in the "*but for*" scenario based on *inter alia* the plaintiff's age of 26 and her positive prospects of promotion in her work.

[34] In *De Jonge v Du Pisanie NO* C&B Vol 5 J2 2013 a 35 year old electrician sustained brain injuries which left him with a changed personality, lack of drive, aggression and lack of judgment. These injuries resulted in him initially still being employable, albeit not in the same capacity he had held prior the accident. At the time of the trial however, he had been medically boarded. The court deducted 10% contingency in respect of future loss of income.

[35] In the assessment of a proper allowance for contingencies I have taken into account the plaintiff's age of 23, his employment history, the fact that he worked for Bhekisiswe Cleaning Services only for 3 years prior to the accident, the positive attitude he displayed in his work. Taking all these considerations into account I am of the view that a contingency deduction of 10% in the first scenario is appropriate.

[36] As for the second scenario I have in the assessment of a contingency allowance considered the usual factors to be taken into account. The following

factors peculiar to this case have also been considered: The plaintiff has no formal qualification, he now suffers from a more vulnerable body which may be more susceptible to injury, illness, etc, retirement age has been taken at 65 years whilst there is a greater possibility that he may have retired earlier. The possibility that plaintiff would be without employment and the fact that he will be making a saving in relation to travel to and from work. In these circumstances I am of the view that a fair and reasonable contingency of 30% should be deducted from his earnings in his injured state.

GENERAL DAMAGES

[37] On a consideration of all the evidence it is clear that the plaintiff suffered pain, discomfort and loss of amenities immediately after the accident and in the months following the accident. He continued to suffer discomfort two years after the accident. Post-accident there is no doubt that the plaintiff's general enjoyment of life has been diminished by the accident. Having regard to the pain, suffering and discomfort and loss of amenities I am of the view that an award of R400 000,00 in respect of general damages would be fair and equitable.

CONCLUSION

[38] To sum up , the full award to be made to the plaintiff is calculated as follows:

Past loss of earning capacity	
Value of income	R 88 418
Less 10%	R 8841,8
Nett past loss	R 79576,2
Future loss of earning capacity	
Value of income	R 1 313 795,00
Less 30%	R 394138,50
Nett future loss	R919656,50
TOTAL	R999232.70
General damages	R 400 000,00
	R1 399232.70

[39] Consequently my order is as follows:

1. That the defendant is to pay to the plaintiff the sum of R1 399232.70.

2. Interest on the amount in paragraph 1 above at the rate of 15,5% per annum calculated from 14 days from the date of judgment to date of payment.

3. Defendant is to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the payment of the cost of future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the collision in which he was involved on 17 May 2009 after such costs have been incurred and upon proper proof thereof.

4. Defendant is to pay plaintiff's costs of suit, as taxed or agreed on party and party scale, such costs are to include:

4.1 The qualifying expenses and costs of appearance if any, of the following experts:

4.1.1 Dr Read

4.1.2 Dr White

4.1.3 Dr Fine

4.1.4 Dr Lewer-Allen

4.1.5 Ms De Freitas

4.1.6 Ms Kellerman

4.1.7 Mr G Whitaker

M B MAHALELO
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL DIVISION,

JOHANNESBURG

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