IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/12/14

Case No: 16576/2010

In the matter between:

SWANEPOEL MORNE obo BRADLEY 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 : **27 NOVEMBER 2014**

DATE OF JUDGMENT : **15 DECEMBER 2014**

JUDGMENT

MANAMELA AJ

Introduction

[1] This matter came before me on trial on 27 November 2014 and I reserved judgment after hearing oral submissions or address from counsel based on expert reports. Mr M van den Barselaar appeared for the plaintiff and Mr F. Matika for the defendant. I requested counsel to file heads of argument by not later than Monday, 01 December 2014. This was timeously done and I am grateful to counsel in this regard.

[2] I had expected that the heads of argument will only address the issues dealt with in oral argument at the trial, but this was not to be. The defendant took advantage of my request to raise, what I consider to be, a technical objection. It is submitted that the plaintiff's claim is limited to an amount of R250 000.00 as per the original particulars of claim attached to plaintiff's summons.[1] Therefore, without a formal amendment in terms of the rules or procedures of this court, no amount above or exceeding the aforesaid amount can now be validly claimed, it is contended.

[3] Although the defendant is always within its rights to object or raise whatever technical or procedural points, it deems fit, I did not expect this to surface for the first time in heads of argument, which I merely requested for the benefit of the court. The defendant was always aware of the changes in the amounts relating to the claim. This is also confirmed by the fact that, both counsel actually submitted that, barring internal or bureaucratic delays, the matter was almost settled. In my view, any merit

[1] This amount is actually R270 000.00 in the particulars of claim dated 05 March 2010 as per pages 3 -8 of the indexed pleadings.

in the objection is mainly defeated by the timing thereof, but I deal with this further, below.

[4] Also, the reports filed by both parties, including the actuarial report by the defendant clearly indicate amounts in millions and not limited to the R270 000.00 originally stated in the particulars of claim. These reports were used in argument by the defendant without any form of limitation being raised. I am curious as to when would the defendant have raised this objection, should I not have requested for counsel's argument to be reduced to writing.

[5] However, in the interests of justice, I decided to call for further submissions on the issue and did so on 04 December 2014 through communication by my registrar to the parties. I made it clear therein that I was more inclined to allow the amendment, even at this late stage, as I could not see any prejudice to the defendant under the circumstances. The defendant had an opportunity to address me on the issue and substantively made submissions with regard to prejudice therein.

[6] Further papers were filed in this regard, although the defendant raised a further technical objection to the amount stated in the notice of amendment, in that the amount the plaintiff was seeking to amend was not R1 million but R270 000.00. However, no real prejudice was indicated and the defendant being fully cognisant of this fact raised rather tentatively an alternative argument accepting that the plaintiff's

claim to be above R270 000.00[2]. To conclude on this, I hereby find that there is no prejudice whatsoever with the amendment being effected at this late stage. The defendant has always been aware that the plaintiff's claim was above the original amount stated in the particulars of claim. Further and of cardinal importance is the fact that amounts stated in expert opinions are merely a guide to the court and not binding. Therefore, it would always be unknown to the contending parties what amount will be awarded as fair and reasonable compensation for the damages suffered. The final amount awarded is not always as pleaded, but as assessed by the court on the basis of the available information. Be that as it may, I deem it warranted to also state that, in my view, once the court has had the benefit of materials accumulated from evidence in the trial, any concerns regarding the elegance or absence thereof, in the pleadings is often alleviated, if not eliminated.[3] The following words by Centlivres JA in ***Colleen v Rietfontein Engineering Works*** 1948(1) SA 413 (A) on page 433, after the learned judge remarked that amendment of the pleadings would have regularized the situation, are instructive in this regard:

"This court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial."

[underlining added]

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[2] See a paragraph or prayer numbered 2 on page 17 of the defendant's heads of argument.

[3] See part A on pages 675-6 of ***Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa*** (5ed) and the authorities quoted there.

[7] I now proceed to deal with the issues in the matter after a brief background.

Brief Relevant Background

[8] On 12 May 2008, a vehicle driven by the plaintiff collided with another vehicle, driven by G Dube (the insured driver) at Kingsway Road, Amanzimtoti. Bradley, the son of the plaintiff and at all material times a minor, was a passenger in the vehicle driven by his father. He was 9 years old and in grade 4 at the time.

[9] He sustained injuries due to the abovementioned collision and the plaintiff, as his father and natural guardian, instituted action against the Road Accident Fund claiming relief on the grounds that, the latter is statutorily[4] responsible for liability of the insured driver. He claimed that the insured driver was negligent and had caused the collision. An amount of R640 000.00 was claimed under various heads of claims.

[10] As stated above, only an amount of R270 000.00 was claimed in respect of Bradley's future loss of earning capacity. The defendant disputed the claims; the matter went to trial [previously] and the defendant was either ordered or agreed to pay 100% of the plaintiff's agreed or proven damages.

[11] As indicated above, the matter came before me for trial and the parties stated that save for determining an amount to be awarded for Bradley's future loss of earnings, the following had been agreed upon:

[4] In terms of the Road Accident Fund Act 56 of 1996.

[11.1] the issue of general damages has been referred to the Health Professions Council of South Africa for determination and is postponed;

[11.2] there is no more claim in respect of Bradley's past loss of earnings, as he has not commenced work;

[11.3] the defendant agreed to give a 100% undertaking for future medical treatment;

[11.3] the joint minutes of the various expert witnesses contained in the reports before the court should stand as evidence.

[12] An actuarial report by Mr Riaan Heynemann of the True South Actuaries dated 26 November 2014 was accepted (by agreement) as part of the record and marked "Exhibit A". This report was compiled at the instance of the defendant. In my view, this report forms the critical or significant aspect of this trial and is highly influential to a determination to be made here. It is based on relevant expert medical reports, some of which are discussed next.

Plaintiff's Injuries and their sequelae

(a) Orthopaedic injuries and Expert Opinions

[13] From the joint minutes of the orthopaedic surgeons, Drs G.O. Read and M.J.H Mair, retained by the plaintiff and the defendant, respectively, the following is recorded. Bradley sustained injuries to his axial skeleton (i.e. neck and back); right knee; tore his right medial co-lateral ligament, and suffered soft-tissue injury to his

left knee, which has become asymptomatic.[5] Bradley expressed similar complaints to both surgeons regarding his axial skeleton and right knee.

[14] Both these orthopaedic specialists agreed that Bradley requires conservative treatment, but Dr Read for the plaintiff added that, he may well require arthroscopic surgery. They both pointed out in agreement that Bradley's future treatment would be covered by any undertaking given by the defendant.[6] They note that the accident appeared to have had a severe psychological impact on Bradley, but the orthopaedic injuries in isolation should have no significant impact on his education or career choice.

(b) Head Injury and Expert Opinions

[15] The joint minutes of Drs T.C. Bingle, for the plaintiff and T.P. Moja, for the defendant are dated 25 November 2014.[7] These experts agreed that Bradley sustained a concussive head injury, other than multiple soft tissue injuries. They recorded that, according to his father Bradley lost consciousness for a minute or two after which he appeared disorientated and "*bewildered*" for a while.[8]

[16] Dr Moja's opinion is that, Bradley sustained a mild head injury (mild concussion). In his opinion, Bradley had made a good post-head injury recovery with no residual neurophysical deficits. He further recorded that Bradley complained of being easily forgetful; forgetting recent memory and given tasks; his concentration

[5] See page 1 of the indexed joint minutes.
[6] In terms of section 17 of the Road Accident Fund 56 of 1996.
[7] Pages 14-16 of the indexed joint minutes.
[8] See paragraph 1 on page 14 of the indexed joint minutes.

being poor; struggling to learn at school and his post-accident performance having declined.[9] However, he noted that Bradley is making good progress at school with no recorded school failures.[10]

[17] Dr Bingle also noted the same complaints as Dr Moja above. He also stated that no specific neurophysical deficit due to the head injury sustained in the accident is evident on clinical examination.[11] He further stated that, although he did not receive hospital records, as they probably did not exist,[12] available information suggested that, there was no indication of Bradley sustaining a significant concussive head/brain injury. He agreed with Dr Moja's opinion of a mild concussive head injury, but opined that "*significant non-contiguous posttraumatic amnesia*" and ongoing neurocognitive *sequelae* with detrimental effect on his school work is indicative of a more moderate concussive brain/head injury. He deferred to neuropsychological opinion in this regard and recommended that, an educational psychologist opinion be acquired.[13]

(c) Opinions of Educational Psychologists

[18] The plaintiff instructed Ms Karin Trollip and the defendant Dr vd Ryst, as educational psychologists. They compiled joint minutes dated 19 November 2014.[14] From their minutes and notings, it appears they had access to the reports of other experts, including those by the orthopaedic surgeons and neurosurgeons discussed above.

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[9] *Ibid.*
[10] See paragraph 2 on page 15 of the indexed joint minutes.
[11] *Ibid* at paragraph 3.
[12] He states that Bradley was not admitted following the accident.
[13] See paragraph 4 on pages 15-16 of the indexed joint minutes.
[14] See pages 3-6 of the indexed joint minutes.

[19] Pre-morbid, the educational psychologists agreed that Bradley was probably of average intellectual potential, although he would probably have been able to obtain a grade 12/NQF Level 4 education in a mainstream school. Dr vd Ryst noted that, although he may have struggled with perceptual development and language difficulties, as well as, low self-esteem pre-morbid, he would still have obtained his matric. They agreed that he would have been more suited to technical or practical type of training and would have completed NQF5 level training depending on the circumstances at the material time.[15] Ms Trollip opined further that, there is a possibility[16] Bradley may have been able to obtain a higher certificate or diploma (NQF6) in a field of his interest.[17] Notably, this view is not shared by Dr vd Ryst and Ms Trollip does not shed more light for her [possible] opinion. They jointly noted that "*it is highly probable*" that he may have joined his father in operating a gymnasium. They naturally deferred to the expertise of industrial psychologists in this regard.

[20] Post-morbid they record the following: They noted Bradley's current school performance and the difference in expert opinion. However, they agreed that it is likely that any pre-existing problems and vulnerabilities might have been exacerbated by the trauma of the accident. They agreed that post-morbid he would probably experience more challenges to obtain matric in a mainstream setting without necessary emotional and scholastic support. He is progressing well and his performance seems to be in line with his family background. They suggested

[15] See paragraph 2 on pages 3-4 of the indexed joint minutes.
[16] I consider "possibility" to have a lesser degree of likelihood than "probability" and I note that these expert are well aware and conscious of their choice of words. The words "probable", "probably", "highly probable" appear from their minutes.
[17] See paragraph 2 on pages 3-4 of the indexed joint minutes.

psychiatric and psychological intervention regarding Bradley's significant emotional difficulties.

(d) Opinions of Industrial Psychologists

[21] Just like it was the case with the other experts above, Dr Lucas Fourie (LF) appointed by the plaintiff and Ms Louise Neveling (LN) appointed by the defendant had delivered expert reports, as industrial psychologists. They compiled joint minutes containing a summary of their opinions from telephonic and electronic mail (e-mail) held discussions between 11 and 20 November 2014.[18]

[22] **Pre-accident**. They agreed with the opinion of Ms Trollip that pre-accident Bradley was likely to complete matric and pursue tertiary education. They further agreed that if Bradley had obtained a higher certificate, he would have entered the corporate environment, after 1 to 2 years of study, on a median B3 Paterson level. However, they differed on his progression, with LF forecasting a straight line and peak (reaching ceiling) at C2 Paterson level between 40 – 45 years of age, whereas LN postulate intervals of 3,5,7 and 10 years, at a median of Paterson B4, B5, C1 and C2. Their opinions regarding the pre-morbid chances of Bradley should he have pursued a diploma are essentially the same as those postulated for a higher certificate, excepting career celling of C3/4 by LF and C3 by LN.[19]

[18] See pages 8-13 of the indexed joint minutes.
[19] See paragraph 1.4 on pages 9 of the indexed joint minutes.

[23] LF added that should Bradley have followed in his father's footsteps he would earn on *par* with a diploma graduate and could have worked until 70 years of age in a self-employed environment.

[24] **Post-accident**. LF agreed with Ms Trollip that Bradley will despite his difficulties still obtain matric, but not a higher certificate or diploma or any post-school education. He would enter the open labour market on an A3 Paterson level and reach an occupational ceiling on the B3/B4 Paterson level around the age of 40-45 years. According to LN, Bradley is likely to secure employment in the unskilled sector. Both experts agreed that he will find it difficult to compete with his able bodied peers in employment requiring specific physical attributes. I must hasten to point out that, I find this opinion or conclusion not supported by the orthopaedics' view.[20]

[25] They recommended [due to the fact that Bradley has been rendered vulnerable as an employee and unequal competitor in the open labour market, and therefore likely to experience slower than expected earnings growth] a higher than normal contingency for unemployment in his injured state.

[26] The industrial psychologists added an addendum in terms of which they revised their opinions regarding the post-morbid prospects of Bradley. Of interest for current purposes is that, LF now puts the prospects of Bradley's employment in the corporate sector environment at probabilities of 50/50.[21] However, there is no

[20] See paragraph 18 above.
[21] See paragraph 2 on page 12 of the indexed joint minutes.

explanation given or basis laid for this conclusion. It actually appear to me, with respect, to be an something of after-thought or even an element of conjecture. I consider its probative value to be doubtful. I have not been furnished with reasons or grounds for the conclusion.

Actuarial Reports

(a) Actuarial Reports

[27] It is submitted that Mr Ivan Kramer prepared an actuarial report, but I couldn't locate a copy thereof.[22] A report dated 26 November 2014 and accepted as "Exhibit A" at the trial compiled by True South Actuaries was handed in on behalf of the defendant. Save to what is perceived to be an incorrect reflection of the 50/50 corporate environment entry prospects postulated by Dr Fourie (LF), the plaintiff appears to be also favourable to the True South Actuarial report.[23]

[28] The True South Actuarial report provides for a four-scenario pre-morbid potential earnings, and a two-scenario post morbid potential earnings.[24] The pre-morbid scenarios cater for obtainment of a certificate or diploma by Bradley as opined by the industrial psychologists. The post morbid scenarios cater for the prospect of Bradley securing corporate sector employment and failing to secure such. I have already stated above, that counsel for the plaintiff bemoans the non-inclusion of a scenario which reflects the "fence-line" 50/50 probability of Bradley

[22] In paragraph 7 on page 6 of the plaintiff's heads of argument the report is said to be in bundle 3A, but no such bundle is included in the file.
[23] See paragraphs 8.1, 10 and 10.6 on pages 7, 8 and 9 of the plaintiff's heads of argument.
[24] See paragraphs 5 and 6 on pages 2 - 5 of the True South Actuarial Report (Exhibit "A").

entering and not entering the corporate sector by Dr Fourie. I have already found that, there is no basis for this finding.

(b) Submissions and Analysis of the Actuarial Opinions

[29] It is submitted on behalf of the plaintiff that scenario 1A in table 1 (i.e. LN's post-morbid non-corporate employment) indicating a post-morbid loss of income in an amount of **R1 598 324.00** and scenario 3B in table 2(i.e. LF's post-morbid corporate employment) indicating a post-morbid loss of income in an amount of **R3 219 182.00** be each multiplied by 50% and adding the result, which is an amount of **R2 408 753.00**. This the plaintiff submits is a fair and reasonable outcome considering the plaintiff is not asserting the higher figures suggested by its own experts. Further, it is suggested that a pre-morbid contingency deduction of 15% be applied, as the plaintiff is already compromising by not adopting the calculations as per its actuary Mr Kramer, which it is contended produces higher results than the defendant's actuarial calculations. Further, it is stated that the parties agreed that lower figures be rather used in order to avoid costs of expert testimony at trial. Also, the plaintiff motivates its submission that a 40% post-morbid contingency should apply from the industrial psychologists' opinion for a higher contingency stated above.

[30] On the other hand, the defendant submitted that an amount of R1 419 092.00 be awarded as per scenario 3B, but this seems to be an inadvertent reference to the amount of R1 480 156.00.[25] The aforesaid submission by the defendant is stated in

[25] See page 7 of the True South Actuarial Report.

the alternative in the written submissions, when this wasn't the case in oral submissions. Obviously, as stated above, counsel for the defendant devoted his energies in the heads of argument to argue against amendment of the plaintiff's papers.

Conclusion: Loss of Income

[31] The scenarios postulated in the True South Report [with its imperfections according to the plaintiff] appear to occupy central or focal point for the parties, barring also the defendant's pre-occupations with [said with respect] the plaintiff's amendments. However, it is trite that although expert opinion constitutes a valuable guide to the court, the court's involvement in determining fair and reasonable award ought not to be reduced to a mere rubberstamp of expert opinions. The learned authors of ***Visser & Potgieter Law of Damages*, Potgieter, JM; Steynberg, L and Floyd, T.B (3 ed) (2012)** at page 467, fortify this view as follows:

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

[Footnotes omitted]

[32] The above view is echoed and expanded on by Professor Klopper in his seminal work in the ***Law of Third-Party Compensation*** **(3 ed) (2012)** (at page 177) who also states authoritatively that:

"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]

[33] Considering the views expressed by the educational and industrial psychologists, it is my view that scenario 3B on table 2, as indicated in the True South Actuarial report, is the most fair and reasonable under the circumstances. It is also my view that, a 15% contingency deduction should be applied on the pre-morbid earnings (of **R4 699 338.00**) and a 30% contingency deduction to the post-morbid earnings (of **R3 219 182.00**). My calculations lead to a total net loss of **R1 741 009.90**. Obviously, although this scenario has appeared common cause for different reasons, my calculations differ with those by the plaintiff, as the latter has assumed the 50/50 scenario postulated by Dr Fourie. I have already stated my disfavour of this proposition or opinion above. The defendant's contended figures, stated in the alternative in the written submissions, do not take into consideration the application of any contingencies.

[34] Therefore, I consider an amount of **R1 741 009.90**, as explained above, to be fair and reasonable compensation for the plaintiff's future loss of income. I will make an order in this regard in which I will incorporate an undertaking in terms of section 17(4)(a) of the Road Accident Fund 56 of 1996 for future costs of medical expenses.

I also consider the plaintiff to have had substantial success and therefore costs will follow this result.

Order

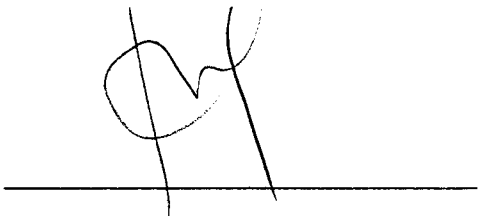
[35] I reflect the main aspects of the order made herein below and the ancillary aspects would be as appearing in the draft order which I have marked X and initialled for identification. The order is as follows:

(a) that, the defendant is ordered to pay the plaintiff damages in respect of loss of income in an amount of **R1 741 009.90**;

(b) 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 Mr Bradley Swanepoel after such costs have been incurred and on proof thereof, relating to the injuries sustained by Bradley Swanepoel on the 12 May 2008.

(c) that, defendant is ordered to pay costs herein on High Court party and party scale, including the qualifying fees of the experts, consequent upon obtaining plaintiff's reports, either as agreed or taxed.

(d) 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 there is no duplication or contradiction with what is stated above.



K.LA.M. MANAMELA

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

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