IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 33128/2017

Date of hearing: 10 October 2019

Date delivered: 15 October 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

15/10/19
DATE

SIGNATURE

In the matter between:

ADVOCATE T CARSTENS
Obo MULUNEH SHAMEBO METORE — Plaintiff

and

ROAD ACCIDENT FUND — Defendant

JUDGMENT

SWANEPOEL AJ:

[1] Plaintiff is Adv. T Carstens, who claims on behalf of Mr. Metore for damages resulting from a collision that occurred on 20 December 2015 in which Mr. Metore suffered serious injuries.

[2] Defendant has conceded that it is 100% liable for Mr.Metore's proven damages. The issues before me for determination relate to the *quantum* of general damages, and of the loss of past and future income. The parties agreed not to call witnesses, and they agreed that they would argue the matter on the joint minutes prepared by the various experts and on the actuarial report prepared on behalf of the plaintiff.

[3] Mr. Metore, now 44 years of age, was 40 years old at the time of the collision. He was a shopkeeper, operating two or three tuck shops for his own account.

[4] After the collision Mr. Metore was hospitalized and treated for a fracture of the right femur. Unbeknown to the hospital personnel, he had also suffered a head injury which remained undiagnosed, and for which he did not receive treatment. Some seven weeks after the collision Mr. Metore was again admitted to hospital suffering from severe headaches. A chronic subdural haematoma was then diagnosed and surgically treated.

[4] Unfortunately, the haematoma resulted in Mr. Metore suffering a severe brain injury. He now suffers from neurocognitive impairment, mental slowing, intellectual difficulties and visual impairment. He also has a 5% risk of epilepsy due to infarcts in both occipital lobes.

[5] The injury to Mr. Metore's femur has limited his ability to stand for long periods of time, or to walk long distances, and is not serious. The brain injury, which defendant admits was sustained in the collision is, however, debilitating. Mr. Metore requires supervision, he requires a caregiver to assist him with the most basic tasks, such as washing, dressing himself and with domestic chores. He cannot drive any longer, and due to orientation problems, he cannot go anywhere without supervision. He will require a permanent care-giver, alternatively he will have to live in a care institution. Mr. Metore is not employable and he is incapable of running his own business. He is also incapable of conducting his own financial affairs.

GENERAL DAMAGES

[6] I have been referred to a number of matters. Mr. Kruger SC, for plaintiff, relies maintly on the matter of ***Zarrabi v RAF 2006 5 QOD B4-231***. In this case a promising young doctor suffered a brain injury which left her intellectually impaired, with dysarthria, spasticity, loss of vision and with personality changes. She was, as a result of the brain injury, not able to continue to practice as a doctor. She also suffered a number of other serious injuries. The sum of R 800 000.00 was awarded as general damages, which equates to R 1.716 million in today's terms. In my view, although the brain injury sustained by the plaintiff in the Zarrabi matter is somewhat comparable to the injury sustained by Mr. Metore in this case, the rest of his injuries were not as severe as in Zarrabi, and so the *quantum* of the general damages should be reduced accordingly.

[7] Defendant's counsel referred me to three matters. In ***Modan v RAF [2011] ZAGPJHC 192 (7 December 2011)*** the plaintiff, a 4 year old child suffered a mild concussive brain injury. She suffered a period of post-traumatic amnesia. She had difficulty with attention and concentration and was assessed as being likely only to attain a 1 to 2 year tertiary diploma course at a college. It is evident from this summary that the case is not comparable in the least with the instant matter. I was also referred to ***Ndlovu v RAF [2013] ZAGPJHC 201***. In this matter the plaintiff suffered a concussion in a collision which resulted in a period of loss of consciousness, he became forgetful and suffered from poor concentration. He has poor memory and is depressed. I fail to see how this matter bears any relevance to the injuries suffered by the Mr. Metore in this case.

[8] In the matter of ***Myhill NO (obo RC Penga) v RAF 2008 (5B4) QOD 271 (T)*** Mr. Penga suffered a focal and diffuse brain injury, resulting in headaches, irritability, fatigue, disorientation and gross cognitive malfunction. He would remain grossly malfunctional and permanently unemployable. This matter is somewhat comparable to the instant case. The sum of R 750 000.00 was awarded for general damages, which equates to R 1 291 095.00 in today's terms. In ***Mngani v RAF 2011 (6B4) QOD 41 (ECM)*** the plaintiff suffered brain damages resulting in severe diminished levels of attention and concentration, impaired learning and memory, severely impaired executive functioning, severely impaired auditory attention and sustained attention, and severely impaired immediate and delayed visual memory. His neurocognitive deficits

deprived him of any vocational or employment opportunities in the labour market. The sum of R 500 000.00 was awarded as general damages, which included an award for orthopaedic injuries, although, in my view, the brain injury sustained by the plaintiff in ***Mngani*** is likely not as severe as in this matter. The award equates to R 810 171.00 in today's terms.

[9] In ***Kerridge v RAF 2016 (7A4) 46 (ECP)*** the plaintiff suffered a traumatic brain injury which left him with neurocognitive, socio-emotional and executive deficits. He struggled to function socially and vocationally, tired easily and was forgetful. He was, however, able to continue to pursue a small business selling motor vehicle accessories, with the assistance of his wife. He also suffered substantial orthopaedic injuries. In my view the brain injury sustained by the plaintiff in ***Kerridge*** was not as severe as that of Mr. Metore in this matter. The sum of R 700 000.00 was awarded which equates to R 821 265.00 in today's terms.

[10] In ***Vakata v RAF 2014 (7A4)*** the plaintiff's daughter, a three year old, suffered a moderately severe brain injury with a skull fracture, resulting in cognitive deficit with a limited ability to learn new information, impairment of executive functioning, disinhibition and lack of control of emotions, and limited insight. Her intellectual abilities fell within the range of mildly retarded, and she was regarded as unemployable. The sum of R 600 000.00 was awarded, equating to R 805 938.00 today. The injury to the plaintiff's daughter in this case strikes me also not to be as severe as the injury sustained by Mr. Metore.

[11] Although it is instructive to compare previous awards, and indeed a Court is required to refer to other similar cases, each case must be considered on its own facts. (**See:** ***De Jongh v Du Pisanie NO 2005 (5) SA 457 (SCA) at 477 B; Mashaba v Road Accident Fund2006 (4) ALL SA 384 (T)***)

[12] Plaintiff's counsel has submitted that an award of R 1.2 million for general damages would be appropriate. On the other hand defendant has submitted that R 750 000.00 would be a more appropriate award. In a few of the abovementioned cases, awards equating to R 800 000.00 in today's terms were made, although, as I have pointed out, the injuries in those matters were not as severe as in this case. An award of R 800 000.00 would therefore be the low water mark, and is in my view too conservative. On the other hand, R 1.2 million seems to me to be out of proportion to the awards granted in the past. In the circumstances I believe that an award of R 950 000.00 for general damages is appropriate.

LOSS OF INCOME

[13] Before the collision Mr. Metore earned his living as a tuck shop owner. He owned two or three tuck shops. There is no documentary evidence relating to his pre-accident income.

[14] Plaintiff bases its claim for loss of income principally on the joint minutes prepared by the parties' industrial psychologists ("IPs), supported by an actuarial report by one Robert Koch.

[15] When the matter came before me, defendant's counsel indicated that defendant took issue with the IPs' joint minute. Defendant specifically took issue with the fact that no documentary proof of income had been provided. For that reason, defendant contended that I should find that plaintiff had not proved Mr. Metore's pre-accident income, and that consequently the loss of income could not be determined.

[16] The joint minute by the IPs was compiled on 8 October 2019, two days before the trial. On the same date the parties held a pre-trial meeting at which they recorded that:

> *"The trial will run for one day and will be argued on the available and (sic) joint reports."*

[17] It has become a regular occurrence that RAF matters concerning the quantum of a claim are argued, by agreement, on the experts' reports and on joint minutes. The very point of joint minutes is to limit the factual disputes, so that the actual issues in dispute can be dealt with as expeditiously as possible. In ***Thomas v BD Sarens (Pty) Ltd [2012] ZAGPJHC 161*** Sutherland J held that where facts are agreed on between the parties in civil litigation, the court is generally bound by such an agreement. That approach has been followed in several cases thereafter, and specifically in ***BEE v RAF 2018 (4) SA 366 (SCA)*** the Supreme Court of Appeal endorsed Sutherland J's finding. It was held by the majority of the Court (at 384 A):

"Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial' (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare...."

[18] In ***BEE*** (*supra* at 384 H) Rogers AJA held that where expert witnesses are directed to file a joint minute, and they subsequently do so, then the joint minute will be regarded as limiting the issues on which evidence is needed.

[19] In this matter the IPs agreed the following facts:

[19.1] Mr. Metore was the owner of two or three tuck shops. There is no documentary proof of his pre-accident income, making it impossible to determine his pre-morbid income.

[19.2] According to Koch, a tuck shop owner can earn an annual income on to the following scale: R 16 600 – R 43 000 – R 82 000.

[19.3] Calculated at the median of R 43 000.00 per annum per tuck shop, and assuming that Mr. Metore had two tuck shops, his income per annum would amount to R 86 000.00 per annum.

[19.4] Calculated at the upper quartile of the scale, Mr. Metore would potentially have earned R 164 000.00.

[20] I take the point that there is no documentary proof of the Mr. Metore's pre-accident income. The reason is simply that he conducted an informal business and he never maintained any records. The evidence presented by the IPs is the best evidence available to them. Defendant contends that one cannot adopt the However, estimating a plaintiff's loss of income is not an exact science. In ***Southern Insurance Association v Bailey NO 1984 (1) SA 98 (AD)*** it was held (at 113 G):

> *"Any inquiry 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 a court can do is to make an estimate, which is often a rough estimate, of the present value of the loss."*

[21] Two varying approaches are possible, either a court may make a round estimate of an amount which seems fair and reasonable, or it may make an assessment by way of mathematical calculations, based on the available evidence (***Southern Insurance*** *at 113 H*). The Court made the point that it is preferable, where there is material upon which an actuarial

calculation can be made, to rather follow that route than to simply award a lump sum that is regarded as fair.

[22] The actuarial report is based upon the average between the median figure and the upper quartile, and postulates that Mr. Metore would have earned R 125 000.00 per annum. There is no reason to doubt the IPs' assumption (and agreement) that Mr. Metore ran two tuck shops. Although there is no documentary evidence, available regarding his actual income, there is equally no reason to doubt the IPs' agreement as to the likely income of a person conducting a tuck shop.

[23] It would, in my view, be iniquitous to allow defendant to disavow the agreement reached by its own expert, and after agreement had been reached between the respective legal representatives that the matter would be argued on the facts contained in the joint minutes.

[24] Defendant's counsel referred me to ***Mlotshwa v Road Accident Fund [2017] ZAGPPHC 109 (29 March 2017)*** where the court found that plaintiff had not proven his loss of income. In that matter the actuarial calculations were done on the basis of information forthcoming from the plaintiff. However, the evidence of the plaintiff matter was contradictory and unsatisfactory. The Court found that the paucity of the evidence was such that it could not come to any conclusion as to the plaintiff's pre-accident income. The ***Mlotshwa*** case is distinguished on the facts from this case by the fact that in this case the IPs agreed on the likely levels of

income of a tuck shop owner, based on the Quantum Yearbook of Robert Koch, and not on plaintiff's say-so.

[24] The actuarial report calculates the past loss of earning at R 340 204.00. To this figure, plaintiff contends, a 10% contingency deduction should be applied resulting in past loss of income in the sum of R 306 183.60. Defendant does not take issue with that submission.

[25] The future loss of income is calculated at R 1 631 092.00. Plaintiff submits that a 40% contingency deduction should be made, resulting in a loss of future income of R 978 655.20. Defendant contends for a 50% deduction which is in my view excessive.

[26] In the premises I find that plaintiff has proven the following damages:

[26.1] General damages:	R 950 000.00;
[26.2] Past loss of income:	R 306 183.60;
[26.3] Future loss of income:	R 978 655.20
Total damages:	R 2 234 838.80

[27] From the aforesaid must be deducted an interim payment already effected in the sum of R 500 000.00. The award for damages is therefore R 1 734 838.80. Plaintiff has presented me with a draft order, and with which defendant has taken no issue. I have amended the draft order to reflect the aforesaid award.

[28] Consequently I make the following order:

[28.1] The draft order marked "X" is made an order of Court.

Swanepoel AJ
Acting Judge of the High Court,
Gauteng Division, Pretoria

MB
Pta

"X"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: **33128 / 2017**

On **10 October 2019**

Before the Honourable Justice Swanepoel AJ

In the matter between:

ADV T CARSTENS obo MS METORE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

HAVING heard counsel and having read the pleadings filed in this matter, alternatively

BY CONSENT between the parties,

THE FOLLOWING ORDER IS MADE:

1. The defendant is ordered to pay to the plaintiff in addition to the sum of R500 000.00 to be paid in terms of the order of court dated 5 February 2019, the sum of R 1 734 838-80 (one million seven hundred and thirty four thousand eight hundred and thirty eight rand eighty cent.)

_____Rand _____)

on or before 28 November 2019, which amount shall be paid to the credit of the trust account of the plaintiff's attorneys of record, Marais Basson Inc, Witbank, whose trust account details are as follows:

MARAIS BASSON INCORPORATED TRUST ACCOUNT
STANDARD BANK - WITBANK
ACCOUNT NUMBER : 030029430
BRANCH CODE : 052750
Ref : DA Venter / ME0095

2. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs, which costs shall include:

2.1 The costs consequent upon the employment of senior counsel, inclusive of the costs of appearance on 10 October 2019 and of attending the pre-trial conferences;

2.2 Insofar as same had not been paid in terms of the order of court dated 5 February 2019, the costs of obtaining the reports (addenda thereto, joint reports and RAF 4 reports where applicable) of and the reasonable taxable preparation, reservation (if any) and / or qualifying fees of the following expert witnesses:

Orthopaedic surgeon	Dr DA Birrell
Neuro surgeon	Dr JJ du Plessis
Ophthalmologist	Dr RL Dippenaar
Plastic surgeon	Dr JPM pienaar

Neurologist	Dr M Pillay
Clinical Psychologist	Dr L Olivier
Industrial Psychologist	Dr D Schreuder
Actuary	Dr RJ Koch

2.3 The reasonable travelling costs of the plaintiff attending the medico-legal consultations and of the plaintiff and witnesses to attend trial on 10 October 2019;

2.4 The costs of the creation of the trust or similar investment vehicle referred to below and all costs in relation to the management thereof.

2.5 The costs for the appointment of and the costs of the *curatrix ad litem* and it was necessary to appoint her.

3. If the capital amount is not paid on the date set out hereinabove and the taxed / agreed costs are not paid on presentation of the *allocatur*, the outstanding amount shall bear interest at the rate of 10,25% per annum from due date to date of payment.

4. The plaintiff's attorneys shall retain the capital sum referred to in paragraph 1 in an interest bearing account in terms of section 28(2)(A) of the Attorneys Act pending the creation of a trust or similar investment vehicle and shall be entitled from time to time pending the creation of the trust, to make discretionary payments

to the plaintiff from the above account to a maximum aggregate total of R250 000.00 to provide for the needs of the plaintiff;

5. A trust or similar investment vehicle shall be established on behalf of the plaintiff, to administer the net proceeds received from the defendant on behalf of the plaintiff (after deduction of the attorney and client fees). If a trust is created, it shall have the following provisions

5.1 The plaintiff shall be the sole beneficiary thereof;

5.2 At least one (1) but no more than two (2) trustees will be appointed, of which one will be an independent professional trustee;

5.3 The trust will have the purpose to administer the funds taking into account the best interest of the plaintiff;

5.4 The trust property will be excluded from any community of property or accrual regime in the event of the marriage of the plaintiff;

5.5 The trustee(s) will have the right to purchase, sell or mortgage any immovable property, to invest and reinvest the trust capital, and to pay out as much of the trust capital as is reasonably

required to maintain the plaintiff (with due regard being had to the requirements of the plaintiff and the purpose of the award of damages);

5.6 The trust deed must be submitted for approval to the Master of the High Court and may thereafter only be amended with the consent of the plaintiff being had and obtained in the alternative by order of court;

5.7 Upon the death of the plaintiff the trust assets or money held on his behalf shall devolve on his legitimate heirs;

5.8 If more than one trustee is appointed, and there is a dispute between the trustees pertaining to any matter in connection with the investment or dissipation of the trust assets or money held on behalf of the plaintiff, the decision of the professional trustee shall prevail above the view of any person having a personal interest in trust in any manner whatsoever.

6. It is noted that attorney Marius Botha of Harvey Nortje Wagner Motimele Inc, Witbank has agreed to act as first trustee of the trust to be created and established on behalf of the plaintiff.

7. There is a contingency fee agreement concluded between the parties

BY ORDER OF COURT

Registrar

Counsel for the plaintiff:	T P Krüger SC	012 942 2220
Counsel for the defendant:	M Pienaar	082 338 0002