IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED.

27 September 2021

DATE SIGNATURE

CASE NO: 3473/2020

In the matter between:

A.RAE Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

KHWINANA AJ

Introduction

[1] The matter was set-down for an application for default judgment on the 19th OF November 2020. The summons was served on the defendant on the 21st of January 2020 and the defendant delivered a notice of intention to defend on the 14th of February 2020. The plaintiff delivered a notice of bar to the defendant's attorneys on the 19th of August 2020 and the defendant did not plead.

[2] The plaintiff applied for default judgment on the 26th of August 2020 which was served on the defendant on the 22nd of October 2020.

[3] The plaintiff claimed the following:-

Liability against the defendant at 100 %, Past and Future Loss of Income, General damages total being R4 498 407.00 and an undertaking for future medical expenses as far as they relate to the injuries sustained in the accident in terms of section 17(4) of the Act 56 of 1996.

Parties

[4] The plaintiff is Allan Rae identity number […], a major male and currently residing at […], […], Germiston, Gauteng Province.

[5] The defendant is the Road Accident Fund, a schedule 3A public entity, established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996, with its service office situated at 38 Ida Street, Menlo Park, Pretoria, Gauteng Province.

Merits

[6] The plaintiff was driving his motorcycle on the N3 highway in a Southernly direction near N17 split in Elandfontein area on 23 March 2019 at approximately 19h35. The plaintiff collided directly with one of the three vehicles directly in front of him and without warning. The plaintiff applied his brakes but was unable to avoid colliding with one vehicle. He fell off his motorcycle and a fourth vehicle behind him drove over him where he was lying helplessly in the road.

[7] He was transported with an ambulance to Union Hospital and then was transferred to Chris Hani Baragwanath Hospital because he did not have a medical aid. He stayed for two days and was transported in a special ambulance as he required a ventilator.

[8] It is submitted that the plaintiff could do nothing to avoid the accident and should receive 100 % of his proven damages.

Legal principle

[9] Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.[1]

[1] *Liebenberg v Road Accident Fund* (39831/2013) [2015] ZAGPPHC (27 February 2015)

[10] In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true.

[11] If the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. The plaintiff submits that the only version which can and should be considered by the Court at this stage is that of the plaintiff as it is the only version that is before Court and therefore admissible.

[12] It is trite that it is the duty of all users of the road at all times to keep a proper look-out so as to avoid colliding with other road users. To keep a proper look-out includes the obligation of a driver to look in his rear-view mirror from time to time. The frequency with which he should do so naturally depends on the circumstances of each case.

[13] *In casu* the plaintiff drove unreasonably, illegally and recklessly thus he was unable to stop his motor vehicle to the extent that he plunged into a motor vehicle. Counsel for the plaintiff submitted that there was nothing he could do

to prevent the accident. Therefore, the question of the Defendant's liability (merits) should be conceded by the Defendant.[2] In the case of ***Arnesen v Protea Assurance Co Ltd[3],*** the learned Fannin J stated at page 717 that:

> *"When a vehicle slows down almost to a stop in the middle of the road, for no apparent reason, and without any signal being noticeable, it must and certainly should, act as a warning to drivers of vehicles behind it that they should proceed with care.*"

[14] It is evident that the plaintiff drove at an excessive speed, failed to keep a proper look-out, did not have regard for other road users and he was the cause of the collision. He must take all reasonable steps that may be necessary to avoid colliding with another motor vehicle. The plaintiff fell off his bike due to the first collision. However, the insured driver that ran over him was also negligent in that he did not have regard for other road users, did not keep a safe following distance, drove at an excessive speed and did not keep a proper look-out.[4] The accident could have been avoided had he observed and kept a safe following distance.

[15] However, the conduct of the plaintiff cannot completely exonerate him from contributory fault, the issue is to what degree. It appears from the totality of the

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[2] *Sieborger v South African Railways and Harbours* 1961 (1) SA 498 (A)

[3] 1973 (1) SA 714 (N)

[4] *Orne-Gliemann v General Accident Fire & Life Assurance Corporation Lief* 1981 (1) SA 884 (Z) the learned Beck J at page 888 stated: *"There is no dearth of authority for the proposition that, before executing a right-hand turn, a motorist is under a duty to ensure that the turn can be executed without endangering, not only oncoming traffic, but following traffic as well."*

evidence therefore as weighed on a scale of preponderance of probabilities as well as dictates of logic, that the plaintiff's conduct too cannot be held to be free from blame. The plaintiff was also negligent in his conduct, and that such negligence contributed towards the said collision which invariably gave rise to a claim for damages to be reduced in accordance with the relevant provisions of the Apportionment of Damages Act, 1956.[5] In the case of ***JM Grove v The Road Accident Fund***[6] the learned Judge Tshiqi stated at paragraph [11]:

> "*Whether the wrongdoer should be liable for the consequences of his wrongful conduct entails an enquiry into whether the link between the act or omission and the harm is sufficiently close or direct for legal liability to ensue, or whether the harm is, as it is said 'too remote'."*

[16] It is trite law that with a rear-end collision the driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he can give an explanation indicating that he was not negligent. *In casu* the plaintiff is unable to give such explanation thus I conclude that he contributed to the accident. Had he not plunged into the insured motor vehicle he found in the middle of the road the motor vehicle that ran him over would not have found them there.

[17] The plaintiff sustained injuries as a result of the first and the second collision. The insured driver who ran him over failed to keep a proper look-out, he drove at an excessive speed and failed to have regard for other road users. It is therefore evident that but had it not been for the accident the plaintiff would not

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[5] *Liebenberg v Road Accident Fund* (29831/2013) [2015] ZAGPPHC 197 (27 February 2015)
[6] [2011] ZASCA 55

have sustained the injuries alluded to. However, the plaintiff was negligent and therefore must be compensated 75/25 % in his favour.

Injuries and sequelae

[18] Dr Ensli T a general practitioner compiled RAF 4, indicating blunt abnomal trauma, bladder injury. Mr Rae is no longer able to move around without a wheechair or a walking frame as a result of severe and devastating injuries he sustained to his left knee. Mr Rae has unsightly scars over the anterior abdominal wall, pelvis, right leg, both hips and the occipital region of his scalp. He is aware of the scars and attempts to hide them. Total impairment of the whole person=40 %.

[19] He has serious long-term Musculoskeletal impairment therefore qualifies for non-pecuniary damages. He will not be able to compete in an open market, he will be able to to perform computer work in a sedentary position and preferably at home. He has colostomy bag in situ. He has loss of movement in his left hip, left knee and left foot. He will benefit from future conservative and probably surgical treatment.

[20] Ms Kleynhans the Occupational Therapist opines that his pain limits his performance of certain activities over an extended period of time. The traumatic events and life changing events have a negative impact on the day to day functioning. He will not be suited for streneous work or manual work that exceeds his physical strength. The salary at the time of the accident was noted as R17 977.60 per month which was manually calculated to R215 977.20 per

annum. He was unable to return to his work and could not be on sick leave as he no longer had sick leave days.

[21] Dr Volkwyn the Reconstructive Surgeon recorded that WPI of 42 % and narrative test qualifies for general damges serious impairment and disfigurement. The plaintiff has suffered multiple injuries and still awaiting various sugeries. He is affected psychological and sexually. He has lost confidence and suffers post traumatic distress order. His work opportunities are slim.

[22] The Counselling Psychologist Karen Havenga notes that quality of life for the plaintiff deteriorated. The American Medical association Guidelines Chapter was used which revealed 20 % Psychiatric impairment rating scale 15 % mental and behavioural disorder WPI 15 % using the narrative test and constitute severe long-terms mental or long-term behavioural disturbance or disorder.

[23] The Industrial Psychologist Mr Beytel notes that:

Pre-accident potential**:** The plaintiff completed grade 10 in 1988. He was employed at Montana Spar when accident occurred on 23 March 2019 as a receiving manager on a fulltime basis. Collateral information was obtained from Mr Afeltra the Manager wherein it was noted that the plaintiff was a permanent employee who was healthy, competent and willing to work. It was further recorded that he had reached ceiling in his employment and would have retired as a manager. He opined that as long as he was healthy he would have remained employed and he has seen others stay until 70 years. The plaintiff

did not receive a 13th cheque however the company would give its employees a bonus if the company did well.

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But for the accident:

[24] The plaintiff would have remained employed until the age of 65 to 70 for as long as he was healthy.

Post-accident potential

[25] The plaintiff was unable to return to his previous employment. He was offered a job to work on a computer but did not have the skills thus did not take the job. The plaintiff is stuck in a wheelchair with a colostomy bag in situ. He has total loss to the age of 65 years. Mrs Beytel opines that normal contigencies be taken into account for eventualities.

[26] Counsel for the plaintiff referred me to plethora of caselaw and the matter that I wish to referto is that of ***Pestana v Road Accident Fund***[7] where the plaintiff sustained multiple lumbar spine fractures, injury to the thoracic aorta open fracture of right tibia, fracture of the stenum and rib bilateral lung contusions and traumatic haemathoraces, liver injury, facial fracures, fracured right calcaneus, concussion psychological and psychiatric sequelae with major depressive disorder, nasal fracture and injury to the cervical spine. Counsel for the plaintiff opines that the plaintiff should be awarded in excess of R1,300 000.00 regard being heard to the sequelae of the injuries in this matter.

[7] 2020 JDR 0358 (GP); *Zavale v Road Accident Fund* 2013 JDR 1952 (GSJ) award was R1 million

[27] The plaintiff has loaded vouchers in an effort to prove his past medical expenses however has indicated that the marked invoices are in relation to the accident which amounts are not consistent to that claimed. I have decided to calculate same however the particulars of claim reflect R300 000.00 as the amount claim which I have decided to award to the plaintiff.

Future medical expenses

[28] The plaintiff has sustained injuries as a result of the accident and it is trite law that an undertaking certificate in terms of section 17(4) will be awarded in relation to the said injuries.

Loss of earnings

[29] Mr Johan Sauer the actuary used a total loss of future earnings to calculate plaintiff's damages. He took into account the findings of other medical experts. The practice note records loss of past earnings was calculated at R318 706.00 and loss of future earnings R2 679 701.00. An undertaking for medical expenses for injuries sustained from this collision and general damages at R1 300 000.00 which amount totals to R4 298 407.00 and whereas the notice of intention to amend reflects the following:

29.1 Past Medical Expenses:	R 300 000.00
29.2 Future Medical expenses:	R 300 000.00
29.3 Past Loss of income:	R 268 606.00
29.4 Estimated Future loss of income:	R 2 524 086.00
29.5 Non-pecuniary loss(general damges):	R 800 000.00
Total	R4 192 692.00

[30] Based on the above factual disposition, as well as the views expressed by the experts, which were largely common cause, the pertinent question, arose as to what award would be fair and adequate compensation for the plaintiff in respect of both his loss of earnings and earning capacity.

[31] In ***Southern Insurance Association Ltd v Bailey NO***[8] at 114C-D, Nicholas JA said:

> *"In a case where the 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 'informed guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920.)*"

[32] It is trite law that no two cases are always similar since it was difficult to find a comparable matter that is in all fours in respect of the facts. Past decided comparable cases, although often useful, merely serve as guidelines. The need to adjudicate each case on its own particular merits was always present.

[8] 1984 (1) SA 98 (A) at 114

[33] It is now well-settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There is no hard and fast rule regarding contingency allowances. Koch in *The Quantum Yearbook* (2011) at 104 said:

> *"General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies."*

[34] The employment history of the plaintiff speaks volumes in his favour. It also evident that he had reached ceiling level in his career. For all the reasons *supra*, I have taken into account the medical evidence and the plaintiff's circumstances herein. However, I conclude that the plaintiff is entitled to what is fair and just being the sum of R2 000 000.00 for past and future loss of earnings.

General damages

[35] I now turn to the plaintiff's head of general damages. The purpose of an award for general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which he or she has been subjected as a result of the particular injuries that were sustained. Although the determination of an appropriate amount in this regard is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases.

[36] It is equally trite that in the determination of general damages it was required of the Court to exercise a wide discretion in order to award what it considered to be fair and adequate compensation, having regard to all the relevant facts and circumstances connected with the plaintiff, as well as the nature of the injuries sustained by him/her, the possible permanence thereof, and the severity and the impact on the claimant's lifestyle.[9]

[37] I am inclined to agree with Mosidi J[10] wherein he says there is no hard and fast rule in determination of application of previous decisions. I have considered all the circumstances and the medical evidence presented and I am satisfied that the plaintiff must be awarded general damages considering that his WPI has been recorded as 58 %, 40-42 %. Counsel for the plaintiff's heads of argument reflect a higher and different amount to the particulars of claim. I am unable to award an amount that has not been prayed. The plaintiff amended his particulars of claim but in relation to the general damages the amount has remained the same.

[38] I award the plaintiff's general damages in the sum of

R800 000.00 as full and final settlement. Counsel has filed a draft order which I have amended.

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[9] *Gwaxula v Road Accident Fund* (09/41896) [2013] ZAGPJHC 240 (25 September 2013)
[10] *Ibid*

[39] In the result, I grant the following order:

(a) Defendant is liable for 75 % of the plaintiff's proven or agreed damages.

(b) Past Medical Expenses R300 000.00;

(c) Undertaking Certificate in terms of Section 17(4);

(d) Past and Future Loss of earnings R2 792 692.00;

(e) General Damages R800 000.00

(f) Costs of Suit on party and party scale

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E.N.B. KHWINANA

ACTING JUDGE OF GAUTENG DIVISION, PRETORIA

CASE NUMBER: 3473/2020

HEARD ON: 8 JUNE 2021

ON BEHALF OF THE PLAINTIFF: Adv. P. Van Der Schyf

INSTRUCTED BY: Slabbert & Slabbert Attorneys

On behalf of Defendant: No appearance

ON BEHALF OF THE DEFENDANT: NO APPEARANCE

DATE OF JUDGMENT: 27 September 2021

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

Case No.: 3473/2020

On 27 September 2021 Before Honourable Justice Khwinana AJ

In the matter of:

A RAE Plaintiff

and

ROAD ACCIDENT FUND Defendant

DRAFT ORDER

AFTER READING THE PAPERS AND HEARING COUNSEL THE FOLLOWING ORDER IS MADE:

1. The Defendant is liable to pay 75% (SEVENTY FIVE PERCENT) of the proven or agreed damages of the Plaintiff with regards to the merits of the matter. The defendant is ordered to pay the plaintiff an amount of R2 919 519.00 (TWO MILLION NINE HUNDRED AND NINETEEN THOUSAND FIVE HUNDRED AND NINETEEN) as a full and final settlement on the plaintiff's claim calculated as follows:
   Past Medical Expenses R 300 000.00;
   Past and Future Loss of earnings R 2 792 692.00;
   General Damages R 800 000.00 less 75% (SEVENTY FIVE PERCENT) payable within 180 days of this order failing which interest at the prescribed rate will be charged.

2. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on 23 March 2019. The aforesaid undertaking is limited to 75 %.

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

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale for 08 June 2021.

   4.1 In the event that the costs are not agreed:

   4.2.1. the Plaintiff shall serve a notice of taxation on the Defendant's attorneys on record.

   4.2.2. The Plaintiff shall allow the Defendant 14 (fourteen) Court days from date of allocatur to make payment of the taxed costs.

   4.2.3. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 7 % per annum on the taxed or agreed costs from date of allocatur to date of final payment.

5. The amounts referred to in paragraphs 2 & 4 above will be paid to the Plaintiff's attorneys, Slabbert & Slabbert Attorneys, by direct transfer into their trust account, the details of which are as follows:
   Account holder: SLABBERT ATTORNEYS INC
   Bank: FNB Branch
   Code: 250655
   Account no: […]
   Ref: TPC/0186

BY COURT

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REGISTRAR