



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

15/12/14

Case No: 2172/2012

In the matter between:

MOKWENA SBUSISO SIMON

Plaintiff

AND

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
15-12-2014	
DATE	SIGNATURE

ROAD ACCIDENT FUND

Defendant

DATE OF HEARING : 25 NOVEMBER 2014

DATE OF JUDGMENT : 15 DECEMBER 2014

JUDGMENT

MANAMELA AJ

Introduction

[1] The plaintiff claims from the defendant an amount of R27 785 991.42 as damages in respect of injuries sustained in a motor vehicle accident which occurred on 18 November 2007 in the Cullinan, Pretoria. He was 17 years old at the time and was injured while being ferried as a passenger in bakkie motor vehicle. The bakkie, which had no canopy, overturned. He is suing the defendant as the statutory body responsible for the liability of the insured driver.

[2] The merits of the matter were settled between the parties on 30 July 2013. The defendant accepted liability for the total proven damages of the plaintiff. This was confirmed by Mr R Hawman, who appeared for the plaintiff, and Ms L Maite, who appeared for the defendant, at the trial on 25 November 2014. It was also stated that the defendant shall furnish an undertaking in terms of 17(4) of the Road Accident Fund 56 of 1996 for plaintiff's future medical expenses claim. Plaintiff's past medical expenses claimed in an amount of R48 927.42 was still a subject of negotiations between the parties.¹ Therefore, what was still the subject of the dispute between the parties at the trial were claims relating to past and future loss of earnings, and general damages.

[3] After argument by counsel at the trial, where only the oral evidence of Dr TP Moja was led, I asked counsel to file heads of argument by not later than Monday, 01 December 2014. I am grateful to have received this from Mr Hawman on behalf of

¹ The plaintiff's heads of argument dated 30 November 2014 stated that an approval from the defendant was awaited.

the plaintiff. Upon enquiry Ms Maite advised² that she held no instructions in this regard. This appears to be a rather curious response, since Ms Maite, as stated above, argued the matter at trial and cross-examined Dr Moja in the pursuit of the defendant's interpretation of the conclusions and findings of the expert contained in their respective reports. Be that as it may, I ultimately see no problem in this regard, as I have the benefit of my notes from the trial and the actual reports for a determination to be made in this matter.

[4] There was also communication to the effect that the parties have reached a settlement in an amount of R850 000.00 regarding the claim for general damages.³ Only the claim for past and future loss of earning remains. I deal next first with the plaintiff's injuries.

Plaintiff's Injuries

(a) Orthopaedic Injuries

[5] According to the report compiled by Dr AM Matime, an orthopaedic surgeon appointed by the plaintiff, the plaintiff sustained injuries to the neck and compound fractures of the right tibia and fibula. He was initially admitted to the Mamelodi Hospital after the accident and thereafter transferred to the Pretoria Academic Hospital also on the same day.

[6] The following is also common cause between the parties. The plaintiff had four surgical operations in an attempt to salvage his right limb but these were without

² Through an electronic mail to my registrar on 04 December 2014.

³ Through an electronic mail to my registrar from Mr Hawman on 01 December 2014.

success. Ultimately, he was amputated below the knee. He thereafter had a fall which injured his stump and led to a further amputation above the knee. In 2010 there was further surgical revision of the amputated stump further up above the knee. He has had a limb prosthesis fitted, but it fits poorly and causes him pain. He also walks with a limp.

(b) Brain Injury

[7] The plaintiff's contentions of a brain injury are disputed by the defendant. It submitted in this regard that, the plaintiff suffered a moderate severe concussive head injury. The plaintiff, as stated above, called Dr Moja, a specialist neurosurgeon, to testify at the trial as an expert, regarding the opinions expressed in his filed reports. Dr Moja reported and testified that the plaintiff reportedly momentarily lost consciousness after the accident and regained it whilst on the scene when he found himself by the roadside.⁴ His Glasgow Coma Scale (GCS) was 9/10 at the accident scene. I will deal later with his explanations [tendered during his testimony at the trial] of the patent discrepancy in this reading, as reflected in the hospital records.⁵ He attributed the 10 in his report to be a typing error. It suffices for the time being that he confirmed his opinion of existence of head injury in his oral testimony. There is no other expert evidence in this regard.

[8] The personal history of the plaintiff; the orthopaedic and brain (if any) injuries and their *sequelae* would have a bearing to the determination to be made in respect

⁴ See page 12 of the Plaintiff's Experts (Part 1) bundle.

⁵ See page 11 of the Plaintiff's General Notices Vol 1 bundle.

of the plaintiff's loss of earnings claim. I devote my attention next to the relevant aspects of plaintiff's historical background.

Plaintiff's educational and employment background

[9] As stated above, the plaintiff was 17 years old at the time of the accident on 18 November 2007. He was born on 22 July 1990.

[10] He was a grade 9 pupil at the time of the accident. After the accident, he was not able to attend school in 2008, but only went back to school in 2009. He completed grade 10. He thereafter quit school after unsuccessfully enrolling in 2010 and re-enrolling in 2011 for the grade 11.

[11] He was never employed. Therefore, educational psychologist opinion will be vital regarding the determination of an appropriate award for the loss of earnings. Naturally, such an opinion would have to be read in conjunction with other expert reports. And a basis would have to come from a clear determination on the effects of the injuries on the plaintiff's employments prospects.

[12] I deal first with the findings of the orthopaedic surgeon and neurosurgeon.

Expert Opinions on Orthopaedic Injuries

[13] Dr Matime, an orthopaedic surgeon, examined the plaintiff on 24 January 2013. Notably, this was over five years after the accident. He observed the injuries

and the treatment received by the plaintiff, stated above⁶. He further reported that, the plaintiff did not engage in any organised sport or special hobbies before the accident. Dr Moja had reported that the plaintiff enjoyed playing soccer with his friends.⁷ He had not been involved in a motor vehicle accident; suffered any severe trauma or has had any surgical operations, before he was injured in the accident relevant to this matter. He informed him that he was in a perfect health condition.

[14] Dr Matime's findings in respect of the future employability of the plaintiff were as follows: The plaintiff will not be competitive in the open labour market. He needs to obtain some skill or vocational training. Dr Matime recommended that the plaintiff be evaluated by an occupational therapist to assess the latter aspect.

[15] Regarding the plaintiff's disability and loss of work capacity he found that the plaintiff has a significant musculo-skeletal functional impairment as a result of the injuries sustained from the accident. This has reduced his capacity to work, which according to him [Dr Matime that is] is up to 70% permanent disability based on the *Workman's Compensation Commissioner guidelines* and a 38% whole body impairment.⁸ The latter opinion, he stated, is based on AMA guidelines (6 ed) according to Dr Matime and his own clinical findings. Further, Dr Matime considered the plaintiff to have "*attained maximum medical improvement*".⁹

⁶ See paragraphs 5 and 6 above.

⁷ See page 14 of the Plaintiff's Experts (Part 1) bundle.

⁸ See page 7 of the Plaintiff's Experts (Part 1) bundle.

⁹ *Ibid.*

[16] He concludes that, the plaintiff has to be compensated for all loss of income resulting from his injuries from the accident.

[17] I was not made aware of any report by an expert in orthopaedic surgery filed on behalf of the defendant and I could not find any in the bundles.

Expert Opinions on Brain Injury

[18] As stated above the court had the benefit of *viva voce* evidence by Dr TP Moja, a specialist neurosurgeon. Although his presence at the trial and involvement in the matter was secured by the plaintiff, I am grateful for his participation at the trial as he assisted the court with his specialist or expert knowledge of the issues. His report filed in the matter is equally valuable. I am not discounting the attack by counsel for the defendant. In fact, as it would appear later below, such will not be necessary.

[19] In the main, the question Dr Moja had to deal with, was whether the plaintiff sustained a brain injury due to the accident. And resultant questions: if so, what is the severity of the brain injury and the *sequelae* of the brain injury?

[20] From his report, I note that he interviewed the plaintiff on 03 July 2013¹⁰ and had stated to have at his disposal the RAF 1 and RAF 4 forms, and the Mamelodi Hospital records.¹¹

¹⁰ This was about 5 years and 8 months after the accident.

[21] As stated above,¹² the plaintiff alleges to have momentarily lost consciousness after the accident, but regained it whilst on the accident scene. His Glasgow Coma Scale (GCS) was 9/10 at the accident scene. Obviously, this reading appears incorrect. Dr Moja explained during his testimony at the trial the patent discrepancy in this reading. He told the court that due to an illegible reading of the portion dealing with the “eyes” which is rated up to 4 of the *Patient Report Form* of the hospital records,¹³ the reading couldn’t be over 15, but only up to 11. He attributed the 10 stated in his report to be a typing error. Therefore, the correct reading of his report as confirmed by his oral evidence is a GCS of 9/11, being less a tally of 4 in respect of the eyes, due to the illegible reading. However, he further explained that even with a total awareness in the eyes and therefore an assumed additional 4 to 9 in order to complete the ratio, the plaintiff would still have had a brain injury at 9/15.

[22] According to Dr Moja the plaintiff does not have a prior history of memory or behavioural problems.

[23] He had recorded in his report that, the plaintiff complained to him [Dr Moja] during the interview of the following: difficulty in walking; right leg “phantom” pain; short-term memory loss and depression.¹⁴ He also told him that since the amputation

¹¹ See page 11 of the Plaintiff’s Experts (Part 1) bundle.

¹² See paragraph 7 above.

¹³ See page 11 of the Plaintiff’s General Notices Vol 1 bundle.

¹⁴ See page 15 of the Plaintiff’s Experts (Part 1) bundle.

of his limb he feels depressed; was diagnosed with bipolar mood disorder by a psychiatrist and that he is on medication.¹⁵

[24] However, Dr Moja found on examination, the plaintiff to have well-orientation; normal concentration; fluent speech; able to follow instructions without difficulty, but withdrawn and appearing depressed.¹⁶

[25] His findings on mental and physical impairment, were as follows: The plaintiff sustained a moderately severe concussive head injury, but has made good recovery post concussive head injury, despite his complaints about residual memory loss and depression.¹⁷ He concluded that the plaintiff is suffering from post-traumatic stress and depression.¹⁸ However, the telling conclusion, in my view, was that the plaintiff has no focal neurological deficits, besides the permanent physical impairments or disability resulting from the amputation of his leg.¹⁹

[26] Therefore, I find that Dr Moja assisted the plaintiff prove existence of head injury of a moderately severe concussive nature, most of his findings were most relevant to the general damages claim. However, they are in no way considered irrelevant for purposes of loss of earnings.

¹⁵ *Ibid.*

¹⁶ See page 16 of the Plaintiff's Experts (Part 1) bundle.

¹⁷ See page 18 of the Plaintiff's Experts (Part 1) bundle.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Expert Opinions of Educational Psychologists

[27] Further from being examined and interviewed by the orthopaedic surgeon and neurosurgeon as dealt with above, the plaintiff was seen by Mr W.M. Kumalo and Ms Sandra Crous, acting on instructions from the plaintiff and the defendant, respectively. Both experts are educational psychologists. They filed individual reports and later compiled joint minutes on their findings. I deal exclusively with the pertinent aspects of minutes next.

[28] They noted the educational achievements of the plaintiff discussed above and that pre-accident he was probably of "*at least average intellectual potential*" and that they also cannot exclude the possibility of pre-existing learning difficulties considering his reported failure of two grades.²⁰

[29] Mr Kumalo opines that the plaintiff would have been able to pass grade 12 and achieve a certificate, whereas Ms Crous is of the opinion that he would have only passed grade 10 and entered an FET college for a trade certificate. She also holds the view that, should he had stayed in the mainstream school and not entered FET college, he would have passed grade 12 without exemption after failing at least one grade.²¹ Both educational psychologists deferred to industrial psychologists for an opinion on the plaintiff's pre-accident employment and earning potential.

[30] These experts agree with the reports that the plaintiff would not be able to complete his high school education as a result of the accident-related complications.

²⁰ See paragraph 2 on page 2 of the educational psychologists joint minutes of 10 November 2014

²¹ *Ibid.*

Their assessment indicated cognitive difficulties relating to concentration, working and short-term memory, reasoning, processing speed and delay in scholastic skills like reading, spelling and arithmetic.²² They further report that the plaintiff struggles with “*emotional, social and psychological difficulties*” as a result of the accident and the disability therefrom. They conclude that he is not likely to pass grade 12 in a mainstream setting and therefore may no longer be able to enter a more practical field of training.²³ Although they defer to opinion of the industrial psychologists (and other experts) regarding the plaintiff’s post-accident employability and earning potential, they express a view that his employment is likely to be “*sympathetic within a protected environment*”.²⁴

[31] Ms Crous would also want to hear the view of neurosurgeon regarding the possibility that, the plaintiff’s, pre-existing learning difficulties were exacerbated by a head injury. She appears not to have had sight of Dr Moja’s report which is dated 25 November 2014, although hers was on 23 October 2014.

Expert Opinions of Clinical Psychologists

[32] Ms Narropi Sewpershad was retained by the plaintiff and Ms Monique Kok by the defendant. They produced joint minutes of their meeting held on 04 November 2014. They also had delivered individual reports.

²² See paragraph 3 on page 3 of the educational psychologists’ joint minutes.

²³ *Ibid.*

²⁴ See paragraph 3 on page 3 of the educational psychologists’ joint minutes.

[33] Regarding the plaintiff's personal circumstances, Ms Kok states in the minutes that she was informed of prior *marijuana* use by the plaintiff, whilst Ms Sewpershad reported that the plaintiff denied illegal substance use or abuse. For completeness, I record here that, Ms Maite appearing for the defendant at the trial, actually submitted that the plaintiff's memory problems may be due to marijuana use. However, she could not furnish the necessary expert or scientific evidence in this regard and this will remain at the level of conjecture, despite her insisting that it was a well-known fact capable of judicial notice. I find that nothing turns on this for current purposes.

[34] Post-accident, Ms Sewpershad concluded that the head injury may have contributed to some of the plaintiff's neuropsychological deficits she identified but Ms Kok furnished no comment in this regard.²⁵

[35] Both experts agree that the plaintiff post-accident is more vulnerable than pre-accident from psychological and psychiatric points of view, due to pain and suffering from his physical or orthopaedic status. They minute that the plaintiff reported that he was diagnosed and treated for a bipolar mood disorder at Vista Clinic.²⁶

[36] They also agree that the plaintiff is unlikely to be able to compete with his peer group on the open labour market and deferred to the industrial psychologists for a prognosis on his vocational abilities.

²⁵ See paragraph 3.2 of the clinical psychologists joint minutes of the meeting held on 04 November 2014.

²⁶ *Ibid* at paragraph 3.4.

Expert Opinions of Industrial Psychologists

[37] Ms Sandra Moses acted as an industrial psychologist on behalf of the plaintiff and, Ms Cecile J Nel and Mr Pieter De Bruyn for the defendant. There are joint minutes for their meeting held on 24 November 2014.

[38] According to Ms Moses, the plaintiff would have probably passed grade 12 and entered university or college but for the accident. He would have thereafter entered the labour market at the Paterson B2 level and progressed to a ceiling Paterson grade C4. However, the industrial psychologists on behalf of the defendant limit the plaintiff's possibilities to a certificate level qualification (NQF level 05 in terms of SAQA²⁷). They also hold the view that plaintiff would have entered the labour market at Paterson grade B2/B3 for five years and progressed to a career ceiling level of C1/C2.

[39] However, these experts agree that the plaintiff would have worked until age 60 or 65 depending on the retirement policy of the company.

[40] Post accident they noted the psychological and psychiatric deficits stated by the other experts above and their respective findings. Ms Moses concludes by opining that, the plaintiff's injuries do hamper his employability and that finding and sustaining any type of work will prove difficult.²⁸ She concludes by finding that the plaintiff would suffer a total loss of income, as with a low level education he is limited

²⁷ South African Qualification Authority.

²⁸ See paragraph 3.3 of the industrial psychologists joint minutes of 24 November 2014.

to unskilled work of a generally physical nature and his physical disabilities from the accident precludes him from this type of work.²⁹

[41] Ms Nel and Mr De Bruyn, on behalf of the defendant, are non-committal about employment prospects of the plaintiff. They attribute his clear lack of employment opportunities to the plaintiff's alleged substance abuse, bipolar disorder and other challenges like in respect of transport for the plaintiff's discontinuation of his six months graphic design course. They conclude that as at the stage of their meeting the plaintiff's career route to be taken is unknown and recommended a high post-morbid contingency deduction in respect of the significant truncation of his range of job choices and level of occupational functioning resulting from his disability.³⁰

[42] With that I deem it opportune to review the reports by industrial psychologists employed by the parties.

Actuarial Reports

(a) General

[43] It is common cause that plaintiff suffered and will suffer loss of income or earning capacity. The only determination to be made is how much is his loss in this regard.

[44] An actuarial report dated 25 November 2014 compiled by Munro Forensic Actuaries instructed by the plaintiff was handed in agreement as an exhibit. The

²⁹ *Ibid.*

³⁰ See paragraph 3.5 of the industrial psychologists joint minutes.

actuaries had the benefit of the information in the industrial psychologists' reports, as well as, their joint minutes referred to above. They therefore sketched three scenarios in respect of the plaintiff's "uninjured income" and "injured income".

(b) Pre-Accident

[45] Scenario 1 is based on the opinions expressed by Ms Moses in the joint minutes. Scenario 2 is based on the views by Ms Nel and Mr De Bruyn, also in the joint minutes. Scenario 3 is based on the opinion of Ms Nel, the defendant's industrial psychologist that the plaintiff would have obtained grade 12 in 2010 and reached Paterson C1/C2 at the age of 45 years pre accident. And now considering the accident, he would start working as a semi-skilled lower level worker in January 2017 and reaching his highest level as a semi-skilled worker (median/upper level) also at the age of 45 years.

[46] Both counsel mentioned preference to scenario 2. In terms of scenario 2, which is based on the views of Ms Nel and Mr De Bruyn, the following aspects are significant: Uninjured, the plaintiff would have completed grade 12 in December 2010; obtained a post-matric certificate in 2011 (assuming he obtains this in one year); enters the labour market in January 2012 at Paterson B2/B3 earning a basic income of R117 500.00 per annum; in 2035 reached his highest level at Paterson C1/C2 earning R288 000.00 per annum. The aforesaid assume inflationary increases until the plaintiff reaches retirement at the age of 62.5 years.³¹

³¹ See paragraph 5 of the plaintiff's actuarial report date 25 November 2014.

[47] Injured, whilst still on scenario 2, the actuaries stated that it has been assumed that the plaintiff would begin his career at the date of calculation and allowed a three year delay. At the date of calculation, the plaintiff is at Paterson B2/B3 earning R117 500.00 as in uninjured, and reaching Paterson C1/C2 being his highest level when he would be earning R288 000.00 per annum in 2038 at the age of 48. The postulated age of retirement is as in uninjured part of this scenario (i.e. at 62.5 years).

[48] The actuaries whilst noting the views of the industrial psychologists regarding suggestion that a high post-morbid contingency deduction be applied in this scenario to allow significant truncation in plaintiff's range of jobs and level of occupational functioning, did not apply any contingencies. It is stated that this should be a subject of legal argument.

[49] Mr Hawman, for the plaintiff, submits a contingency deduction of 5% be applied to both uninjured and injured past loss of income. This is equally what was submitted by Ms Maite on behalf of the defendant. Therefore, an amount of R311 100.00, less a 5% contingency deduction in respect of past loss of income appears to be common cause in terms of scenario 2. This leaves a balance of R295 545.00.

(c) Post-Accident

[50] Also based on scenario 2 and in respect of the plaintiff's future loss of income, the following is submitted on behalf of the plaintiff: That appropriate contingency deductions of 20% to uninjured income and 50% to injured income be allowed. The defendant submitted that a 10% / 70% contingency deduction be effected. These

translate to an amount of R2 973 765.00 as submitted by the plaintiff and an amount of R2 907 645.00 as submitted on behalf of the defendant. Evidently, the difference between the two amounts is R66 120.00. Both amounts are less an amount of R77 460.00 received by the plaintiff in the form of social grants.

[51] It was submitted on behalf of the plaintiff [both at the trial and written heads of argument³²] that he is willing to accept the amount as submitted by the defendant and thereby foregoing the difference, should this court be inclined to make an award on this basis or scenario.

Analysis and Conclusion: Loss of Earning Capacity

[52] The parties have agreed that, opinions expressed in the reports and minutes by the experts be accepted for what they purport to be: expert evidence. This would not reduce the involvement of this court to be the imprint of a mere rubberstamp of the opinions of the experts. This will be against prevailing authorities, including the views of the learned authors of ***Visser & Potgieter Law of Damages, Potgieter, JM; Steynberg, L and Floyd, T.B (3 ed) (2012)*** at page 467, when they authoritatively state with regard to actuarial opinions that:

“An actuary is an expert witness whose opinion is merely part of all of the other evidence before this court, to be given greater or lesser weight according to the

³² See page 18 of the plaintiff's heads of argument.

circumstances of the case. The calculations and evidence of an actuary often plays an important role.”

[Footnotes omitted]

[53] The above views are also shared and elucidated by the **Klopper, H.B** in his seminal work in the ***Law of Third-Party Compensation (3 ed) (2012)*** at page 177, where he stated:

“Of course, the actuarial report is only used as a base and does not in any way bind, the court’s inherent discretion to asses such damages.”

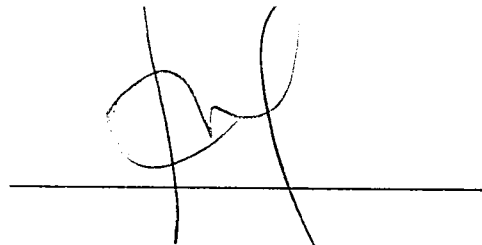
[Footnotes omitted]

[54] However, I also find the basis and assessment in scenario 2 to be fair and logical regarding both pre-morbid and post-morbid potentials of the plaintiff. The fact that both counsel has the same preference only fortifies this finding. Therefore, I consider an amount of **R2 907 645.00** to be fair and reasonable compensation for plaintiff’s loss of past and future loss or earnings. I will make an order in this regard and incorporate the agreement reached on future medical expenses. Costs will also follow the outcome.

Order

[55] I reflect the main aspects of the order made herein below and the ancillary aspects of the order would be as appearing in the draft order which I have marked X and initialled for identification. The order is as follows:

- (a) that, the defendant is ordered to pay the plaintiff damages in respect of loss of earnings in an amount of **R2 907 645.00** (two million nine hundred and seven thousand six hundred and forty five rand);
- (b) that, the defendant shall pay interest of the sum of R2 907 645.00 (two million nine hundred and seven thousand six hundred and forty five rand) at the rate of 9% per annum from after 14 (fourteen) court days from date of this order to date of payment
- (c) that the defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of future accommodation in a hospital or a nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff after such costs have been incurred and on proof thereof, relating to the injuries sustained by the plaintiff, injured on 18 November 2007.
- (d) that, defendant is ordered to pay costs of trial herein on party and party scale, either as agreed or taxed, including the costs specified in the draft order marked "X";
- (e) that, the rest of the orders are as contained in draft order of the same date as this judgment, marked X and initialled by me, to the extent that it is not a duplication or contradiction of what is stated above.



K.L.A.M. MANAMELA

Acting Judge of the High Court of
SA: Gauteng Division, Pretoria

APPEARANCES

For the Plaintiff : Adv. R Hawman

Instructed by : Mphela & Associates

Pretoria

For the Defendant : Adv. L. Maite

Instructed by : Diale Mogashoa Attorneys

Pretoria