IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2203/14
DATE: 14 January 2016

NJJ WEBB Plaintiff

v

ROAD ACCIDENT FUND Defendant

JUDGMENT

MABUSE J:

[1] The plaintiff, an adult male of Rustenburg, North-West Province, has sued out summons against the defendant, a juristic person constituted as such by the provisions of s. 2 of the Road Accident Fund Act 56 of 1996 ("the Act") in which he has claimed payment of money and certain ancillary relief.

[2] The plaintiff's claim has its origin in the following circumstances. On 1 January 2012 and at or near Harrysmith the plaintiff was a passenger in a motor vehicle with registration numbers and letters […] which was at all material times being driven by one Marne Maritz ("Maritz"). The said accident occurred after the said Maritz had lost control of the said motor vehicle and as a result of which it overturned while the plaintiff was inside it. It is the plaintiff's case that the said motor vehicle overturned as a consequence of the negligence of the said Maritz. This aspect has been conceded by

the defendant.

[3] As a result of the said motor accident the plaintiff sustained the following injuries:

3.1. L1 burst fracture with T12/L 1 dislocation resulting in paraplegia,

3.2. left displaced radius and ulna fracture; and

3.3. such further and better injuries as has been set out by various experts in their respective reports.

[4] Following the said injuries, the plaintiff was:

4.1. transported to hospital where he was given emergency treatment appropriate to the serious nature of his injuries whereafter he was treated during further hospitalisation;

4.2. experienced pain, suffering and discomfort and would continue to do so in future;

4.3. experienced emotional trauma and would in the future continue to experience further emotional trauma;

4.4. required hospital and medical treatment as outlined above and will, in the future, require further such treatment and will have to incur expenditure with regard thereto;

4.5. has been permanently disabled;

4.6. has experienced loss of earnings and earning capacity; and

4.7. has sustained substantial loss of enjoyment of amenities of life.

[5] At all material times hereto and more in particular on 1 January 2012 the defendant was liable in terms of the said Act, to compensate people who sustained injuries and suffered damages arising from negligent driving of motor vehicles in a public road where the identity of the owner or driver has been established.

[6] It is alleged in the combined summons that as a consequence of the aforementioned injuries and *sequalae* thereof, the plaintiff sustained damages in the total amount of R9,561,685,49 which is computed as follows:

6.1 past hospital medical and related expenses: R556 763.49;

6.2 estimated future hospital and medical related expenditure to be covered by an undertaking in terms of s. 17(4)(a) of the Act.

6.3 loss of income and earning capacity: R6 504 922.00. It is contended that the amount in respect of loss of income and earning capacity was determined by way of actuarial calculations done by Mr. JW Whittaker on 9 July 2015; and
6.4 general damages: R2,500,000.00.

[7] Dr. PA Engelbrecht confirmed in the RAF 4 Serious Injury Assessment Report that the plaintiff's impairment was 43%. On this basis it is contended that the plaintiff has suffered a serious injury as contemplated by s. 13(1)(A) of the Act.

[8] When this matter came before Court for hearing, the court was informed as follows that:
8.1 the only issue that the court was called upon to determine was quantum, in particular loss of income and general damages;
8.2 the injuries that the plaintiff suffered were not in dispute;
8.3 the liability was not in dispute;
8.4 the defendant was liable 100% for the plaintiff's injuries; and
8.5 the medical expenses have been dealt with and the court need not be detained by this aspect of the claim; and
8.6 that the defendant admitted the correctness of the expert reports in respect of which it had no expert reports itself. There were also joint minutes of experts.

Mr. Tyatya, counsel for the defendant, confirmed that the only issues in dispute between the parties concerned the general damages and loss of income.

[9] Mr. De Waal, for the plaintiff, led the testimony of three witnesses before closing the plaintiff's case. These witnesses are Chipo Mabaya ("Chipo"), the plaintiff himself and one Jacobus Johannes Prinsloo. Chipo testified that she was a senior underwriter with certain insurance brokers. She knew the plaintiff as she was one of his supervisors. Her duties included having training the plaintiff and assessing his performance. During the course of working together with the plaintiff Chipo was aware of several handicaps that the plaintiff was, following the said incident, faced with. She was aware that the plaintiff was unable to get to the upper floor where the cabinets in which some of the files were kept were located. This was due to the fact that no elevators had been installed in the building. Accordingly, to reach the upper floors where other departments

were situated the plaintiff would have to walk. The plaintiff could not walk. Some of the files are big and in order to work on them one needs to pick them up and put them on one's side.

[10] From time to time and primarily due to his handicap, the plaintiff has, to take 6 days leave. This happens frequently. The problem they are faced with his absence was that there would be no one to assist his own clients. The consequence thereof is that prospects of someone who is regularly absent from work, irrespective of the reason for his absence, are drastically reduced. The plaintiff has prospects of success if he becomes an underwriting manager or accounting officer. He will, however, be hampered by his physical handicap. If he aspires to those positions he will have to fight for them with sixteen others who are able bodied. According to Chipo, the plaintiff's chances of promotion to these senior positions are 70% to 80%. The plaintiff would stand a better chance of occupying these positions if he had a better qualification.

[11] The plaintiff himself testified and in his testimony told the Court that at the time he testified he was 24 years old. The accident in which he was involved took place when he was 20 years old. As a consequence of the injuries he sustained during the motor vehicle accident in question, he has now become a paraplegic. On 1 August 2013 he started working at a certain insurance company as a junior underwriter or intern. The plaintiff told the Court furthermore that he has a University degree. Because of the injuries he sustained during the motor vehicle accident in question there was an inordinate delay in completing his studies. The delay was for a period of six months which translated into a year. But for the motor vehicle accident, he would have completed his studies earlier.

[12] He is now on a wheelchair. The reality that he would be permanently injured dawned upon him a few days after his operation. Because of his physical problem, he has now become a problem to those around him. They become impatient when he needs them to assist him.

[13] Before the accident in question he played provincial hockey, rugby and took part in swimming. To him sport was something he took seriously in his life. It was a big thing to him. The injuries he sustained have become an insurmountable hill in many other

respects. Now he is unable to play with his sisters, something he enjoyed doing before the accident. He cannot go and see his clients because he is on the wheelchair. He testified that because he is on a wheelchair he will find it difficult to attend social events. Despite his handicap the plaintiff is determined to work himself up.

[14] During cross-examination it turned out that he was appointed as a trainee for four months from 1 August 2013 to 31 December 2013 at the salary of RS 500.00 per month and without any allowances. From 1 January 2014 to 31 December 2014 he did his internship. He had to do internship because he had no experience in the insurance industry. As an intern, he received a salary of R14 000.00 per month and an allowance of R10 000.00. At the same time he was studying part-time at the University of South Africa so that he could become an insurance representative. He stated that he should be able to complete his studies within a record time.

[15] The last witness that Mr. de Waal called as the plaintiff's witness was one Jacobus Johannes Prinsloo ("Prinsloo"), an industrial psychologist, who, for the purposes of his testimony, had compiled a report about the plaintiff. He testified that it is important that, in the determination of loss of earning capacity, the Court should have regard to the plaintiff's pre-morbid scenario i.e. his situation had the accident not occurred; the prospects of securing employment and holding onto it; the family background, the individual himself and the opinion of other people about such an injury.

[16] He compiled his report after he had, inter alia, interviewed the plaintiff himself. From the information he obtained from the plaintiff he was able to establish that the plaintiff had a keen interest in the business world. Mainly because of the motor accident in question, the completion of his studies was interrupted for a period of six months which translated into a year. A man reaches his pinnacle at 45 years. He assessed the plaintiff on the basis that but for the motor accident he would have reached retirement age of 65 years. Because of his disability his projected age of retirement is 55 years.

[17] The plaintiff's pre-morbid scenario is, according to him, dismal. Dismal people who are handicapped like the plaintiff do not get employment. This is despite the Constitution of the Republic Act 108 of 1996 ("the Constitution") providing for equal opportunities for all, disabled or not and despite the declared policy of the State

according to which all the people have equal opportunities. According to him, the field that the plaintiff has chosen to work in presents with some inherent challenges i.e. for instance the ability of the insurance brokers to travel in order to see their clients. With this disability there is always a risk he is facing. The plaintiff has restrictions.

[18] He conceded that despite the plaintiff's disability any award made to him must still be subjected to contingency deductions. Reference was made in his evidence to the Joint Min:..ites which were not signed by him and his counterpart on the defendant's side. Notwithstanding that fact, it was still part of his evidence that it would be wrong to think th::it because of the legislation more disabled people will get work. He opined that on the contrary, despite the attempts of the legislature to level the playing fields for all people, the chances of disabled people getting more work are gradually receding. He expressed an opinion that it was wrong to imagine that the plaintiff will be permanently employed by one employer until he reach the age of 65 years. If the plaintiff was not a paraplegic and stayed with the same company he would reach the age of 65 years.

[19] Mr. Prinsloo testified that there are contingencies of 6% made by one Industrial Psychologist. There is a 45% chance that the plaintiff will not reach the age as the industrial psychologist has projected. There is also a 55% chance that he may reach it.

[20] During cross-examination he furnished reasons why the Joint Minutes were not signed by both Industrial Psychologists and the steps that he took to make sure that the defendant's expert signed the Joint Minutes. He further opined that although the defendant's Industrial Psychologist has not signed the Joint Minutes, he still regarded the Minutes technically as Joint Minutes after the other expert responded by email to him. He also spoke to her by phone.

[21] At the close of the plaintiff's case Mr. Tyatya informed the Court firstly, that the defendant had no witnesses to call and that the defendant had obtained four reports but that the plaintiff disputed such reports. The defendant therefore closed its case without tendering any evidence.

[22] The plaintiff, as set out above, claims a sum of R6,504,922.00 in respect of past and future loss of earnings. Of the said amount R106,590.00 is claimed in respect of

past loss of income while the balance of R6,398,332.00 is in respect of future loss of earnings. The plaintiff's claim is predicated on the delayed entry by him into the labour market resulting from the injuries he sustained during the motor vehicle accident in question. It will be recalled that the Industrial Psychologist testified that due to the motor vehicle accident the plaintiff was delayed for six months before he could complete his studies and that the said period translated into one year.

[23] The amount of R6,504,922.00 that the plaintiff claims in respect of past and future loss of income is based on an actuarial determination made by Algorithm Consultants and Actuaries. The calculation was made on August 2015.

[24] Before dealing with the Actuarial Report it is, in my view, important to deal with the Joint Minutes by the parties' Industrial Psychologists, Mrs. Moiponi Kheswa ("Kheswa") for the defendant and Kobus Prinsloo ("Prinsloo") for the plaintiff. Each one of them had prepared a report for her or his client. Mr. Prinsloo's report was dated 8 July 2015 while Kheswa's was dated 20 June 2015. They are agreed that they had perused all the documentation and accordingly their conclusions, despite their differences, and I will point them out later, are based on the same set of documents, except that Kheswa did not have the benefit of the report by Dr. Zolani Mukansi, the orthopaedic surgeon.

[25] According to the Joint Minutes between Prinsloo and Kheswa agreed that the plaintiff's biographical information which included family backgrounds and education and career information was a matter of record and as they particularly referred to an aspect or part of dispute; that the plaintiff would have obtained his BCom Honours Degree (NQF8) at the end of 2013, whilst also working as an intern and Graduate Trainee capacity in the general sector of the labour market; that thereafter the plaintiff would have entered the corporate sector on a Paterson 85 job complexity level. The plaintiff would then have progressed as a highly skilled or a tactical middle management level, typically functioning on a Paterson 03 and MK:D2/D3 job complexity level as his typical career ceiling at forty five (45) years of age. He would have retired in this capacity.

[26] Furthermore they agreed that Mr. Webb's earnings would have been as follows:
<u>Market remuneration</u>

The National Remuneration Guide 2004 from Deloitte Consulting Pty Ltd was used as the basis. The survey represents effective market information as at 1 March 2015. The information used is very comprehensive and was based on 180 companies in 19 economic sectors in seventeen (17) defined geographic regions in South Africa. The information represents the combined market information for Task and Peromnes Grades. A number of 11648 shop incumbents remuneration is included in the survey. A comparative table with the relevant job grades was developed out of sourced documents based on a predictive market move of 7.0% for the period 1 March 2015 to 28 February 2016, the Basic Salary, the Total Guaranteed Package and the Total Grand Package figures for the relevant job grades have been adjusted with the relevant percentage formula to be effective on 31 July 2015.

[27] Kheswa and Mr. Prinsloo agreed with regard to pre-morbid earnings growth. The two experts were agreed that the plaintiff would have worked until normal retirement. They disagreed, however, with respect to the age of retirement, with Kheswa postulating 60-65 years Prinsloo postulating 65 years. In the Joint Minutes Mr. Prinsloo gave a full motivation of his view that the plaintiff's retirement age is placed as 65 years of age. He opined that the plaintiff will continue functioning as a graduate trainee within the underwriting environment. Due to his cognitive abilities the plaintiff will probably migrate to the Life Insurance Underwriter discipline and then he will progress to a Senior Underwriter within the Paterson C4/C5 job complexity levels. Due to his paraplegia, inter alia mobility restrictions, the plaintiff will probably attain his career plateau in terms of job complexity whether he functions as an Insurance Writer or in another office based job role until recommended retirement age.

[28] The plaintiff's discomforts, complaints and impairments could result in the classification under the designated employees in South Africa "Employees with Disabilities Category". With the best legislations like the current Employment Equity Act and Integrated White Paper for People with Disability (1997) in South Africa, people with disabilities have been integrated into the workplace. Accordingly the plaintiff has more chances, also coupled with his education profile and work experience to be accommodated until his retirement age.

[29] The two experts agreed furthermore that the plaintiff will work until the

recommended retirement age of 55 years. According to Prinsloo the plaintiff's future loss of earnings will be the difference between the projected pre-morbid and post-morbid earnings until his retirement age. Pre-morbid 65 years of age; post-morbid 55 years of age. Accordingly his loss of earnings will be the loss of total earnings post 55 years until 60-65 years. The retirement age of his current employer is 63 years.

[30] Prinsloo noted that over and above the plaintiff's loss of earnings due to the following career impediments, firstly his diminished career potential, not realising pre-morbid career potential and diminished opportunities for career development, the plaintiff will still be subjected to additional career impediments and risks until recommended early retirement. In that regard Prinsloo noted the following:
firstly, declined personal productivity as a result of physical and psychological impairments and, secondly, diminished work opportunities due to his restriction to function in a sedentary and light natured work environment as well as limited mobility. The "labour market covert discrimination" towards people with disabilities which manifests in the "poor" actual employment of facilities for people with disabilities. On this basis, Prinsloo recommended, that a significantly higher contingency than the pre-morbid contingency be applied to the plaintiff's post-morbid occupational functioning.

[31] Report by Algorithm Consultants and Actuaries
Because of the report by Dr. JJ du Plessis, dated 28 January 2015 that the plaintiff was expected to live up to the age of approximately 63 years, the determination of the plaintiff's loss of income was over a period of 39 years.

[32] The plaintiff's past loss of earnings
The plaintiff's claim for past loss of earnings is founded on the late entry into the labour market. It was argued by the plaintiff's counsel, based on the evidence of Prinsloo, that such a delay into the labour market amounted to six months. On that basis it is contended that the delay of six months translated efficiently into a period of one year. In the determination of the plaintiff's past loss of earnings, his actual earnings as a graduate trainee were used as the basis for his calculation. As pointed out by Mr. de Waal in his heads of argument, the actual calculation provides for the actual salary earned by the plaintiff in January 2014 but which was adjusted to reflect income figures as at 1 January 2013. This calculation assumes that but for the accident the plaintiff

would have become a graduate trainee as at 1 July 2013.

[33] At the time of the accident, the plaintiff had completed his second year studies for the degree of Bachelor of Commence. In other words, during 2012, the plaintiff would have been in his third year of study. He was 20 years of age at the material time of the accident. Despite his physical handicaps his qualifications are an Honours Degree 1n Bachelor of Commence (Business Management). Quite clearly, his physical disability has not affected his ability to further his studies. As a consequence of the motor accident he only managed to complete his first degree six months after the accident. There was therefore a delay of six months. This fact was not disputed by the defendant.

[34] According to Corbett and Buchanan 1 at page 49:
"Where as a result of his injuries a plaintiff has been precluded from carrying on the activities whereby he normally earns a living, he is entitled to damages representing the income or wages he would have earned during his period of incapacity. "
In order to recover loss of earnings, it is incumbent upon the plaintiff to prove, by way of evidence, that his injuries prevented him from earning his living in the normal way and what he would have earned but for the injuries. In *casu,* the plaintiff's actual earnings of R5500.00 per month from 1 August 2013 as an intern was calculated and deducted from the income he would have earned had he not suffered the injuries from the accident. In order to produce the past loss of income a 5% contingency deduction was applied and what remained was the sum of R106,590.00.

[35] With regard to loss of earnings, Mr. Tyatya argued that a sum of One Million Rand (R1M) would be fair and reasonable. What I found unfortunate with his argument was that Mr. Tyatya had not set out how he arrived at the sum of One Million Rand (R1M) that he postulated. Relying on the authority of AA Mutual Insurance Association Ltd v Magula 1978(1) SA 865(A), he submitted that with regard to an assessment of this kind which cannot be made with any precision or mathematical accuracy a Court has a discretion. It must always be recalled that the Courts do not possess the scientific knowledge or skill for the assessment of damages. In most cases, especially where complex formulae are involved, a Court will rely on the outside assistance. The other problem I have with the figure of One Million Rand (R1M) postulated by Mr. Tyatya is that it does not distinguish between past and future loss of earnings.

[36] Relying on the principle set out in paragraph 37 supra, I am satisfied about the correctness of the determination of past loss of income.

[37] With regard to future loss of income the principle to calculate the present value of future income was set as follows by Corbett and Buchanan page 65 paragraph 2:
"Where the plaintiff has been totally disabled and his earning capactfy has been reduced to nil, this calculation presents no difficulty whatever. The answer is nothing. When on the other hand he is not completely disabled then it is again a question of first determining factually what his average earnings are ltkely to be in the future and for what period he is ltkely to continue to earn and then reducing such future income to Ifs present value. "

[38] The plaintiff claims, in respect of future loss of earning, a sum of R6,398,332.00. This is the amount that has been determined mathematically by actuarial calculation. An entirely different situation prevails in this scenario. The said amount is claimed not because the plaintiff is a paraplegia but that because of his paraplegic condition emanating from the injuries he sustained during the motor accident in question. His retirement age is postulated at 55 years when ordinarily he would have retired at 65 years of age. In other words, the plaintiff has a shortened expectation of life. According to Prinsloo, but for the motor accident, the plaintiff would have reached the Paterson level 03 at the age of 45 years. Making allowance for certain contingencies of 5% the actuaries produced a future loss of income prior to the application of the loss limit. Such a figure they arrived at was R8,855,081.00. On the other hand Mr. Tyatya contended in his heads of argument that there is no patrimony that has been diminished other than the experts' hypothetical and speculative approach for loss of income and earning capacity.

[39] Counsel for the defendant seems to argue that because six months after the accident the plaintiff picked himself up, dusted himself off and went to obtain his junior degree honours qualification, got internship programs, got permanent employment and got to be what his superior actually testified, then he has not sustained any patrimonial loss. In my view this approach is flawed because the plaintiff's claims for loss of future earnings are not based on his inability to work but instead on his early retirement

because of his injuries.

[40] In their assessment, the actuaries do not seem to have had regard to certain relevant factors which would have compelled them to adjust their assessment. In Gillbanks v Sigournay 1959(2) SA 11(N) at pages 17-18, the Court per Henochsberg J, stated as follows:

> *"In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the gross income to allow for unemployment benefits, insurance and so on. This configuration would include -*
>
> *(i) a possibility that a plaintiff's working life may have been less than 65 years,·*
>
> *(ii) a possibility of his death before he reaches the age of 65years,·*
>
> *(iii) the /Jkelihood of him suffering an illness of long duration,·*
>
> *(iv) unemployment,·*
>
> *(v) inflation and deflation,·*
>
> *(vi) alterations on the cost of living allowance,·*
>
> *(vii) an accident whilst participating in sport such as hockey or cricket or at any other time which he would affect his earning capacity and*
>
> *(viii) any other contingency that may affect his earning capacity.* "

[41] I have a few problems with this actuarial report. For post-accident contingency deduction the actuaries relied on paragraph 8.6 and 8.7 of Prinsloo's report. However, they do not specify with any particularity the relevant portions of such report on which they rely. Secondly, they have made a 60% post-accident contingency in respect of future loss of income. They have not set out how they arrived at 60%. Thirdly and lastly, they have not taken all the relevant factors into account. In this regard I refer to the preceding paragraph.

[42] Considering the fact that contingency deduction were made at a steep 60% which is to the advantage of the defendant, the absence of evidence by the defendant and absence of any other evidence juxtaposed with the available evidence, I would conclude that the sum of R6,398,332.00 determined by the actuaries is fair and reasonable.

[43] General damages

I now turn to general damages. The basic principle underlying an award of damages in the Aquillian action is that the compensation must by so assessed as to place the plaintiff as far as possible in the position he would have been had the wrongful act causing him injuries not been committed. The assessment of compensation is done by comparing the plaintiff's *"properties"* meaning a universitas or complex of general relations, including the plaintiff's rights and duties, as it is after the commission of the wrongful act with its projected state had the wrongful act not been committed. This is how the Court put it in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665:

"In later Roman Law property came to mean the universitas as it was after the act of damage and as it would have been if the act had not been committed. A difference reckoned in terms of money becomes the damages to which the plaintiff is entitled "

[44] In the combined summons, an amount claimed under the subheading for general damages was the sum of R2,500,000.00. In both his argument and heads of argument, Mr. de Waal submitted that an award of an amount of between R2,200,000.00 and R2,300,000.00 would be fair and reasonable. In support of this submission, he had referred this Court to several reported and unreported cases, some old which required an award then made to be converted to the present time and other related decisions. In addition he referred the Court to Quantum Book Year by Robert J Koch. I will revert to the unreported cases and one reported case during the course of this judgment.

[45] As pointed out earlier, the defendant led no evidence at all in respect of general damages. The only evidence before this Court and on the basis of which the determination or assessment of the award has to be made comes from the plaintiff's side only. Such evidence consists of oral evidence tendered by the plaintiff and his witnesses, some of whom were expert witnesses and the details contained in the reports by various experts and the uncontested admissions contained in the Joint Minutes and lastly the admitted medico-legal reports. From the defendant's side no expert report was placed before the Court to enable it to assess the award. The consequence of the defendant's failure to lead evidence and to tender any expert reports is that the plaintiff's evidence relating to his claim for general damages, in particular the difference between his pre-accident and post-accident lives was not

challenged.

[46] It is correct that notwithstanding the best available medical treatment that he may receive the plaintiff's current condition will never be restored to its original position. The difficulties he now has following the motor vehicle accident will always be with him. He will always be a paraplegic with all the accompanying difficulties, discomforts, pain, and all the challenges he will daily take to his place of work. Much of the evidence relating to the plaintiff has already been referred to somewhere supra. The motor accident in question has forced the plaintiff to completely change his life and to have little interaction with his friends.

[47] As a consequence of the motor vehicle accident he has lost a lot of his friends, social events and have become burdensome, unpleasant and a degrading reminder of his difficulties. He now has very little participation in social events. Following the incident he had a protracted spell of hospitalisation and rehabilitation. During rehabilitation he developed pressure sores and at the time he gave evidence had developed some. On a regular basis he has to be alit and not let the pressure sores to fester. Should he let the situation get out of control and let the pressure sores to develop, he will require hospitalisation and surgery which may require a recovery period of about six weeks at a time. The plaintiff suffers from frequent bouts of depression and cannot erase from his memory the trauma of the motor accident and its accompanying devastating consequences on his life. He suffers from post- traumatic stress disorder ("PTSD"). The *sequelae* of his spinal cord injury have negatively impacted various aspects of his life. These aspects include such as already indicated supra, his social, intimate, relational and working life.

[48] It had always been his dreams to take over the business of the family in Rustenburg. This desire evaporated with the motor accident in question. His dreams to do so have been irreparably shuttered by the injuries he sustained. The trajectory of his lifestyle has now been adversely redirected. His life now consists of a life replete with monotony and interspersed characteristically isolated features often spiced with conflicts with his girlfriend and family members. He has challenges if he has to visit new areas because of the fear of not knowing whether such areas will be wheelchair friendly. He already has fallen out of his wheelchair twice.

[49] This Court has to take into account the fact that the motor accident happened when he was still 20 years of age, which means he will have to live a longer life with his handicaps. Again the Court must take into account the fact that he is a male and that the chances of him establishing an intimate relationship may be an insurmountable mountain to climb. He may not be able for this reason to have a family. He is nevertheless an intelligent young man who is forever mindful of his difficulties. The plaintiff is *au faff* with the various factors which compromise his ability to complete on an equal footing with his competitors in the labour market. He has been forced by his injuries to choose a career best suited for his handicaps.

[50] The plaintiff now experiences chronic back pain and suffers from intermittent bladder infections. Every two hours he has to self-catherize himself. He has to manually evacuate his bowls when the need arises. He experiences mishaps due to his bowl and bladder incontinence and to him they are degrading. He experiences increased personal fatigue on a regular basis. His pain and discomfort contribute to his frustration, irritability and intermittent depression. He has no normal sleeping pattern. During the night the plaintiff has to wake up regularly in order to turn in order to prevent the development of pressure sores. Apart from the chronic and often debilitating pain he experiences in his back, shoulders, left forearm and wrist, the plaintiff is likely to experience future pain and discomfort and suffering due to foreseeable and unforeseeable medical treatment he may have to undergo. His paraplegia has left him with a neurogenic bladder. Because of this he is at an increased risk of developing chronic bladder infections and other neurogenic difficulties. Life is not going to get any easier for him.

[51] According to the report by Dr. Darell L Kirsten, the plaintiff's lung infection is mildly restrictive with a 20% loss of lung capacity. Accordingly he has a mildly increased risk of developing complications in the event of him developing chest infections. The plaintiff used to be active. He used to enjoy many physical activities. Now that he is confined to a wheelchair he cannot participate in any form of active physical activity. He is now restricted to participating in passive or activities, such as reading, video games and television watching.

[52] The function of the law is to enable the plaintiff theoretically, at least, to receive proper compensation or a satisfaction which does not burden the defendant unnecessarily. The object of the award is of crucial importance. In making an award, the Court must have one or the other object in mind otherwise the award may be found to be predicated on arbitrary grounds and therefore speculative. One of the important guidelines a Court must adhere to in the award of damages or in the quantification process is fairness and convertism. This means that in general a Court should not merely out of sympathy with the plaintiff award a huge amount of money at the expense of the defendant. This is how Holmes J, as he then was, put it in Pitt v Economic Insurance Co. Ltd 1957(3) SA 284 (D) at 287:

"I have only to add that the Court must take care to see that each award is fair to both sides - it must give just compensation to the plaintiff but must not pore out largesse from the horn of plenty at the defendant's expense. "

[53] According to Law of Delict 5^{1}h Edition by Neethling, Potgieter, Visser, edited and translated by JC Knobel at page 232, the concept of *"fairness"* or *"equity"* is usually a phrase that summarises the following principles:

"The Court must take all the relevant circumstances into account which disclose the extent of the injury to personality and it must ignore irrelevant factors such as undue sympathy towards the plaintiff; the basic object of compensating the plaintiff must be emphasized,· the Court must exercise its discretion carefully and conservatively and rather award too little than too much and the amount awarded must not necessanly burden the defendant in the plaintiff's favour. If these principles are applied it may safely be said that "a fair" approach has been followed. "

I wish to point out that it is the duty of the parties to place all the relevant circumstances before the Court to enable it to make a proper assessment of the amount to be awarded to the plaintiff. Trollip J dealt with the concept *"conversatism"* extensively in **Bay Passengers Transport Ltd v Franzen 1975(1) SA 267 AD 274** and laid the general rules that should be observed in assessing an award. In order to illustrate this very important point, I wish to quote copiously from page 274 E-H:

"In recent years there has been several appeals to this Court raising the issue of the quantum of general damages awarded for pain and suffering, disability, loss of amenities, disfigurement, etc., for bodily injuries sustained in a vehicle collision. Hence,

it is opportune, I think, to sound a note of caution about the correct judicialy approach to adopt in the admittedly difficult problem of deciding what amount to award for such damages.

Awarding damages for the items mentioned is, of course, anomalous, since they do not involve any patrimonial loss,· moreover, the so-called loss is not susceptible of being measured with any certainty in terms of money. The latter imponderability is usually also aggravated by reason of having to adjudge, not only past, but also "loss" in respect of those items, which involves some degree ofjudicial prophecy. The best that a Court can do is to decide "by the broadest general considerations" on an amount which it considers to be "fair in all the circumstances of the case" (Sandler v Wholesale Coal Supplies Ltd,· 1941 A.D. 194 at p. 199). But, because of that very anomaly and imponderability, the general rule that should be observed in assessing the amount is, I think, the well-known, fundamental one that, in such circumstances of difficulty and dubiety, defendants should be regarded with greater favour than plaintiffs, favorabiliores re potius quam actores habentur (Digest 50. 17 125). In other words, in striving to determine an amount that will be fair in all circumstances, the Court should act conservatively, rather than liberally towards the plaintiff unless some injustice be perpetrated on the defendant. That must also apply where the defendant is, as is now usually the case, registered insurance company being sued for compensation under Motor Vehicle Insurance Act 59 of 1942. Furthermore an award of general damages of the kind under an enquiry, especially one determined or confirmed by this Court, often serves as some guide to future awards and might therefore influence the cause. See F. Sigournay v Gil/banks, 1960(2) SA 552 AD at page 555H."

[54] According to practice, the general rule in the quantification process is the consideration of previous awards in comparable cases. It is for this very reason that in **Bay Passenger Transport Ltd v Fransen** supra Trollip *J* stated that:

"Furthermore an award of general damages of the kind under enquiry, especially one determined or confirmed by this Court, often serves as some guide to future awards and might therefore influence their cause. "

The quintessential case in the method of taking previous cases into consideration is without doubt **Protea Insurance Co. Ltd v Lamb 1971(1) SA 530 (A) 534 to 536B** where the Court had the following to say:

"It should be emphasized, however, that this process of comparison does not take the

form of meticulous examination of awards made in other cases in order to fix the amount of compensation,· nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible in an appropriate case to test any assessment arrived upon this basis by reference to general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration. "

[55] Once again the defendant did not tender any evidence in respect of the relevant circumstances this Court is required to have regard in the assessment of general damages. However in his heads of argument, Mr. Tyatya, having conceded that in his research he could not find any case comparable to the instant case, referred this Court to Mosupi (not Mosupa) v Road Accident Fund (11/23686) (2013) ZAGPJHC108 (10 May 2013) at page 45. The principle involved herein was that in determining the quantum of general damages the Court has a wide discretion to award what it considers to be fair and equitable compensation having regards to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries suffered by the plaintiff, which include their nature, permanence, severity and impact on the plaintiff's lifestyle. Although Mr. Tyatya did not deem it prudent to furnish the Court with a copy of the relevant case, which in the Court's view would have greatly assisted the Court, he has, however, set out the facts of the said case succinctly and has shown the similarities between that case and this instant case. I do not deem it necessary to point out the similarities in both cases. In the end, and based on the said case he submitted that a sum of R900,000.00 would be a fair and reasonable compensation in respect of the plaintiff's general damages.

[56] On the other hand, the plaintiff, as indicated earlier, has testified and led the evidence of certain witnesses. He relied not only on the oral evidence of his witnesses but also on numerous expert reports which were handed in and admitted by the defendant. In his turn Mr. de Waal, has, for the purposes of enabling this Court to

assess the amount in respect of general damages, referred the Court to numerous unreported cases. There are five such unreported cases he has referred the Court to and one important matter namely Marine and Trade Insurance Co Ltd v Katz N.O 1979(3) SA 1(A) in which in 1979 the Court awarded the plaintiffs in that case a sum of R90,000.00 for general damages. It was argued by Mr. de Waal that the amount of R90,000.00 awarded in 1979 translates to R2,262,963.00 in terms of today's value.

[57] Now may I rush to point out the following which, in my view, is of paramount importance. I will point out the reasons why it is important. Counsel for the plaintiff has not furnished the Court with copies of the relevant unreported cases. This means that the duty was cast on this Court to look for and peruse those cases itself. Second!y, save for one case namely Oosthuizen v Road Accident Fund, the unreported judgment by Bertelsmann J, the Court has not been favoured by Mr. de Waal with a brief summary of the facts of each of such cases. It was important that copies of the cases or the facts or summary of the facts be furnished to enable the Court to compare the facts of such cases with the facts of the current matter. The importance of comparable cases has been set out somewhere supra. It is not sufficient to inform the Court that an amount that was awarded during the past years was translated into so much during the current year.

[58] I now turn to the facts of Mosupi v Road Accident Fund supra as set out in Mr. Tyatya's heads of argument. The facts of that case were almost identical with the facts of the current case. Mosupi ltumeleng ("Mosupi"), the plaintiff in that matter, had suffered severe permanent and multiple injuries. As a consequence of the accident in which she was involved, she had become a paraplegia and, among others, had sustained head and chest injuries. Now compared with the current plaintiff, it is not in dispute that the plaintiff in this matter is also a paraplegia. While Mosupi had sustained head and chest injuries, it is not the plaintiff's case that she has suffered such similar injuries. Mosupi was 19 years in age and in his second year of studies. She was doing Bachelor of Commerce degree. The current plaintiff was also 20 years old at the time of the accident and was in his second year of a Bachelor of Commerce degree. Mosupi, like the present plaintiff, became wheelchair bound and like the present plaintiff was unable to transfer herself from the wheelchair to a sofa or a bed. Like the current plaintiff, Mosupi relied entirely on those around her to assist her to trcinsfer from a

wheelchair. In order to avoid her developing pressure sores, she has to be turned regularly during the day and night. She could not sit upright for more than two hours. Mosupi, unlike the current plaintiff was paralysed from the armpit downwards.

[59] There is no evidence that the current plaintiff was paralysed to the same extent as the said Mosupi. In 2013, the Court awarded the said Mosupi general damages in the sum of R1,000,000.00. In other words if the Court in 2012 were to make an award to the plaintiff for the injuries he sustained on 1 January 2012 R1,000,000.00 would have been regarded as a fair and reasonable amount of compensation.

[60] In the premises, taking into account the fact that the award I am about to make is made as at 2015, the year in which this matter was heard and finalised, taking into account furthermore the ravages of time on money, a sum of R1,500,000.00 is, in my view, a fair and reasonable amount of compensation in respect of the plaintiff's general damages.

[61] Mr. Tyatya has also referred the Court to the unreported case of Marilyn Fortuin v Minister of Safety and Security (Case No. 2728/02). Briefly he has also set out the facts of the said case and the fact that the Court awarded the plaintiff, in that case, a sum cf R350,000.00. The problem though is that Mr. Tyatya has not indicated the year in which the said award was made nor has he indicated what the current value of the said award would have been.

[62] Finally I am satisfied that on the facts of this case and using my discretion the sum of R1,500,000.00 would be fair and reasonable compensation for the plaintiff for general damages.

Accordingly I grant an order incorporating the terms of the draft order hereto attached and marked "XPS".

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P.M. MABUSE JUDGE OF **THE** HIGH COURT

Appearances:

Counsel for the plaintiff: Adv. WP de Waal (SC)
Instructed by: Adams & Adams
Counsel for the defendant: Adv. L Tyatya
Instructed by: Tau Phalane Inc.
Date Heard: 29-31 July 2015
Date of Judgment: 14 January 2016

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2203/14
DATE: 14 January 2016

NJJ WEBB Plaintiff

v

ROAD ACCIDENT FUND Defendant

DRAFT ORDER

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1. Having heard Counsel for the Plaintiff and Defendant the following order is made:

1.1. That the defendant shall pay the plaintiff the sum of R8,004,922.00 in respect of the following heads of damage:

1.1.1. past and future loss of earnings R6,504,922.00;

1.1.2. general damages R1,500,000.00.

Payment must be made to the Plaintiff's attorneys, Adams and Adams, payable by direct transfer into the trust account with the following details:
NEDBANK

Account Number: […]

Branch Number: 198765

Pretoria Ref NK/RIW/P906

1.2. That the amount reflected in paragraph 1.1 above is over and above amounts awarded in respect of past medical expenses, brought by means of applications for interim payment, and awarded by the Court on the following dates and in the following amounts:

1.2.1. 15 August 2014 - R396,262.00;

1.2.2. 23 January 2015 - R28,065.95;

1.2.3. 29 May 2015 - R104,067.71;

1.2.4. 22 July 2015 - R28,367 .02.

1.3. That the capital amounts refer to in paragraph 1.1 above will not bear interest unless the defendant fails to effect payment thereof within 14 (fourteen) days of the date of this Order, in which event the capital amount will bear interest at the rate of 9% per annum calculated from and including the 15[1]h (fifteenth) day after the date of this Order to and including the date of payment thereof.

2. That the defendant shall forthwith provide to the plaintiff an undertaking in terms of section 17(4)(A) of the Road Accident Fund 1996 for the payment of 100% of the cost of the plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or a supplying of goods to him resulting from the injuries sustained by him in the motor collision which occurred on 1 January 2012, of such costs have been incurred and upon proof thereof.

3. That the defendant must make payment of the plaintiff's taxed or agreed party and party costs on the High Court Scale which costs shall include the following:

3.1. all the fees of senior counsel on the High Court Scale, inclusive of counsels' fees for preparation of heads of argument;

3.2. the reasonable taxable cost of obtaining all expert/medico-legal and actuary reports from the plaintiff's experts which were furnished to the defendant;

3.3. the reasonable taxable preparation and reservation fees, if any, of the following experts:

3.3.1. Dr. PR Engelbrecht;

3.3.2. Dr. DF Louw;

3.3.3. M Du Plooy;

3.3.4. Dr. Potgieter;

3.3.5. Dr. L Coetzee;

3.3.6. Dr. DL Kirsten;

3.3.7. Dr. JJ du Plessis;

3.3.8. Dr. K Truter;

3.3.9. Dr. Rademeyer;

3.3.10. Dr. JPM Pienaar;

3.3.11. E Prinsloo;

3.3.12. Dr. Grobler;

3.3.13. L Eybers;

3.3.14. C Pretorius;

3.3.15. K Prinsloo;

3.3.16. J Whittaker;

3.4. The cost of preparing for, attendance at Court and testifying in respect of Mr. K Prinsloo, which cost will not be limited to R1,500.00.

3.5. The cost incurred in payment of the amount mentioned in paragraph 1.1 above;

3.6. Reasonable traveling cost (including of toll gate and e-toll charges) incurred by the plaintiff in attending medico-legal appointments with the parties' experts and attending Court on the day of trial;

3.7. The above costs will also be paid in the aforementioned attorney's trust account.

4. That the following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs –

4.1. The plaintiff shall serve the notice of taxation on the defendant's attorney of record;

4.2. the plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs from date of settlement or taxation thereof;

4.3. should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 9% on a taxed or agreed cost from date of allocator to date of final payment.

5. That no contingency fee agreement has been entered into between the plaintiff and his duly appointed attorneys of record.

BY ORDER REGISTRAR