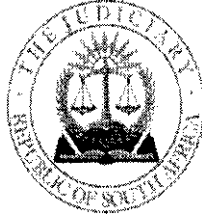


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 30173/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

Date: 6/12/2016

In the matter between:

M G NTSUKANYANE

PLAINTIFF

versus

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

TOLMAY, J

BACKGROUND

[1] The Plaintiff instituted action against the Defendant, the Road Accident Fund, as a result of the injuries suffered by the Plaintiff in a motor vehicle collision which occurred

on 6 July 2012.

[2] The Defendant conceded the merits. Plaintiff qualifies for an undertaking in terms of Rule 17(4) (a) of the Road Accident Fund Act (Act 56 of 1966 as amended by Act 19 of 2005) ("the Act").

[3] No past medical expenses were incurred as the Plaintiff was taken to a public hospital after the collision.

[4] The only issues that this Court has to determine are the question of general damages and the contingency to be applied to past and future loss of earnings. The parties agreed that past and future loss of earnings would be limited to pre-noncorporate sector earnings.

[5] Plaintiff contended that the appropriate contingencies to be applied would be 10% for past loss of earnings and 20% in respect of future loss of earnings. Defendant submitted that a 15% past and a 30% future contingency should be applied.

[6] Plaintiff testified that he lost his right eye as a child apparently after being abused by a teacher. Despite that he lived a perfectly normal life up to the day of the accident.

[7] The Plaintiff suffered the following injuries as a result of the collision:

7.1 Head and facial injuries to such an extent that he lost his left eye, and was rendered blind. He suffered some facial scarring. The facial scarring will require further surgery;

7.2 He regularly suffers from headaches;

7.3 A disc lesion with early arthritis at the C3/4 and C4/5 level. This will require future surgery;

7.4 Plaintiff also suffered a severe chest injury resulting in severe thoracic pain as well as scarring; and

7.5 He suffers from depression.

CONTINGENCIES APPLICABLE TO LOSS OF EARNINGS

[8] The Plaintiff's evidence was that he was unfairly dismissed in 2008 from his employment at Impala Platinum and Chrome mines where he was employed as a mine planner from 2005 until 2008. He had challenged his dismissal and this matter would have proceeded to trial during 2012, but by virtue of the accident he missed the trial date. This case is still pending.

[9] After his dismissal the Plaintiff was self-employed. He owned a taxi which transported children to school, he assisted his brother in the running of a business, a night club, and was also self-employed as a draftsman.

[10] The Plaintiff gave evidence that his work as a draftsman required of him drawing plans depending on instructions from clients. The income from this would vary. He did not issue any invoices. When questioned he indicated that he could not exactly recall the exact amounts but it varied and sometimes it was as much as R10 000.00 per month. The industrial psychologist is of the view that Plaintiff would probably have remained self-employed as a draftsman. According to the industrial psychologist Plaintiff also had the capacity to work in any other position similar to his pre-morbid position and would have earned until retirement age. It is assumed that his salary would have increased and it is likely that the normal inflation rate would have been one of the determinants of the increases.

[11] The industrial psychologist remarked that there are no bench marks for self-employed people and after considering his employment opportunities after he had been dismissed from the mine, earnings of between R53 000-00 and R136 400-00 per annum were suggested to be appropriate.

[12] Contingencies remain an aspect that falls within the discretion of the trial Court and

can't be determined by mathematical and expert calculation.¹

[13] Plaintiff submits that in respect of loss of earnings a sum of R1 568 813-00 be awarded as calculated by the actuary applying 10% past and 20% future contingencies.

[14] Defendant contended that 15% past and 30% future contingencies be applied and an amount of R1 393 789-00 be awarded under this heading.

[15] Defendant submitted that due to the fact that Plaintiff worked in the informal sector and the income earned was not properly recorded, there is no factual proof for his income that would justify the contingencies argued for.

[16]The Defendant's argument however loses sight of the fact that the Plaintiff is qualified and before the dismissal Plaintiff was employed in the formal sector and he could have re-joined the formal sector once his labour dispute has been resolved. I am of the view that this should, together with the aspects already referred to, be considered when the appropriate contingencies are determined. Although the Plaintiff is defined as being semi-skilled he holds qualifications *inter alia* a diploma in civil engineering. It is trite that a Court has a wide discretion pertaining to contingencies. In the exercise of that discretion I am of the view that the contingencies proposed by the Plaintiff are more appropriate.

[17] Consequently Plaintiff, is after applying contingencies of 10% for past loss of earnings and 20% for future loss of earnings, awarded an amount of R1 565 813-00 for loss of earnings.

GENERAL DAMAGES

[18] Plaintiff's evidence was that he had perfect sight with his left eye and lived a normal life up to the date of the accident. This is evident from the fact that he was gainfully employed, had qualified and had a healthy family life.

¹ Wessels v AA Onderlinge Assuransie Assosiasie Co. Pty A 3-19; De Jong & Du Pisansie N.O. (obo JA Rabe)

[19] The Defendant's view is that as Plaintiff already lost one eye prior to the accident that the Defendant cannot be held liable for the fact that he is now blind. This contention loses sight of the maxim that "you must take your victim as you find him" (the *talem qualem* rule). This rule states that if a Plaintiff suffers more serious injury or loss as a result of the wrongdoers conduct than would have been the case if the Plaintiff had not suffered such a weakness, the Defendant is obliged to compensate Plaintiff for the greater loss.² Consequently the Defendant must compensate Plaintiff for the fact that he was rendered blind by the accident.

[20] The Plaintiff, who impressed the Court as an exceptional person, testified how the loss of his sight affected him. Ironically he testified how on the day of the accident, he was admiring the beauty of Johannesburg when the accident occurred which left him blind. Prior to the accident his wife died of cancer, but his 4 children lived with him and his family. After the accident he was unable to take care of the children and they now live with his deceased wife's family. The loss of his family greatly affects him.

[21] He told the Court that his fiancée was five months pregnant when the accident occurred and he never got to see his youngest child who is now 4 years old. This causes a lot of emotional distress to the Plaintiff. During Plaintiff's evidence, the emotional distress caused by his blindness was evident, and confirmed what was stated about his emotional wellbeing in the expert reports.

[22] He testified that his fiancée left him because she could not cope with his blindness. He told the Court that he now has to eat with his hands where he previously used a knife and fork, there is sometimes a bad smell coming from his eye, which is offensive to him and people close to him.

[23] He was able to provide for his family prior to the accident. Even when he lost his job, he worked as a draftsman, owned a taxi and assisted his family in their nightclub. He didn't earn any income from the family business, but the fact that he assisted his family clearly contributed to his self-worth. The pride he took in having been able to provide for himself and his family prior to the accident was evident during his testimony.

[24] He had dreams of returning to the mining sector which he could have done once the labour dispute has been resolved. He was even planning to move to Australia to work there on the coal mines.

[25]The Plaintiff, who obviously was a hardworking man, is now unemployed and unemployable.

[26] He had undergone surgery and will in the future have to undergo further surgery.

[27] He stated that the loss of his vision ruined his life. He is totally dependent on his family and find it hard to cope with the loss.

[28] General damages falls within the discretion of the Court³. Loss of one's vision is indeed a profound loss. Plaintiff was an ambitious, hardworking and independent man. His enjoyment of life, self-worth and emotional wellbeing has been greatly affected by the accident.

[29] In the matter of **Van Der Merwe v Premier of Mpumalanga**⁴ (QOP, vol 13-15 [2005] ZAGPHC 103) an amount of R700 000-00 was awarded to a girl who was rendered blind at birth due to medical negligence. This amount equates to R1 341 051-00 in present monetary values. It may be argued that to turn blind might even be worse for someone who previously had the privilege of sight than for a person who does not know what he/she is missing out on. Consequently it may, depending on the circumstances of the case, even be appropriate to award a larger sum. Comparable cases can only provide guidelines in determining an appropriate award, but ultimately the award will depend on the circumstances of each case. I am of the view that in this instance the loss of his sight affected not only the Plaintiff's ability to live an independent life, but resulted in the loss of his children and his fiancée and his general enjoyment of life.

² Smit v Abrahams 1992 (3) SA 158 (C) 171

³ Road Accident Fund v Marunga 2003(5) SA 164 (AD) 169E

⁴ (QOP, vol 13-15 [2005] ZAGPHC 103

[30] The loss that the Plaintiff suffered impacts on each and every aspect of his life. I am of the view that an amount of R1350 000-00 will be a fair award as general damages are concerned.

THE CREATION OF A TRUST

[31] The legal representative of the Plaintiff indicated that a trust should be created to manage the amount paid to the Plaintiff. I enquired why it was necessary seeing that the amount is not large and Plaintiff is obviously capable of managing his own affairs. I requested that the legal representatives for the Plaintiff should report back to me in this regard. Instead of reporting back I was just sent two draft orders, one with an order that a trust manages the whole amount and the other with a trust managing half of the awarded amount. I can, however, see no reason why the Court should order that such a trust be created. The Plaintiff can, if he wants to do so, still create a trust but there exists no need for a Court order in this regard.

[32] Consequently I make the following order:

1. The Defendant is to pay to the Plaintiff's attorneys the sum of **R 2 915 813-00 (Two million nine hundred and fifteen thousand eight hundred and thirteen rand) in full and final settlement, calculated as follows:**

1.1 R1 350 000-00 for general damages

1.2 R 1 565 813-00 for loss of earnings

2. The amount should be paid into Plaintiff's attorneys trust account, the account details are as follows:

ACCOUNT HOLDER:	BRANCH: VZLR INC
Branch:	ABSA VAN DER WALT STREET
BRANCH CODE:	323345
TYPE OF ACCOUNT:	TRUST ACCOUNT
ACCOUNT NUMBER:	[...]

3. In the event of default on the above payment, interest shall accrue on such

outstanding amount at the *mora* rate as per the Prescribed Rate of Interest Act, 55 of 1975, as amended calculated from due date, as per the Road Accident Fund Act, until the date of payment.

4. The Defendant shall furnish the Plaintiff with an undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on **6 July 2012**.

5. If the Defendant fails to furnish the undertaking to the Plaintiff within 30 (thirty) days of this order, the Defendant shall be held liable for the payment of the additional taxable party and party costs incurred to obtain the undertaking.

6. The Defendant is to pay the Plaintiffs taxed or agreed party and party costs, which costs shall include, but not be limited to the following, subject to the taxing master's discretion:

- a. All reserved cost, if any;
- b. The costs for the previous trial date (16 November 2015) inclusive of counsel's cost (Senior Junior counsel) of that date;
- c. The fees of Senior Junior counsel for the current trial date of 16 November 2016 inclusive of the costs of preparing Heads of argument;
- d. The costs of obtaining all expert medico legal-, actuarial, and any other reports of an expert nature which were furnished to the Defendant and/or it's experts;
- e. The reasonable taxable qualifying, preparation and reservation fees of all experts, including the costs of consultation fees with the legal teams, if any;

- f. The reasonable traveling- and accommodation costs, if any, and on proof thereof, incurred in transporting the Plaintiff to all medico-legal appointments;
- g. The costs for Plaintiffs attendance at court as a necessary witness;
- h. The reasonable costs for the medico legal appointments for translation of information, if any and on proof thereof;
- i. The above-mentioned payment with regard to costs shall be subject to the following conditions:
 - i. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and
 - ii. The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs.
 - iii. In the event of default on the above payment, interest shall accrue on such outstanding amount at the *mora* rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

R G TOLMAY
JUDGE OF THE HIGH COURT

DATE OF HEARING:
DATE OF JUDGMENT:

16 NOVEMBER 2015
6 DECEMBER 2016

ATTORNEY FOR PLAINTIFF:

VZLR INC

ADVOCATE FOR PLAINTIFF:

ADV P A VENTER

ATTORNEY FOR DEFENDANT:

T M CHAUKE INC

ADVOCATE FOR DEFENDANT:

ADV N MHLONGO