IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

DATE 29 NOVEMBER 2019 **SIGNATURE**

Case no: 42977/2016

In the matter between: -

DE LANGE, LEE Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

NE NKOSI AJ

[1] The dispute between the parties relates to the amount of damages to be awarded to the plaintiff for loss of earnings. At the center of the dispute are questions whether the plaintiff has been rendered completely unemployable due to the injuries sustained in the motor vehicle collision and consequently would be forced to retire at the age of 55 years.

[2] The plaintiff was involved in a motor vehicle accident on the 27th of May 2015 and sustained serious injuries which are mostly Orthopaedic in nature. At the time of the accident he was 23 years old and was employed as a fitter and turner.

[3] The injuries are well documented in the reports compiled by Dr. Volkersz, for the plaintiff, and Dr. Dybala, his counterpart. In the joint minute[1] compiled between the two doctors, they agreed that the plaintiff sustained the following injuries:

a) bilateral Volar Barton fracture which were treated appropriately by means of an open reduction and internal fixation, and he requires a conservative management of the injuries and eventually a wrist fusion;

b) a fracture of the right femur which was initially treated with an internal fixator and later, with an intermedullary nail and the fracture is united some remaining symptoms which will improve after the nail is removed;

c) a chondromalacia of the right patella which should be conservatively managed and eventually an arthroscopic debridement performed;

d) a fracture of the left ankle which was treated conservatively with a plaster of Paris without any further symptoms; and

[1] Page 7, updated bundle 5.

e) a Lisfranc fracture of the left foot which was managed with a plaster of Paris but remains with persistent pain resulting in the antalgic gait on the left-hand side.

[4] Both doctors agree that he sustained loss of productivity as a result of the orthopaedic injuries sustained in the accident. Dr Volkersz is further of the view that the plaintiff will not be able to continue working as a fitter beyond the age of 55. Dr Dybala did not express a view on this issue. Adv. Van den Berg, appearing for the defendant, argued that the fact that Dr Dybala did not express a view of early retirement prospects issue, did not necessary mean that he agreed with Dr Volkersz's view. Adv Avvakoumides submitted that Dr Volkersz's opinion should prevail because Dr Dybala simply did not challenge it.

[5] The issue of early retirement prospects has a direct impact on plaintiff's claim for loss of earnings. It does not help to resolve the issue before Court by simply refraining to express a view as Dr Dybala did. The same principle enunciated in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**[2], equally applies in this matter namely:

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if*

[2] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008(3) SA 371 (SCA) (10 March 2008) at para [13].

they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party...."

[6] At para [16], the Court (**Wightman t/a JW Construction**, supra) went on to state that:

".... Each material averment should have been met and answered appropriately not enveloped in a fog which hides or distorts the reality...."

[7] Dr. Volkersz unambiguously expressed the view that the plaintiff would not be able to continue working as a fitter beyond the age of 55. This view is met with a response completely enveloped in a fog. In the absence of a serious and appropriate response, Dr. Volkersz's view should stand but subject to the views of other expert witnesses in particular, the Occupational Therapists and the Industrial Psychologists.

[8] In addition to the orthopedic injuries, the plaintiff sustained a head injury which was diagnosed by Dr Lewer-Allen, a Neurosurgeon as been mild. He states that:

"However as I read the assessment by Ms Shubert and Ms Rossouw there appears to be very little by way of measurable

mental fallout in the workplace, and so the severity of the head injury must be considered mild"[3].

The severity of the head injury and the finding by Dr Lewer-Allen were not placed in dispute by either party. I therefore accept his finding.

[9] Ms. Tarry and Ms. Buthelezi are Occupational Therapists and have compiled a joint minute in which they noted that the plaintiff's occupation was a skilled one with medium physical to very heavy load handling demands. The plaintiff returned to the same position after the accident. He was retrenched in March 2019 for reasons unrelated to his involvement in the accident. He remains unemployed.

[10] They both agree that:

> *"Although the client was assessed to meet the demand for mid-range heavy physical demand level, in light of the client's reports of pain and orthopaedic findings in the interest of joint preservation, the client would be better suited to perform medium work; with accommodations and/or use of assistive devices to reduce injury-related pain and limitations; and minimize discomfort during work performance. These can be accommodated for with intermittent rest breaks and reducing the amount of heavy lifting that the client is required to do"*[4].

It is apparent from their view that the plaintiff was a vulnerable employee upon his return to work. He will remain vulnerable should he become employed. His levels of fitness and strength have been seriously compromised in particular by the orthopaedic injuries. They further agree that:

> *"As a result of the afore mentioned limitations and the necessity for the implementation of various accommodations within the workplace, the client is considered a more vulnerable employee within the open labour market when compared to his able bodied counterparts"*[5].

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[3] Page 54, updated bundle 3, at para 8.1.27.
[4] Page 5-6 of updated bundle 5, at para 7.
[5] Page 6, of updated bundle 5, at para 7.

This fact is further confirmed by the Industrial Psychologists Ms. Shubert and Ms. Campbell, in their joint minute[6].

[11] The Industrial Psychologists agree that the plaintiff would remain subject to longer than normal periods of unemployment and that he has limited options available to him. He would likely always require a sympathetic and accommodating employer which would be difficult to come by, over the span of his career[7]. Ms. Campbell suggests that taking all factors into account, appropriate contingencies should be considered. Ms. Shubert, on the other hand, holds the view that the plaintiff has limited options, but to continue in his current position although less competitive. Her view finds credence in the fact that the plaintiff has been actively seeking employment of a similar nature although he would accept any job. His disadvantage is lack of experience in any other type of career. She concludes by stating that the plaintiff would likely be at risk of premature retirement[8].

[12] There seems to be very little doubt if any, that the plaintiff has been rendered less competitive in an open labour market by the sequelae of the injuries sustained in the motor vehicle accident in question. His future employability has been severely impacted on.

[13] In the decision in **Southern Insurance Association v Bailey NO**[9] Nicholas JA when considering the method of assessing damages for loss of earnings had this to say:

> *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of*

[6] Page 16, updated bundle 5.
[7] Page 16 of updated bundle 5, at para 2.8.
[8] Para 17 of updated bundle 5, at para 2.9.
[9] Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) at 113 G-I. *Also see*: Esau v Road Accident Fund (3410/15) [2017] ZAECPEHC 30 (1 June 2017) at para [22] and Kilian NO v Road Accident Fund (34116/2016) [2016] ZAGPPHC 844 (15 September 2016) at para [1].

the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative".

[14] In the present case, the assessment of the plaintiff's loss of earnings is not a mere speculation but guesswork premised on well-reasoned and informed views of various experts for the defendant and plaintiff. The end result is subjective. The extent of the contingency deduction is at the Court's discretion to decide.

[15] In exercising the Court's discretion, I have been ably assisted in particular by the reports compiled at the instance of both parties by all the experts and the Orthopaedic Surgeons, although to some extent.

[16] According to the Industrial psychologists, the plaintiff's normal retirement age is 65 years. Mr. Kramer, the Actuary applied a 20% contingency deduction to the value of income but for the accident. In my view the said deduction is fair and reasonable. It represents a fair balance of those contingencies in favour of the plaintiff and the various hazards of life affecting his earnings. After applying the 20%, Plaintiff's net prospective value of income but for the accident is R6 745 931.00.

[17] A 40% contingency deduction has been applied to the value of income having regard to the accident. This approach is to a large extent informed by Dr Volkersz's view that the plaintiff will not work beyond the age of 55, and the Occupational Therapists view that the plaintiff retains limited residual working capacity. I accept this view to some limited extent. I do so having regard to the fact that the plaintiff remains positive and believes that he will be gainfully employed in the future. Currently he is actively looking for employment. His attitude and behavior confirm the fact that he is partially rendered unemployable. Lack of experience in other

careers further compromises his condition. The longer it takes for him to secure employment, psychological challenges will gradually creep in and worsen his situation.

[18] Having considered the circumstances of the plaintiff I am persuaded that a deduction of 40% is inappropriate. A fair and reasonable deduction, in my view, would be 35%.

[19] The value of income having regard to the accident is R 4 433 177.00 less 35% contingency deductions. The net value is R 2 881 565.05. The net loss of income is therefore the difference between R 6 745.931 and R 2 881 565.05, which is R 3 864 365.95.

[20] I have been furnished with a draft order and by agreement I should insert the amount which I regard as fair and reasonable, and give an order in terms of the draft order.

[21] I therefore order that:

1. The signed draft order attached hereto is made an order of Court.

NE NKOSI, AJ
Acting Judge of the
Gauteng Division of the
High Court

Date of Hearing	: 21 October 2019
Date of Judgement	: December 2019
For the Plaintiff	: Adv. George Avvakoumides
Contact Details	: 083 306 1671
Instructed by	: De Broglio Attorneys
For the Defendant	: Adv. Gerhard Van den Berg
Contact Details	: 082 772 8008
Instructed by	: Iqbal Mahomed Attorneys

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

Case No: 42977/2016

In the matter between:

DE LANGE, LEE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

On 21st of October 2019 before the Honourable Just ice Nkosi, AJ, ~~DJP~~; ~~by agreement~~ between the parties and having heard counsel; it is ordered:

1. The Defendant shall pay to the Plaintiff the capital amount of R 3864 365.95

in respect of Loss of Earnings,

together with interest *a tempore morae* calculated in accordance with the Prescribed Rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996.

2. Payment will be made directly to the trust account of the Plaintiff's attorneys with fourteen (14) days:

Holder	De Broglio Attorneys
Account Number	109 645 1867
Bank & Branch	Nedbank – Northern Gauteng
Code	198 765
Ref	D831

3. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse 100% of the Plaintiff for the costs of any future accommodation of the Plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by Plaintiff in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof

4. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the preparation and qualifying and reservation fees of the experts, consequent upon obtaining Plaintiff's reports to be served between the parties, inclusive of the time spent by Experts for preparation for and of the draft joint minute, drafting of proposed joint minute and time spent in finalizing joint minute, the Plaintiff's reasonable travel and accommodation costs to attend the

Defendant's and own experts, and senior counsel. All past reserved costs, if any, are hereby declared costs in the cause and the Plaintiff as well as subpoenaed witnesses are declared necessary witnesses.

4A. The Plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the Defendants Attorney of record; and

4B. The Plaintiff shall allow the Defendant fourteen (14) days to make payment of the taxed costs.

5. There is a contingency fee agreement in existence between the Plaintiff and his Attorneys.

COUNSEL FOR PLAINTIFF	: George Avvakoumides : Tel: 083 306 1671
ATTORNEY FOR PLAINTIFF	: Nikita Van der Linde : Tel: 011 442 4200
COUNSEL FOR DEFENDANT	: Gerhard Van den Berg : Tel: 082 772 8008
ATTORNEY FOR DEFENDANT	: Riaan Van Staden : Tel: 012 324 2203

BY ORDER

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REGISTRAR OF THE HIGH COURT