REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2019/10067

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

In the matter between:

ADAMS, CLINT JOSEPH **PLAINTIFF**

AND

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 28th of April 2021.

DIPPENAAR J:

[1] This is a trial action arising from an accident which occurred on 11 March 2018 in the intersection between Hendrik Potgieter and Christiaan De Wet Roads, Roodepoort.

[2] Despite the notice of set down for the trial being properly served on the defendant, it did not appear at the hearing. The defendant did not respond to the plaintiff's requests for the holding of a pretrial conference or the completion of a joint practice note. Directives issued by me on 15 April 2021, directing the defendant's claims handler, Mr Malvin Khoseni to attend a pretrial conference with the plaintiff's legal representatives by no later than 18 April 2021 and to be present at the hearing on 19 April 2021, were also ignored by Mr Khoseni. The matter was stood down to enable plaintiff's legal representatives to make contact with Mr Khoseni. I was informed by plaintiff's counsel that contact had been made with Mr Khoseni who was aware of the proceedings but would not attend as he was attending to another matter. An affidavit has been filed by the plaintiff's representative pertaining to the communications with the defendant's claims handler.

[3] I intend to direct that a copy of this judgment be provided to the senior officials of the defendant to investigate the conduct of the claims handler, Mr Khoseni.

[4] The applicability of Judge President's Practice Directive 1 of 2121, dated 18 February 2021 and a proper interpretation of its provisions fell for consideration after I enquired from the plaintiff whether the matter should have proceeded to the interlocutory trial court for a compelling order directing the holding of a r 34(7) pre-trial conference and the striking of the defendant's defence.

[5] The plaintiff's argument was that, on a proper interpretation of chapter 6 of the directive, the plaintiff, having obtained certification of trial readiness on 9 October 2021 and having been allocated a trial date prior to the date applicable to transitional provisions in paragraphs 32 to 36 of the directive, was not obliged to attend the trial interlocutory court, but could proceed to apply for default judgment at the hearing. Having considered the directive, I agree with the plaintiff's submissions. It follows that the matter is to proceed on a default judgment basis.

[6] Judgment was reserved in order to provide written reasons for the order.

[7] At the hearing, the following issues were in dispute:

[7.1] liability;

[7.2] Past and future medical expenses;

[7.3] Future loss of earnings;

[7.4] General damages

[8] On the issue of liability, the plaintiff presented the evidence of a passenger in the plaintiff's vehicle, Mr Karl Burgess. The plaintiff has no recollection of the accident. It appeared from the various expert reports that the plaintiff was rendered unconscious in the accident and suffered amnesia as a result thereof.

[9] The evidence of Mr Burgess was that he was a passenger on the front seat of the vehicle driven by the plaintiff. There were two other passengers in the vehicle, Mr Adams' daughter, seated behind the plaintiff and a friend, Rameez, on the other back seat. Their vehicle was travelling from Eagle Canyon Golf Estate down Christiaan De Wet Drive, in the left lane of two lanes. The road makes a T-junction with Hendrik Potgieter Road, with traffic approaching from the left. The accident occurred between 20h00 and 21h00 on 11 March 2018. The headlights of the vehicle were on. Mr Burgess could not estimate the speed of the vehicle as he was on his phone, but stated that their vehicle was not speeding. As their vehicle approached the intersection of Christiaan De Wet Drive and Hendrik Potgieter Road, the traffic light was green in their favour. A white vehicle, which he thought was a BMW, entered the intersection from Hendrik Potgieter Road from the left to turn right. Mr Adams, the plaintiff, swerved left to avoid a collision with the vehicle, lost control and hit the pavement. The pavement was hit a second time, causing the airbags in their vehicle to deploy. Mr Burgess lost

consciousness and when he awoke, the vehicle was upside down. It had gone down an embankment. The plaintiff was slumped across him and he thought he was dead as he was bleeding. Mr Adams' daughter was screaming. He assisted her in getting out of the vehicle after he was able to extricate himself and took her up the embankment. He left her in the care of a lady who had stopped. When he got back down the embankment, both other passengers were out of the vehicle.

[10] There was no agreement reached on the status of the documents discovered by the plaintiff. No further documents were presented in evidence on the merits. It was argued that the other vehicle was unidentified and that the plaintiff had proved that the driver of the unidentified vehicle was solely negligent, thus rendering the defendant 100% liable for the proved damages of the plaintiff.

[11] The evidence presented by the plaintiff was not comprehensive. From the available evidence it can be concluded that if it is accepted, as I must, that the traffic light was green for the plaintiff, it must have been red for the unidentified white vehicle. It would have been unreasonable for the plaintiff to have swerved right to avoid the accident as it would have put him in the path of the white vehicle. It was thus not negligent for him to have swerved left to try and avoid the collision. It was not explained why the plaintiff lost control of the vehicle. There was no evidence led regarding what other steps could have been taken by the plaintiff to avoid an accident. There was also no evidence led regarding the speed at which the plaintiff was travelling. It was apparent that he could not stop in time in order to avoid a collision. The fact that he lost control of the vehicle may or may not indicate that he was travelling at an improper speed. Absent any evidence to the contrary, it cannot however, be concluded, without resorting to speculation, that the plaintiff was negligent.

[12] I thus conclude that the plaintiff has established on a balance of probabilities that the unidentified driver was negligent in ignoring the red traffic light and that this caused the accident, thus rendering the defendant liable for 100% of the proved damages of the plaintiff.

[13] In relation to the issues pertaining to quantum, the first issue to be determined is plaintiff's claim for past medical expenses.

[14] The plaintiff produced a schedule of expenses, supporting by supporting documents, which were provided to the defendant's claims handler. It was referred to in argument by the plaintiff's counsel but no evidence was led in relation thereto. It was further not confirmed on oath by way of an affidavit. In terms of the schedule, the total amount was R 468 903.79. In terms of the schedule, an amount of R136.79 was paid by the plaintiff and an amount of R468 767.14 had been paid by plaintiff's medical aid. The papers did not contain any reference to the medical aid or any undertaking to reimburse the medical aid for amounts paid by it. An appropriate notice in terms of r 35(9) was delivered to which there was no response. The schedule of itself has no evidentiary value and constitutes hearsay evidence. As such I am not persuaded that judgment can be granted for this claim.

[15] In relation to his future medical expenses, the plaintiff sought an undertaking in terms of s17(4)(a) of the Road Accident Fund Act[1]. The parties could not reach agreement on this issue and no undertaking was provided. The plaintiff did not present any evidence of the issue and argued that it should be postponed for engagement with the defendant.

[16] In my view, the issues pertaining to past and future medical expenses are to be postponed.

[17] The plaintiff provided expert reports by various experts accompanied by affidavit. From the reports, the plaintiff sustained the following injuries: (i) a head injury with loss of consciousness; (ii) multiple facial bone fractures, (iii) blunt chest trauma with bilateral rib fractures, and (iv) a fracture of an upper incisor tooth on the right hand side.

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[1] 56 of 1996

[18] The plaintiff was stabilized at the scene with a recorded Glasgow Coma Scale reading of 2/10 (post sedation and intubation). He was airlifted to Millpark Hospital via helicopter. He experienced a dense phase of post traumatic amnesia of 10 days during which he was sedated, medically paralysed, intubated and mechanically ventilated. He was discharged on 25 March 2018.

[19] His present complaints are cognitive mental problems with loss of short term memory, facial pain aggravated by cold weather, a twitching eye, muscle tension headaches, an untreated right upper incisor tooth fracture (which has been fixed) and chronic lumbar back pain aggravated by physical activity and sitting for prolonged periods. The plaintiff further has facial scarring and struggles to concentrate and gets easily distracted. He however still plays golf and lifts weights as he did prior to the accident, although his ability to lift heavy weights has reduced.

[20] Dr Kruger, a neurosurgeon, qualified the plaintiff as a serious injury under the narrative test to qualify for general damages by virtue of severe long term mental or behavioural disturbances as a result of the accident. He did not find a focal brain injury from the available records. There are no CT scans available. The plaintiff was rendered unconscious in the accident and was taken to the ICU unit in Millpark Hospital. He was intubated and mechanically ventilated, which according to Dr Kruger could account for the prolonged period of loss of memory. He was placed in an induced coma. Dr Kruger found plaintiff had sustained a severe traumatic brain injury. His initial GCS scale post sedation was 2/10. The records did not indicate when the GCS scale increased to 15/15. The existence of such an injury is corroborated by the report and investigations undertaken by the occupational therapist, Ms Doran.

[21] The only report provided by the defendant was that of an orthopedic surgeon, Dr Khan. Dr Enslin produced a report. Despite there being no joint minutes, the experts were agreed that the orthopedic injuries suffered by the plaintiff were not so grave that the plaintiff qualified for general damages. According to Dr Enslin, the plaintiff had a

slight cosmetic disfigurement and a long period of lower back pain, treated with conservative treatment.

[22] The cosmetic surgeon, Dr Berkowitz concluded that the plaintiff is left with permanent disfiguring scarring.

[23] Dr Naidoo, in investigating the psychological sequelae, concluded that the plaintiff suffers self-consciousness as a result of his facial injuries. He further suffers from a lack of concentration and memory loss. He is easily distracted and more absent minded. The plaintiff has greater dysfunction in his social functioning. His working diagnosis was one of depressive disorder as a result of his injuries.

[24] The occupational therapist, Ms Doran concluded that the plaintiff has the physical capacity for work tasks of a sedentary to light physical nature correlating with him being able to sustain his occupation as an IT manager. However, should there be an increased demand placed on him with increased planning and problem solving requirements, his identified difficulties may become more prominent which would probably continue to negatively impact on his ability to sustain expected efficacy levels. This would increase his vulnerability and compromise should he lose his present position. She concluded that the plaintiff could be regarded as an unequal competitor in the labour market. Ms Doran performed numerous examinations pursuant to which the conclusion was drawn that the plaintiff illustrated average and below average abilities and variable performances in neurocognitive functioning attributable to an organic insult.

[25] The industrial psychologist Ms Burger, found the plaintiff to be a vulnerable employee and would suffer a two-year delay in achieving his maximum earning capacity at age 52 rather than at age 50. Had the accident not occurred he would have continued with his own business in addition to his employment as IT manager and would have progressed in his career path.

[26] Ms Cramer, a clinical psychologist, corroborated this version pursuant to her own investigations. She concluded that the plaintiff was somewhat withdrawn and reticent about himself in emotional terms and seemed reluctant to admit problems. In her opinion plaintiff may have sustained a traumatic brain injury. Although uncorroborated by other evidence, she suspected a secondary brain injury, not found by Dr Kruger. On testing plaintiff has difficulty sustaining attention and fluctuations were evident. His simple attention was average at best but variable overall with limited and variable complex attention and working memory. His psychomotor speed was average but variable. His mental processing speed was also variable. His forward conceptual practical planning and problem solving was below average and indications of impulsivity on both tasks. His verbal fluency was below expectation. Plaintiff's fine motor speed and manual dexterity was below average on the right but average on the left. His neurocognitive profile indicated variable fluctuations and deficits which in her view could be attributed to what is suspected to have been a significant head and brain injury. Ms Cramer concluded that the plaintiff suffered memory and concentration problems which would render him a vulnerable employee. She further recorded moderate symptoms of depression on psychometric assessment and on presentation, he appeared objectively depressed and anxious.

[27] The plaintiff was 37 years old at the time of the accident and has a grade 12 qualification without exemption. He works in the IT industry and obtained various certificate qualifications. At the time of the accident, he was employed in a business owned by his father in law, Bhekani Abuntu Services as IT manager, a position acquired during 2016. He has retained this employment after the accident in the same position. Plaintiff abandoned any reliance on a loss of income from plaintiff's own business, operated independently from his employment as the necessary financial records were not available. According to plaintiff's 2018 IRP5 he earned R316 680 during the 2018 tax year.

[28] Mr Kramer, an actuary employed by the plaintiff, utilised this information as well as the report of the industrial psychologist to perform his calculations. But for the

accident it was postulated that the plaintiff would have reached the Paterson C3/C4 level (guaranteed package) by age 50. It was assumed that his income would have risen evenly from R456 000 per annum at the valuation date [2] to reach the C3/C4 level.

[29] The claim for future loss of income was predicated on an assumed two-year delay in progression to the Paterson C3/C4 level between ages 50 and 52, when the plaintiff would reach his career plateau. But for the accident it was postulated that the plaintiff would have reached the Paterson C3/C4 level (guaranteed package) by the age of 50. It was also assumed that the plaintiff's income would rise evenly in real terms from R456 000 per annum at the valuation date to reach the Patersen C3/C4 level by the age of 52 Having regard to the sequelae of the injuries it was assumed that there would be a delay of 2 years in reaching the Paterson C3/C4 level, based on Mrs Burger's finding that the plaintiff suffered a decrease in productivity and is now a more vulnerable and unequal competitor in the open labour market. It was further assumed plaintiff would retire at age 65. In the actuarial report of Mr Kramer, the loss was stated as R1 194 907.00 based on a 15% contingency on the plaintiff's prospective income but for the accident and a 30% contingency based on his prospective income having regard to the accident.

[30] Reliance was placed on *Southern Insurance Association v Bailey NO*[3]*; Goodall v President Insurance Co Ltd*[4] and Robert Koch, Quantum Yearbook[5]. On those calculations, the plaintiff suffered a future loss of income of R1 194 907.

[31] The following dictum in *Southern Insurance Association Ltd v Baily NO*[6] is apposite in considering appropriate contingencies:

> *"Any enquiry into damages for loss of earning capacity is of its nature speculative, as it involves a prediction as to the future. All that the Court can do is*

[2] 1 August 2020
[3] 1984 (1) SA 98 (AD)
[4] 1978 (1) SA 389 (W)
[5] 2020 p118
[6] 1984 (1) SA 98 (A) from 99-100 i

to make an estimate, which is often a very rough estimate, of the present value of the loss. Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is tied down by actuarial calculations. The court has "a large discretion" to award what the court considers right. One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the patient may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.

The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case and may be favourable.

The technique of assessing damages involves consideration of relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a balance of probability justice may require that what is called a contingency or allowance be made for a possibility of that kind…"

[32] Although there was no direct evidence of a brain injury, I am persuaded that the experts presented a satisfactory factual basis for the conclusion that the plaintiff has indeed suffered some neurological fall out as a result of the accident. The approach adopted by Ms Burger is conservative and I am persuaded that the facts sustain her conclusion. I am further persuaded that the contingencies applied in the calculations of Mr Kramer are reasonable based on the facts. The plaintiff has thus established the quantum of his loss of earnings as calculated by Mr Kramer. This amount is considerably less than that claimed in its amended particulars of claim.

[33] On the evidence presented I am further persuaded that the plaintiff has established an entitlement to general damages. I was referred to various authorities by the plaintiff supporting his argument that an award of between R1.3 million and R1.35 million would constitute a reasonable award. I was referred to *Van Zyl NO v RAF*[7], *Opperman v RAF*[8], *Gazo v RAF*[9], *Smith v RAF*[10], *Bukaza v RAF*[11], *Dlamini v RAF*[12], *Herbst v RAF*[13], *Mohlaphuli NO v South African National Road Agency Ltd*[14] and *Torres v RAF*[15]., all of which I have considered, including the present values of the awards. Considering the facts in those cases compared to the facts in the present instance, I conclude that an amount of R 1 000 000.00 constitutes an appropriate award for general damages.

[34] I was provided with a copy of the contingency fee agreement, which accords with the Act.

[35] The normal principle is that costs follow the result. There is no basis to deviate from this principle. The plaintiff sought the costs of senior counsel, arguing that such costs were warranted. I am persuaded that considering the complexities involved, the employment of senior counsel was warranted.

[36] I was provided with a draft order by counsel, which has been amended where appropriate. The plaintiff elected to proceed by way of affidavit thus the reservation fees of the experts are not allowed. There were further no witnesses subpoenaed for trial.

[37] I grant the following order:

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[7] 2012 (6A4) QOD 138 (WCC)
[8] Case no 47697/2009 (SGHC)
[9] Case no 276816/07 (SGHC)
[10] Case no 47697/2009 (SGHC)
[11] Case no 08/39524 (SGHC)
[12] 2012 (6A4) QOD 68 (GSJ)
[13] 2007 96) QOD A4-7 (WLD)
[14] 29 October 2012
[15] 2007 (6) QOD A4-1 (GSJ)

[1] The Defendant is liable for 100% of the Plaintiff's damages.

[2] The Defendant is directed to pay to the Plaintiff the capital amount of R2 194 907.00 (two million one hundred and ninety-four thousand, nine hundred and seven rands), in respect of and calculated as follows:

Loss of Earnings	R1 194 907.00
General Damages	R1 000 000

Together with interest *a tempore morae* calculated in accordance with the Prescribed Rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996.

[3] Payment is to be made directly to the trust account of the Plaintiff's attorneys within One Hundred and Eighty Days (180) days:

Holder	De Broglio Attorneys
Account Number	[....]
Bank& Branch	Nedbank – Northern Gauteng
Code	198 765
Ref	A276

[4] The plaintiff's claims for past and future medical expenses are postponed sine die.

[5] The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the preparation and qualifying fees of the experts, consequent upon obtaining Plaintiff's reports to be served between the parties, inclusive of the Plaintiff's reasonable travel and accommodation costs to attend the Defendant's and own experts, and Senior counsel. All past reserved costs, if any, are hereby declared costs in the cause.

[6] The Plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the Defendants Attorney of record; and

[7] The Plaintiff shall allow the Defendant fourteen (14) days to make payment of the taxed costs.

[8] It is recorded that there is a contingency fee agreement in existence between the Plaintiff and his Attorneys.

[9] A copy of this judgment is to be provided to the senior official of the defendant in charge of the claims handler, Mr Malvin Khoseni for investigation of Mr Khoseni's conduct in relation to this matter.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 19 April 2021
DATE OF JUDGMENT	: 28 April 2021
PLAINTIFF'S COUNSEL	: Adv. GJ. Strydom SC
PLAINTIFF'S ATTORNEYS	: De Broglio Attorneys Inc. Ms Van der Linde

NO APPEARANCE FOR DEFENDANT