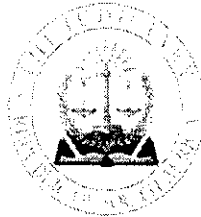


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 66684/2012

Date:

9/2/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

9/2/2016 *Pretorius*
DATE SIGNATURE

In the matter between:

ADV MARYKE VAN ROOYEN N.O.
(obo STEVEN JOUBERT)

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PRETORIUS J.

- (1) The plaintiff in this action is Adv M van Rooyen, appointed as *curator ad litem* to represent and assist Steven Joubert. Steven was involved in a motor vehicle accident on 7 July 2010, when he was 17 years old.
- (2) The defendant accepted 100% liability for the merits of the claim. A court order was granted on 26 February 2015, resolving liability, as well as most of the aspects of quantum. Loss of income and earning capacity are the only outstanding issues.
- (3) The Steven Joubert Trust was created and the trustee appointed. The amount awarded in respect of loss of income and earning capacity will be paid into the Steven Joubert Trust.
- (4) The defendant admitted the reports of the plaintiff's experts and their reports were submitted as evidence. The experts whose reports were admitted are:

"Professor Hofmeyr (Ear, Nose and Throat Surgeon), Dr Birrell (Orthopaedic Surgeon), Dr Henning (Psychiatrist), Dr Mazabow (Neuropsychologist), Ms Gous (Speech/Language Pathologist and Audiologist), Dr Truter (Clinical Psychologist), Ms Hatting (Speech and Language Therapist), Ms Bubb (Educational Psychologist) and Mr Whittaker (Actuary)."
- (5) There are joint minutes where the defendant had also appointed experts:

"Drs du Plessis and Okoli (Neurosurgeons), Mesdames Greeff and Van Rensburg (Occupational Therapists), and Mr Linde and Ms Nel (Industrial Psychologists)."

- (6) It is important to note that the parties have agreed to accept the correctness of the joint minutes and to be bound by the joint minutes.

- (7) The agreement between the neurosurgeons was:

"severe diffuse axonal brain injury with significant irreversible neurocognitive neurophysical and neuropsychiatric sequelae [and]... a focal injury to the right frontal lobe of the brain."

The agreement between the industrial psychologists was:

"Steven has been rendered practically unemployable in the open labour market. He has suffered a total loss of income."

- (8) An agreement was reached that the predicted retirement age would be regarded as 65 years for actuarial calculations.
- (9) Ms Nel, the industrial psychologist for the defendant, raised certain concerns in the joint minute regarding pre-morbid behaviour. There is mention of behavioural problems and admission to Denmar Psychiatric Hospital, dabbling in drugs and Satanism.
- (10) The plaintiff addressed all the reservations of Ms Nel by submitting an

affidavit by his mother, who stated that all the problems that were experienced in grade 9 were resolved. He had passed grade 9, despite the problems and then passed grade 10 and was in grade 11 when the accident took place, without being on medication for psychiatric problems at that time. The independent evidence, which was admitted by the defendant, was that there were no problems with the plaintiff. He was working during the holidays for Mr Osborne when the accident happened. According to Mr Osborne:

"Steven was a hard worker, the other employees enjoyed working with him. He was eager to learn and he was strong. We used him as a "fetcher" to take items onto the roof. He was able to do the administrative side of the work as well as he was competent on a computer. There is no doubt that Steven had a future in my company, and that I would have assisted him in furthering his education"

- (11) The psychiatrist, Dr Henning, found:

"When he presented with behavioural difficulties in 2008 he was diagnosed with bipolar and was treated with Epilim for a short period of time. However, he stopped the medication the same year and had a stable mood until the accident."

- (12) Dr Truter, the clinical psychologist found:

"He was admitted to Denmar Psychiatric Hospital and also

attended a religious rehabilitation centre in Vereeniging. He managed to pass Grade 9...[in 2009] he was a Grade 10 pupil. He managed to pass Grade 10 without any behavioural or disciplinary problems."

- (13) All the factual evidence, admitted by the defendant, indicates that all Ms Nel's concerns were addressed and allayed.

CONTINGENCY DEDUCTIONS:

- (14) Mr Bam, for the defendant argued that the court should allow a contingency deduction of at least 30% post-morbid. His first reason for the larger deduction is the age of the plaintiff, who is young as he was 17 years old when the accident took place.

- (15) In the *locus classicus*, **Southern Insurance Association v Bailey NO 1984(1) 98 AD** Nicholas JA found at p114:

"In a case where a Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informal guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis." (Court's emphasis)

- (16) Nicolas JA held at 116G – 117A:

*"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of live; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. **The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.**" (Court's emphasis)*

- (17) In the article, "Omvattende Omskrywing van Gebeurlikhede in die Skadevergoedingsreg" 2005 THRHR 638, by Loma Steynberg at page 645:

"Daar moet verder daarteen gewaak word om alle moontlike omstandighede wat daar in ons bekende wêreld bestaan voor die voet as gebeurlikhede in ag te neem. Dit blyk uit die definisie dat die spesifieke omstandighede van die betrokke

persoon ook in ag geneem moet word. Getuienis moet derhalwe aantoon dat daar ten minste 'n moontlikheid bestaan dat die gebeurlikheid relevant is of kan word. Indien die kans daarvoor baie klein is behoort dit as de minimis non curat lex beskou te word, en derhalwe geïgnoreer te word."

- (18) In **Road Accident Fund v Reynolds (2005) 5 QOD D3-1 (W)** Malan J dealt with contingencies as follows:

"The Court must, of course, do the best it can in the particular circumstances of each case. Having done that, I am of the view that the contingencies in this matter are fairly evenly balanced. I have little doubt that fairness requires me in the exercise of my discretion to leave the award made by the Court a quo unaltered." (Court's emphasis)

- (19) The parties in the present case were in agreement that contingency deductions should be applied and that the court should start at what is termed the normal, or usual contingencies, which is 5% pre-morbid and 15% post-morbid.
- (20) It is however so, that the assessment of contingencies is arbitrary and the trial judge is in the best position to make a decision after considering all the facts of the case and having regard to the expert opinions provided.

(21) The plaintiff's counsel provided the court with previous decisions regarding contingencies as an illustration of how conservative or how liberal the assumption is on which the underlying calculation is based. It further illustrates that each case has to be decided on its own merits, but having regard to the previous cases. I mention only two of the cases.

(22) In **Sgaty v Road Accident Fund (2001) 5 QOD A2-1 (E)**, where Jannet J found at A2-9:

"I have, however, to consider what allowance should be made to Dr Koch's calculations for general contingencies... In relation to future loss of earnings, which are based on the assumption that plaintiff would have followed a career in the private sector, I must take into account the consideration that plaintiff's expectations as far as his salary increases are concerned may not have been met. Of course they may have been exceeded. Plaintiff's claim for loss of earnings, however, extends over a fairly extensive period and the deduction I make from plaintiff's loss as calculated by Dr Koch in order to provide for the ordinary accidents and chances of life" (Sigourmay v Gillbanks, supra, at 569A) is necessarily an arbitrary one which I assess at 20%..."

(23) In **Raupert v Road Accident Fund (2011) 6A4 QOD 52 (ECP)** Neppen J applied a 20% contingency deduction and said in para [24]

of his judgment at A4-58 to A4-59:

"In the present instance there can be no doubt that there is a considerable amount of speculation involved in trying to quantify the plaintiff's future loss of income, particularly as the approach adopted by Martiny (the industrial psychologist for the plaintiff, whose evidence was accepted) has not been based on salaries earned by photographers... It is my view, because the plaintiff's loss is to be determined without specific reference to what she could have earned had she followed a photographic career and the further uncertainty as to the precise nature of the career she would have followed, that a deduction of 20% for contingencies would be appropriate."

- (24) I was referred to **SM Mngomezulu v RAF (04643/2010) [2011] ZAGPJHC107 (8 September 2011)** where Kgomo J referred to Dr Robert Koch's principle that every year of a person's remaining working life should represent a 0.5% contingency deduction. It is so that it can be the starting point, but once again it will depend on the facts of each case.
- (25) Mr Mullins SC, for the plaintiff, argued that Ms Nel was conservative as she took all artisans into consideration when trying to predict the future and did not provide for the plaintiff to become an electrician, but only an artisan, as was indicated by the evidence. The defendant was of the opinion, that under the circumstances, a 30% deduction should be

applied.

- (26) I cannot agree with this argument, as from the outset it was agreed by the parties to accept the joint minutes and therefor his argument as to Dr Mazabow's evidence cannot take the matter any further. The same must apply in regards to the educational psychologist, Ms Bubb, as it was clear that her finding was:

"Pre accident, he probably was of average to high average ability. The limited school reports and fluctuating marks suggest that he was not focusing on his work, but he passed each year. He probably would have completed Grade 12 and studied further, probably at an FET College, achieving what was previously an N4 level. He indicated that he wanted to qualify as an electrician or in electronics pre injury and probably would have completed this training and qualified as an artisan."

- (27) The defendant did not consult with an educational psychologist and could not counter this finding. This finding was supported by the evidence of Mr Osborne that the plaintiff would, most probably, have qualified as an electrician.

- (28) In these circumstances, after considering all the facts, the expert reports as well as the arguments by counsel, I find that the difference between Mr Whittaker, actuary for the plaintiff's scenario 1 and Mr Munro, actuary for the defendant's scenario must be split to calculate

the amount and a 20% deduction for contingencies must be applied.

(29) I agree with Loma Steynberg that:

"The proven factual situation should be paramount in making a contingency adjustment, rather than an arbitrary adjustment that could be in conflict with the factual situation." (2008 THRHR 287)

(30) In the light of what I have found, based on the agreed aspects between the parties, which includes the joint minutes the following is the order of this Court:

1. The contingencies to be applied will be 5% pre-morbid and 20% post-morbid.

2.

2.1 Advocates East and Bam are given leave to approach me in chambers with the actuarial calculations resulting from paragraph 1 above, for an order sounding in money.

2.2 The aforesaid capital amount that will be ordered as per paragraph 2.1 above will not bear interest unless the defendant fails to effect payment thereof within thirty calendar days of the date of that Order, in which even the capital amount will bear interest at the rate of 9% per annum calculated from the thirty first calendar day after the date of that order up to and including the date of payment thereof.

3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs, including the following costs:

3.1 The costs of the employment of two counsel (including the costs of senior counsel);

3.2 The costs of the qualifying, preparation and reservation fees, if any, of the following experts:

3.2.1 Mr L Linde; and

3.2.2 G Whittaker

3.3 The costs attendant upon the obtaining of payment of the amounts referred to in this Order; and

3.4 The costs relating to the curator ad litem, including her preparation, the drafting of her report, consultation with the patient, as well as attendance at court.

4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed party and party costs:

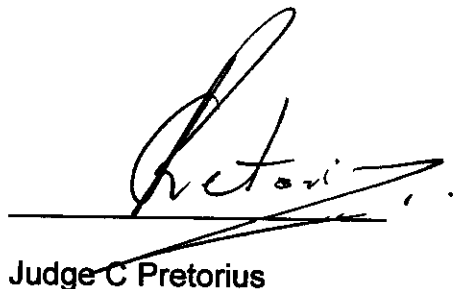
4.1 The plaintiff's attorneys shall serve the Notice of Taxation on the defendant's attorneys of record;

4.2 The defendant shall be allowed 15 (fifteen) calendar days from date of settlement or of taxation within which to effect payment of the agreed or taxed costs; and

4.3 Should payment not be effected within the aforementioned period, the plaintiff will be entitled to recover interest on the taxed or agreed costs at the rate

of 9% per annum calculated from the thirty first calendar day after the date of settlement of the costs or of taxation, up to and including the date of final payment thereof.

5. The nett proceeds of the payments referred to above, after deduction of attorney and own client costs ("the capital amount"), shall be payable by the plaintiff's attorneys to the Steven Joubert Trust.
6. There is no applicable contingency fee agreement.

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line. The signature is stylized with a large initial 'P' and a long, sweeping underline.

Judge C Pretorius

Case number : 66684/2012

Matter heard on : 28 January 2016

For the Applicant : Adv Mullins SC / Adv East

Instructed by : Paul Du Plessis Attorneys

For the Respondent : Adv Bam

Instructed by : T Moabelo Attorney

Date of Judgment :