

**IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)**

Case number: 49442/2013

Date: 16/11/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

**ADVOCATES SAYED N.O. (*CURATOR AD LITEM*  
OF R R RIGNEY)  
PLAINTIFF**

**Versus**

**ROAD ACCIDENT FUND RESPONDENT**

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**JUDGMENT**

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**TOLMAY, J:**

[1] The Plaintiff was involved as a passenger in a motor vehicle accident that occurred on 27 March 2012.

[2] According to the Plaintiff's neurosurgeon he suffered a severe traumatic brain injury, with scalp lacerations, brain oedema and multiple small haemorrhages, including multiple abrasions on his torso and right leg.

[3] Merits were previously settled together with general damages and future medical treatment. Defendant is liable for a 100% of the damages suffered by the Plaintiff. The Plaintiff is assisted by a curator ad litem and she filed a report. She is thanked for her assistance in this matter.

[4] The matter was allocated for argument as to future loss of income on the filed reports only.

[5] During argument the Defendant preferred the following arguments:

5.1 That the Plaintiff has suffered no loss of earnings as he is still working;

5.2 That the Plaintiff should be medically assessed for the purposes of  
boarding by the SAPS and be held to be unfit before a loss will be  
proven; and

5.3 That the contingency should be lower.

[6] The Plaintiff worked as a student constable prior to the accident. Post- accident he is still employed by the South African Police but he is not able to perform the normal duties of a constable. His employment can be described as sympathetic employment.

[7] In **Santam Versekeringsmaatskappy Bpk v Byleveldt**<sup>1</sup> it was held that when an employee was employed purely on compassionate grounds such a salary is not taken into account when dealing with the Plaintiff's claim for loss of earnings. Obviously the Plaintiff must prove a loss of earning capacity.<sup>2</sup>

[8] After the accident Plaintiff presented with neurological deficits. He has difficulty with speech, suffers from short term memory loss, poor co- ordination and from residual neurocognitive problems. His neurological problems are permanent.

[9] After the accident Plaintiff no longer has the required communication skills and

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<sup>1</sup> 1973(2) SA 146 A

<sup>2</sup> Rudman v Road Accident Fund 2003(2) SA 234 (SCA) par 8 and par 13

struggles to work with the public. Due to his cognitive and communication deficits the experts found that he will not be able to respond quickly and appropriately in stressful conditions. The experts are of the view that he poses a risk to himself and his co-workers as a result of the *sequelae* of his injuries. Plaintiff's neurophysical impairment makes it difficult for him to live an independent life.

[10] Plaintiff also suffers from post-traumatic stress disorder and major depressive disorder according to the clinical psychologist.

[11] The argument that Plaintiff could be medically boarded does not assist the Defendant. No evidence was put before Court to substantiate this argument. Plaintiff's counsel pointed out that, as the Defendant has less than 10 years' service he will not be entitled to a proportionate amount of his salary and will only receive the little he has built up in terms of his pension fund. Consequently this argument by Defendant does not have any merit.

[12] The Plaintiff submitted that the only reasonable way to compensate the Plaintiff for his future loss of earnings would be by way of a contingency deduction to factor in the risk factors as referred to by the various experts.

[13] Using the Defendant's own actuarial calculations the Plaintiff submitted that scenario 1 of the actuary's calculation should be used. However, Plaintiff's counsel argued that where the actuary used a 15% pre and a 35 % post morbid contingency, the post morbid contingency should be raised to 60%. In other words instead of a 20% so-called spread, a 45% spread should be applied to fairly compensate the plaintiff for the various additional risk factors he is facing.

[14] In support of this contention the following was submitted on behalf of Plaintiff:

14.1 The Plaintiff is in actual fact sympathetically employed and any income he receives should be disregarded in line with what was found in **De Mellin v The Road Accident Fund**<sup>3</sup> where a 60% contingency was allowed in

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<sup>3</sup> Unreported South Gauteng High Court case no 2010/19802 judgment given 18 November 2013

circumstances where the Plaintiff's employment could be described as sympathetic employment. Plaintiff's counsel contended that as in the aforementioned case he does not contribute to his employer's business in that:

- a. All he is allowed to do is certify documents - which given the fact that he has a curator, is probably in any event irregular.
- b. His cognitive profile means he is a danger to the public.
- c. Has it not been for Plaintiff's intense wish to remain in the employ of the SAPS he would probably already have been unemployed. The measure he has gone through to remain in the employ is further proof of his limited insight into his problems.

[15] The experts agree that Plaintiff is not suited to work as a police constable and that should there be changes at the station where he works, he faces unemployment for the remainder of his life. The Plaintiff's neurocognitive profile is irreversible, i.e. he will not improve and will in all likelihood get worse.

[16] The Court has a wide discretion when determining the appropriate contingencies and it will depend on the Court's impression of the case.<sup>4</sup> Despite Plaintiff's submissions to the contrary I am of the view that in the circumstances of the case a 50% contingency will be fair.

Such a contingency takes into account the fact that the Plaintiff is still employed and may remain in that position, and also allows for the possibility that he may be rendered unemployable if he should lose his job. I am of the view that basis I of Plaintiff's actuary's calculation based on Plaintiff's industrial psychologist's, Ms Talmud's opinion should be followed. I must point out that the calculation based on Ms Talmud's opinion favours the Defendant slightly, but the difference is negligible. Ms Talmud concluded that Plaintiff may either continue working in his current accommodated capacity, alternatively if he should lose his employment at the SAPS he should be regarded as unemployable in the open labour market. In my view her opinion is supported by the facts in this case.

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<sup>4</sup> See *Southern Insurance Association v Bailey* NO 1984(1) SA 98 (A); *Van Der Plaats v South African Mutual Fire & General Insurance Company* 1980(3) SA (A), p105 at 114-5

[17] The calculation of loss of income according to the actuary is set out as follows:

### **SUMMARY OF LOSS OF INCOME**

**Basis** : Based on Mrs Talmud's opinion

#### **Past Loss**

Value of Income but for accident	R 543 215	
5% Contingency deduction	<u>R 27 161</u>	
	<u>R 516 054</u>	
 Value of Income having regard to accident	 R 504 702	
5% Contingency Deduction	<u>R 25 235</u>	
	<u>R 479 467</u>	
Net Past Loss:		<u>R 36 587</u>

#### **Future Loss**

Value of income but for accident	R 5 189 352	
15% contingency Deduction	<u>R 778 403</u>	
Net value of income but for Accident	<u>R 4 410 949</u>	
Value of Income having regard to Accident	R 4 320 276	
50% Contingency Deduction	<u>R 2 160 138</u>	
Net value of income having regard To accident	<u>R 2 160 138</u>	
 <b>Net future loss:</b>		<b><u>R2 250 811</u></b>
 <b><u>TOTAL NET LOSS:</u></b>		<b><u>R2 287 398</u></b>

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[18] The Plaintiff should therefore be awarded the amount of R2 287 398- 00 as compensation for future loss of earnings.

[19] Consequently I make the following order:

**19.1 Merits have been settled 100% in favour of the Plaintiff.**

**19.2 The Defendant must pay the Plaintiff an amount of R2 287 398-00 (two million two hundred and eighty seven thousand three hundred and ninety eight rand only) in full and final settlement of the Plaintiff's claim for Loss of Earnings, payable within 30 days of this order into the Plaintiff's attorneys of record's trust account with the following details:**

**Account Holder : Ehlers Attorneys**

**Bank Name : FNB**

**Branch Code : 261550**

**Account Number : [...]**

**19.3 The issue of past medical expenses as well as any remaining heads of damages for non-medical expenses are postponed *sine die*.**

**19.4 The Defendant will not be liable for interest on the above mentioned amount, save in the event of failing to pay on the due date, in which event the Defendant will be liable to pay interest on the outstanding amount at a rate of 10.50% per annum.**

**19.5 The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court scale, which costs will include, subject to the discretion of the Taxing Master the following:**

**19.5.1 The reasonable taxed fees for consultation with the experts mentioned below, together with delivery of expert bundles including travelling and time spent travelling to deliver such bundles, preparation for trial, qualifying and reservation fees (if any and on proof thereof), including the costs (fees and disbursements) of all consultations (inclusive of**

telephonic consultations) with Counsel and/or Plaintiff's attorney and the costs (fees and disbursements) of all consultations between the Plaintiff's and Defendant's experts, as well as costs of the reports, addendum reports, joint minutes and addendum joint minutes and full day fees for court attendance (if at Court) of the following experts:

- 19.5.1.1 Dr P Engelbrecht – Orthopaedic Surgin;
- 19.5.1.2 Dr. Smuts - Neurologist;
- 19.5.1.3 M Sisison - Clinical Psychologist;
- 19.5.1.4 Dr. Moja - Neurosurgeon;
- 19.5.1.5 I Jonker - Neuropsychologist;
- 19.5.1.6 Dr. Langenegger Maxillo - facial Surgeon;
- 19.5.1.7 Dr. Fredericks – Disability and Impairment Assessor;
- 19.5.1.8 Dr. Maimela - Urologist;
- 19.5.1.9 Dr. Zako - Psychiatrist;
- 19.5.1.10 Hattingh - Speech Therapist;
- 19.5.1.11 Dr. Pienaar - Plastic Surgeon;
- 19.5.1.12 N September - Occupational Therapist
- 19.5.1.13 Jacobson IP's - Industrial Psychologist;
- 19.5.1.14 G Jacobson - Actuary

**19.5.2** The costs for transportation of the Plaintiff as well as a family member, with JT Transportation Services or any alternative transport provider, to the medical legal examination(s) arranged by Plaintiff and the Defendant.

**19.5.3** The costs for transport with JT Transportation Services or any alternative transport provider, for the injured as well as a family member, to attend Court.

**19.5.4** The costs for the Plaintiff's attorney travelling to and spending time travelling to pre-trial conferences and attendance at pre-trial conferences by the Plaintiff's attorney.

**19.5.6** The costs for preparation of Plaintiff's bundles of documents for experts, as well as the travelling costs and time spent to deliver these bundles.


**19.5.7 The costs and fees of the *curator ad litem*, including but not limited to any consultations deemed necessary, including but not limited to consultations with trustees, the Master's office, the Plaintiff's attorney, family members of the injured, medical experts and any other experts deemed necessary, as well as the drawing of reports and day fees.**

**19.5.8 The full costs of Plaintiff's Counsel Adv Karin Strydom.**

**20. The Defendant is ordered to pay the Plaintiffs taxed and/or agreed party and party costs within 7 days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties.**

**22. Should payment of taxed costs not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10.50% on the taxed or agreed costs from date of allocator to date of payment.**

**23. As a *Curator Bonis* was appointed the Plaintiff's attorneys: Ehlers Attorneys, will only be allowed to pay the monies received as set out in clause 2 of this order over to the *Curator Bonis*.**



R G TOLMAY

JUDGE OF THE HIGH COURT