

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 07245/2015**

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

.....  
**SIGNATURE**                      **DATE** .....15/11/2016.....

In the matter between:

**N S N**

plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

---

**JUDGMENT**

---

---

**KATHREE-SETILOANE:**

[1] The plaintiff sues the defendant for damages arising from injuries which he sustained in a motor vehicle collision, which occurred on 27 September 2013. The merits of the claim have been settled. The only issue for determination is the quantum of plaintiff's claim.

[2] The defendant has agreed to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of his future medical expenses. It has also agreed to pay the plaintiff the sum of R500 000.00 in respect of general damages for pain and suffering, loss of amenities of life, disfigurement and disability. The only issue that remains for determination in so far as the quantum of plaintiff's claim is concerned is damages for loss of earning capacity.

[3] The plaintiff presented the court with expert reports of the following expert witness: Dr Frey (orthopaedic surgeon); Ms Rice (neuropsychologist); Prof Chait (plastic surgeon); Ms van der Walt (occupational therapist); Dr Shevel (psychiatrist); Mr Peverett (industrial psychologist); Mr Munro (actuary). The contents of the expert reports of the orthopaedic surgeon, occupational therapist, plastic surgeon and the actuary were admitted by the defendants. The defendant did not rely on any medical experts and called no witnesses in support of its case. The expert reports of Ms Rice (neuropsychologist) and Mr Peveritt (industrial psychologist) were in contention and they gave testimony at the trial in support of the plaintiff's case.

[4] It is common cause that the plaintiff sustained the following injuries from the accident: head injury with loss of consciousness; left eye injury; cervical spine injury; lower back injury; fracture of the right femur, fracture of the left tibia plateau; and fracture of the left ankle. He had surgery to his right femur and left tibia. Open reduction and internal fixation of the right femur with an interlocking nail was performed and his tibia was fixed with plates and screws. Since the accident, the plaintiff has alteration in mental status and cognition. He also suffers headaches, memory loss, lack of attention, mood changes and is depressed. It is furthermore common cause that the plaintiff will be unable post-accident to do physically demanding work as this will place stress on his back and legs. He would, in this regard, struggle to walk and stand frequently and would not cope with climbing stairs, step ladders or work at a level below the knees. He is best suited to doing sedentary to light work with basic and familiar cognitive demands, provided he is able to secure such employment. His current work abilities are not conducive to working as a supervisor or invigilator due to his mobility restrictions and his cognitive difficulties. This will make it difficult for him to compete equally on the open labour market for appropriate employment.

[5] The only issue in dispute concerns the question of whether the court can accept the expert opinion of the plaintiff's neuropsychologist, Ms Rice, in relation to the nature and severity of any head/brain injury which he sustained as a result of the collision, in the absence of evidence from a neurosurgeon or a neurologist on that aspect.

[6] Ms Rice's qualifications are not in dispute. She is a registered Clinical Psychologist with the Health Professional Council of South Africa (HPCSA). She holds a specialized Masters of

Arts degree in Neuropsychology as well as a Masters of Science degree in Psychology from the University of Witwatersrand (Wits University). Her MA (Neuropsychology) allows her to perform highly specialized work for people experiencing neuropathology, including traumatic brain injuries and other neurological deficits or diseases.

[7] Ms Rice is only registered as a clinical psychologist with the HPCSA, yet she has practiced as both a neuropsychologist as well as clinical psychologist for the past four years. Ms Rice's testimony for this state of affairs is broadly this. In anticipation of the HPCSA promulgating regulations recognizing neuropsychology as a separate discipline, Wits University and the University of Cape Town (UCT) had each offered a Masters of Arts degree in neuropsychology. Ms Rice was one of six students who was accepted, and read, for this degree in 2012 at Wits University. The HPCSA had, however, failed to promulgate the anticipated regulations. Both Wits University and UCT, nevertheless, permitted students to complete the degree, provided that they also completed the requirements for a clinical psychology degree. This additional requirement enabled successful graduates to register with the HPCSA as clinical psychologists yet practice as neuropsychologists. Currently, graduates with a Master's degree in neuropsychology are still unable to register as neuropsychologists because the regulations are yet to be promulgated.<sup>1</sup> Ms Rice is also an accredited member of the South African Neurological Association (SACNA).

---

<sup>1</sup> [www.sacna.co.za](http://www.sacna.co.za) () (accessed on 8 November 2016). Accordingly to the South African Clinical Neuropsychological Association, neuropsychology is a highly specialized field, and any person conducting a neuropsychological assessment is required to be a registered Clinical, Counselling or Education Psychologists.

[8] Miss Rice testified that Neuropsychology is recognised as a specialist discipline in many areas of the world, including the United States, the United Kingdom, Europe, Australia and New Zealand. Neuropsychologists assist in the diagnosis and treatment of brain related problems such as memory, attention deficits, impaired reasoning, visio-spatial functioning and the like. Neuropsychologists are often able to match certain problems to certain areas of the brain, for example frontal lobe damage which is likely to lead to problems with the higher order of brain functioning. She explained that although she had deferred to a neurosurgical and/or neurological opinion regarding the nature and severity of the plaintiff's brain injury, her vigorous training as a neuropsychologist qualified her to assess the nature and severity of such an injury. She said that in her experience, it was not unusual for a neurosurgeon to alter the assessment of the nature and severity of brain injury, based on a neuropsychologist's opinion. She listed the common indicators of brain injury severity to include the impairment of a patient's level of consciousness as measured by the Glasgow Coma Scale (GCS) and the duration of a patient's post-traumatic amnesia.

[9] Ms Rice assessed the plaintiff as having sustained a mild concussive head injury as a result of the collision. Her evidence was that she able to assess the nature and severity of this injury by evaluating the plaintiff's reported symptoms and complaints after the collision as well as other collateral information such as hospital records. She testified that the hospital records provided evidence of a head injury as they gave an initial GCS score of 15/15 on arrival at hospital on 27 September 2013. This was in keeping with a mild head injury. The hospital records also indicate that on examination at the hospital, the plaintiff was found to have right upper eyelid and multiple scalp lacerations, which were sutured. This indicated to her that he

had suffered a blow to his head. She said that there was also evidence from the hospital records of brief post traumatic amnesia which would indicate that the plaintiff did sustain a concussive brain injury, which is a physical injury to the brain that causes a disruption of normal functioning. In this regard, she testified that:

‘1.e.1 [The plaintiff] reported that he can remember the impact, but he claimed to have been rendered unconscious thereafter.

1.e.2 His first memory after the accident was allegedly of being stuck in the car, which was seemingly a short while after the collision.

1.e.2.1 The duration of the primary PTA implies a mild concussion.

1.e.3 After coming to his senses, [the plaintiff] remembers being in severe pain and that his left ankle was trapped under the clutch and/or brake. He remembers his wife being extricated from the car and he vaguely remembers the paramedics cutting him out of the car with the Jaws of Life. His memory of events in the car and the ambulance is patchy and hazy.

1.e.3.1 The duration of secondary PTA implies a mild concussion.’

[10] Ms Rice emphasized that her deference to a neurosurgeon or neurologist in her medico-legal report, had one been available, related only to the nature and severity of the brain injury and not to the sequelae or consequences thereof. She maintained that although traditionally it is accepted for neurosurgeons and neurologists to diagnose the nature and severity of brain injury, she was also trained to diagnose a mild head injury and to assess its functional impact, where such dis-function is suspected. She said that a mild brain injury is often initially diagnosed by evaluation of the of the symptoms that a person reports after sustaining the injury. The assessment, she testified, is comprised of a wide range of tests that objectively measure specific brain functions. Testing includes a variety of different methods for evaluating areas like attention

span, orientation, memory, concentration, language (receptive and expressive), new learning, mathematical reasoning, spatial perception, abstract and organizational thinking, problem solving, social judgment, motor abilities, sensory awareness, and emotional characteristics and general psychological adjustment.

[11] In response to a question, from counsel for the defendant, relating to the absence of neuroimaging, she responding by stating that due to the diffuse and subtle nature of mild brain injury, it is common for typical neuroimaging (CT scan or MRI's) to show no evidence of injury. In this regard, she said that the limitation of brain imaging technologies is that they often cannot detect mild injury, and hence such imaging is not essential for the diagnosis of a mild brain injury.

[12] Ms Rice also took into account the plaintiff's pre-morbid functioning as well as his functioning at the time of the interview in order to determine the impact of the injury on their functioning. She said that there was no history of psychiatric illness or significant psychological problems prior to the accident. On the basis of his educational and occupational history, as well as his neuropsychological test profile, she said he was of average intellectual abilities pre-morbidly. She noted that the plaintiff failed standard 8, but said that this was due to insufficient focus on his schoolwork and did not reflect lowered intellectual abilities pre-morbidly.

[13] Ms Rice testified that despite the classification of the nature and severity of the plaintiff's head injury as mild, the plaintiff suffered neurocognitive difficulties as a consequence thereof. In particular, she testified that the predominant pattern of the plaintiff's test results indicated frontal

lobe involvement and executive dis-function. In particular, she found that his memory, attention, concentration, multitasking, processing and reasoning skills had been negatively affected. She said that there was also evidence of poor verbal and visual learning and memory, as well as construction difficulties and reduced visual and spatial awareness. She said that the plaintiff's concussive head injury would have contributed to these deficits or difficulties.

[14] In relation to the emotional and behavioural impact which the brain injury has on the plaintiff, she said that he is objectively depressed, has a mood disorder (chronic mild-to-moderate depression with features of post-traumatic stress disorder) due to his general medical condition (multiple orthopaedic injuries with ongoing pain and physical deficits, as well as unsightly scarring).

[15] In relation to the plaintiff's employment capacity and anticipated future loss of earning capacity, Ms Rice testified that his occupational functioning seems to have been affected by his cognitive and emotional symptoms, as well as his pain and physical status. She said that based on his cognitive difficulties, he will likely be more restricted to repetitive work. She concluded that overall his capacity for employment has been negatively affected by the accident, and that he is no longer an equal competitor on the open labour market.

[16] It is undisputed that Ms Rice is a clinical psychologist with the added qualifications and expertise as a neuropsychologist. She is an accredited member of SACNA. It requires accredited members to have both a neuropsychology degree as well a clinical, educational or counselling psychology qualification and to be registered with them for a continuously for two years before they can be accredited to practice neuropsychology. These additional requirements are required pending the promulgation of a



register for neuropsychologists.<sup>2</sup> Taking into account the presence of indicators and symptoms consistent with a mild brain injury in the plaintiff as well as the the hospital records, I find that Ms Rice was had sufficient information before her to assess the nature of severity of the plaintiff's brain injury as well as the sequelae thereof, and that there was no need for the plaintiff to adduce the expert opinion of a neurosurgeon or neurologists. Crucially, the defendant has failed to lead any countervailing evidence of a neurologist or neurosurgeon to suggest otherwise. I am accordingly satisfied that Ms Rice is appropriately qualified to provide the court with an opinion on the severity and nature of the plaintiff's brain injury as well as the sequelae thereof for the purposes on assisting the court to arrive at a finding in relation to the plaintiff's loss of earning capacity as a result of the collision which he was involved in.

[17] The plaintiff testified as to his educational history, work history pre and post - accident as a machine operator and supervisor as well as an invigilator. Prior to the accident, the plaintiff worked as a supervisor at Tech Lighting and Electrical (the factory), which was in the business manufacturing conduit pipes. He started working at the factory in 2004. He was promoted from the position of machine operator in the trunking department to that of supervisor overseeing the work of approximately sixty machinists who worked under him. He reported to the production manager. His job demanded both physical and cognitive skills. It entailed large amounts of walking and standing to monitor and oversee the work of the machinists who were scatted across different areas in the factory. It also entailed bending and crouching repair faulty machines. In addition, it required him to record the daily productivity of the machine operators, as well as the presence of faulty machines. He said that these tasks required concentration and ability to

---

<sup>2</sup> [www.sacna.co.za](http://www.sacna.co.za) (above)

remember information. And that his failure to report a faulty machine would have drastic consequences for the daily productivity and could result in receiving a written warning.

[18] The factory went into liquidation about a month before the collision. When the plaintiff was made aware that the factory was going into liquidation he looked for alternate employment. He applied to the University of South Africa (UNISA) for a contract invigilator post. His was called for an interview on 5 October 2013 but was unable to attend due to the injuries which he sustained in the accident. In May 2014, the plaintiff managed to find employment as a machine operator at a factory in Port Shepstone, KwaZulu Natal. He was required to work at night, but was unable to manage due to the pain he experienced. He was therefore only able to work for two days and had to give up the job and return to Johannesburg.

[19] The plaintiff was fortunate in that UNISA employed him in a contract invigilator post in October 2015. He was contracted to invigilate three times a year during examination periods only. He worked as an invigilator during the October/November 2015 and May/June 2016. His contract ends in December 2016. He described the challenges associated with the job of an invigilator as follows: The students write their examinations in large examinations halls, which accommodate approximately 300 students per examination session. The invigilators are, therefore, required to do large amounts of walking and standing.

[20] He said that he was fortunate thus far because he has been accommodated by being allocated register duty, where allows him to be seated at the table for the first part of the examination. He said that before the examination begins, students are required to enter their

details on tear sheets which are collected by the invigilators, and handed to the invigilator on register duty. This invigilator then checks the eight- digit student no on the tear sheet against the student number in the attendance register. If the student number on the tear sheet corresponds with the number on the register, the student is marked present on the register. The register has a sticker with a corresponding student number. The register invigilator is required to paste the sticker onto the blank examination script which is then handed to the student. Once the register invigilator has completed the registration process, he or she joins the other invigilators in monitoring the students writing the examination. This part of the job entails walking around the hall. The plaintiff testified that while he is coping currently with the invigilator job, he is not sure that he would cope in the future due to his mobility restrictions and memory and concentration difficulties.

[21] Mr Peveritt, the industrial psychologist quantified the plaintiff's earning capacity "but for the accident" and "having regard to" the accident. Mr Peverett testified that but for the accident, the plaintiff would have continued to be remunerated as a supervisor of six machine operators until liquidation of the factory in December 2013. He said that it was probable that the plaintiff would have sought alternative employment in a similar capacity in his field of experience as he had worked in that field for nine years without interruption and had progressed from the position of machine operator to that of supervisor responsible for overseeing a sixty workers. Mr Peverett concluded that given the plaintiff's work history, it was probable that the plaintiff would have continued along the same lines until retirement at age 65. Significantly, Mr Peverett had not indicated that the plaintiff would have received any further promotions, but had assumed that the plaintiff would have continued working in the capacity of supervisor.

[22] Having considered the medical reports of the orthopaedic surgeon, Dr Frey, the neuropsychologist, Ms Rice and the occupational therapist, Ms van der Walt, Mr Peveritt concluded that having regard to the injuries which the plaintiff sustained in collision, and the behavioural and cognitive sequelae flowing therefrom, the plaintiff had been rendered functionally unemployable in the formal employment sector. Importantly, in this regard, he took into consideration the opinion of Ms van der Walt, the occupational therapist, that the plaintiff's current work abilities did not match his work as a supervisor or invigilator due to his mobility restrictions and his cognitive difficulties. Ms van der Walt is of the opinion that the plaintiff is less competitive on the open labour market and that he will find it difficult to re-enter employment.

[23] In relation to his employment as an invigilator, Mr Peverett testified that he would probably lose his job in a period of less than five years due to his mobility and cognitive difficulties, in particular his concentration, memory and attention deficits which could lead to dismissal for reasons of competence or incapacity. Mr Peverett said that once the plaintiff loses his part time job as an invigilator, the best that he can hope for would be to secure earnings in the informal sector earning between R0 and R6000,00 per annum. Again, no serious challenge was presented to the Mr Peverett's testimony in cross examination.

[24] On consideration of the expert evidence of the plaintiff's medical experts, which remains unchallenged, I find that the plaintiff has been rendered functionally unemployable within the formal sector (corporate and non-corporate) Future employment based on his experience and

accessed competence as a machine operator will be confined to work of a technical, physical and manual nature which he is physically no longer able to do. From a neuropsychological point of view, the plaintiff no longer presents with the ability to supervise others or learn a suitable alternative form of sedentary work at his pre-accident level of functioning. Accordingly, and in view of the defendant's admission of the plaintiff's actuarial calculations which are based on the unchallenged evidence of Mr Peverett (the industrial psychologist) I award the plaintiff an amount of R2113 210,00 for loss of future earnings. I applied a 10% contingency on future income (uninjured) as the plaintiff has a stable background which is demonstrated by the fact that he remained with the same employer for 9 years and received a promotion. I also applied a 30% contingency on future income (injured) as he is likely, due to his cognitive and physical deficits, to lose his income as an invigilator in the coming five years. He is also likely, for the same reason, to lose any income that he may receive working in the informal sector.

### **Costs**

[25]           The plaintiff seeks a punitive costs order against the respondent on the grounds that:

- (a)       The defendant had no expert reports of its own, but refused at roll-call to admit the plaintiff expert reports and to argue the matter on the basis of these reports;
- (b) The defendant declined to do so and continued to do.
- (c) The reports of the orthopaedic surgeon, the plastic surgeon, the occupational therapist, the psychiatrist and the actuary were uncontroversial yet the defendant failed to admit them on the Friday, 12 August 2016, at roll call;

- (d) The real issue that the defendant wished to place in dispute was the qualification of Ms Rice, the neuropsychologist, to express an opinion in regard to any brain damage suffered by the plaintiff, in the absence of the report of a neurologist or neurosurgeon;
- (e) On Friday after (12 August 2016) the plaintiff arranged for the neuropsychologist; the occupational therapist and the industrial psychologists to attend court on the Monday, 15 August 2016;
- (f) Soon thereafter, on that same afternoon, the defendant's attorney advised the plaintiff's attorney that the defendant was prepared to admit all the plaintiff's expert reports;
- (g) On Monday morning, the plaintiff's attorney called the defendant's attorney to confirm this, but defendant's attorney informed her that the defendant persisted in its denial of all the plaintiff's expert reports;
- (h) The plaintiff's attorney then arranged for the plaintiff's remaining experts (apart from the actuary and plastic surgeon) in respect of whose evidence plaintiff's attorney believed there could be meaningful dispute, to be present
- (i) Mr Frey, the orthopaedic surgeon was informed that he had to testify and he was compelled to cancel all the operations which he had scheduled for Monday, 15 August 2016;
- (j) The matter was allocated to me for trial on Monday, 15 August 2016;
- (k) The defendant admitted for the first time on Monday morning, outside my chambers, that it was prepared to admit the reports of the orthopaedic surgeon, the occupational therapist and the plastic surgeon;
- (l) Unfortunately Ms Van der Walt, the occupational therapist, had already driven from Pretoria to be at court in Johannesburg, and Mr Frey, the orthopaedic surgeon, had cancelled his surgery for the day.

[25] The defendant has, in my view, approached this trial and conducted it in an imprudent manner. Despite several requests by the plaintiff's legal representatives that the plaintiff's uncontested reports be admitted into evidence, this admission never came until the morning of the commencement of the trial and after two of the experts had already cancelled all appointments for the day, and presented themselves at court. The defendant also insisted on the evidence of Ms Rice and Mr Peverett being led despite when these opinions being unmet by corresponding experts. What's more, is that the defendant's challenge to their testimony was uneventful and left their evidence materially unchallenged. The defendant's conduct, in my view, warrants the grant of a punitive costs order against it, in order to prevent the plaintiff from being out of pocket, particularly, in relation to the fees of the expert witnesses.

[26] The court does, however, recognise that the defendant's attorney was frequently absent from the courtroom during the trial, despite being obliged to be present. In fact, on at least two occasions the court had to demand his presence in court, and even then he absented himself the very next morning. I consider it fair and just, in the circumstances, that the plaintiff's attorney be disallowed his fees for, the first day of trial and, half of the second day of trial.

[27] In the result, I grant judgment for the plaintiff against the defendant as follows:

- 1 The Defendant is liable for 100% of the Plaintiff's proven damages.

- 2 The Defendant shall pay the Plaintiff the amount of R500 000.00 in respect of general damages for the Plaintiff's claim arising out of a motor vehicle accident which occurred on 27 September 2013.
- 3 The Defendant shall pay the Plaintiff the amount R2113 210,00 in respect of loss of earning capacity for the Plaintiff's claim arising out of a motor vehicle accident which occurred on 27 September 2013.
- 4 The Defendant shall furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 27 September 2013.
- 5 Payment of the amounts set out in paragraphs 2 and 3 above shall be made within 14 days of date of judgment into the Plaintiff's attorney's account, the details of which are as follows:

Name of account holder: Raphael and David Smith Incorporated Trust Account

Bank Name: First National Bank

Branch Name: Rosebank

Account Number: [...]

Type of Account: Trust Account

Branch Code: 253305

- 6 The Defendant shall pay the Plaintiff's taxed or agreed party-and-party costs on the scale as between attorney and client. The Plaintiff shall, in the event that the costs are not



- agreed, serve the notice of taxation on the Defendant's attorneys and the Plaintiff shall allow the Defendant 7 court days to make payment of the taxed costs.
- 7 The costs shall also include the costs of the Plaintiff's experts being CT Frey, Diagnostic Radiological Services, Jessica Rice, Professor Chait, Wilma van der Walt, Dr DA Shevel, Marc Peverett, and Munro Consulting.
- 8 The costs shall also include the reservation/qualifying fees of Jessica Rice, Marc Peverett, Dr CT Frey and Wilma van der Walt.
- 9 There is no contingency fee agreement between the Plaintiff and the Plaintiff's attorneys.
- 10 The Defendant's attorney of record shall not recover its fees from the Defendant for the full day on the 15<sup>th</sup> of August and half a day on the 16<sup>th</sup> of August 2016.

---

**JUDGE KATHREE-SETILOANE  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG**

Counsel for the Applicant/ Plaintiff: Adv I Smith

Instructed by: Raphael & David Smith Inc

Counsel for the Respondent/ Defendant: Adv Magano

Instructed by: Pule Incorporated

Date of Hearing: 15 August 2016 to 19 August 2016

Date of Judgment: 15 November 2016

