REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

04/11/2021
DATE

SIGNATURE

CASE NO: 8989/2017

In the matter between:-

JOHN PETER GRAHAN Plaintiff

and

ROAD ACCIDENT FUND Defendant.

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 04 November 2021.

JUDGMENT

SKOSANA AJ

[1] This matter concerns a claim by the plaintiff against the Road Accident Fund, the defendant for damages arising out of injuries sustained as a result of a motor vehicle collision which occurred on 27 August 2015. The plaintiff is currently about 45 years of age. The issue of liability (merits) was settled between the parties on the basis that the defendant is liable to compensate the plaintiff for 90% of his damages. What remains for determination is the quantum of damages under the following heads:

1.1 Hospital, medical and related expenditure;

1.2 Future medical expenses;

1.3 Loss of income and earning capacity; and

1.4 General damages.

Past hospital, medical and related expenditure

[2] Under this heading, the plaintiff claimed an amount of R1 067 398-91. During the course of the present proceedings, the defendant offered an amount of R943 505-39 in this regard. As a solution to this, the plaintiff proposed that this offer be made an order of court on the basis that such amount is regarded as

interim payment subject to proof of a balance of the claim by the plaintiff at a later stage.

[3] In my view, the damages under past medical, hospital and related expenses constitute patrimonial loss which can be proved with a good measure of exactitude, i.e. by producing invoices or receipts and/or any documentary proof of such expenditure. It was also explained by counsel for the plaintiff that the difference between the plaintiff's claim and the offered amount is due to the defendant being skeptical of a certain portion of the claim relating to hospital treatment. The defendant apparently disputes whether such portion of the claim is related to the injuries sustained from the accident. That is capable of being resolved separately at a later stage.

[4] For these reasons, I am in agreement with the plaintiff that the disputed portion of the claim can be severed from the agreed one and dealt with at a later stage. It is therefore my view that the offer of R 943 505-39 may be regarded as an interim payment and the balance of the claim under this heading be postponed *sine die*. There is no perceptible prejudice to the defendant in this approach save for the loss of a bargaining tool, which should not form part of this judicial process.

Future medical expenses

[5] The damages under this rubric have been covered through the agreement to issue a section 17(4) certificate for 90% of such damages. Nothing further need be said in this regard.

Loss of income and earning capacity

[6] At the commencement of the proceedings, I was requested by the plaintiff to make an order in terms of Rule 38(2) of the Uniform Rules in relation to the evidence of the plaintiff's expert witnesses and their reports. Such request, which is contained in a substantive application filed by the plaintiff, was not opposed by the defendant and therefore such order was accordingly made. In effect therefore, the reports of the plaintiff's experts have been admitted into evidence in these proceedings. There was also no request on the part of the defendant that any of such expert witnesses be called to appear in person for purposes of cross-examination or otherwise.

[7] In this regard, the plaintiff filed reports of ten expert witnesses. The plaintiff's counsel, Mr Grobler, summarized the reports to me but particularly took me through two reports by the plaintiff's Industrial Psychologist, Ms Noble dated 31 January 2018 and 4 August 2021, respectively. The essence of such reports are the following:

7.1 That the plaintiff was employed as a General Manager at Wimpy Bela-Bela, which is owned by his wife. He used to draw a salary of R20 000-00 as in 2016 and R25 500-00 per month as in August 2017 and leads a staff component of 37 employees.

7.2 According to assessments made by various other plaintiff's experts, the plaintiff cannot continue to do the work that he used to do. The plaintiff used to be good with the business and attended the restaurant every day but could not do so post the collision.

7.3 The plaintiff has had to rely on an office assistant after the accident. Such office assistant is no longer employed by the Wimpy and therefore there is no longer any support for the plaintiff.

7.4 It is also reported that the plaintiff at times cannot work for more than 2 hours per day and can hardly concentrate for more than an hour in doing administrative work.

7.5 The Industrial Psychologist concludes that the plaintiff has become totally unemployable as a result of the accident in relation to his current job but has been kept in employment purely because it is his wife's business. The plaintiff would probably have continued working as a general manager until a normal retirement age of 65 and would have

received yearly salary increases accordingly. The plaintiff will in all probability not be able to secure other employment in the open labour market should he ever leave the employ of his wife.

7.6 It was also reported that due to the COVID-19 pandemic, the chances of the Wimpy business surviving are 50%. This is evident from the challenges that occurred in 2020 and 2021 where the salary of the plaintiff had to be reduced to between R10 000-00 and R15 000-00 and when he did not receive any salary for certain months as well as the retrenchment of staff.

7.7 The plaintiff's salary increased to an amount of R30 000-00 per month in July 2019 as apparent from the IRP5 documentation for that financial year.

[8] On the basis of the expert reports referred to above, the plaintiff's actuary, Mr Whittaker produced 3 scenarios in regard to loss of income and earning capacity of the plaintiff. The first scenario is based on a contention that the plaintiff has become unemployable and only remained in employment on the basis of the fact that the employer is his wife. His argument was premised on the case of ***Fulton v Road Accident Fund***[1], the principle enunciated thereat being that the income received in such circumstances constitutes *ex gratia* payment which should not be deducted from the loss of income. The other alternative

[1] 2012 (3) SA 255 (GS).

scenarios drawn by the Actuary live out of account the principle laid down in the ***Fulton*** case.

[9] In my view, the **Fulton** principle does find application in the present case. The plaintiff's salary is paid evidently out of an act of benevolence on the part of his wife and therefore such payment constitutes *res inter alios acta* which cannot be taken into account when his damages for loss of income are quantified. The Wimpy will still have to find someone to assist the plaintiff (if not to do most of his tasks) as the office manager used to do. The plaintiff does not provide services which are commensurate with his remuneration. This parallels the facts of the ***Fulton*** case where school had to incur additional costs in hiring staff that could perform part of the duties that Ms Fulton could no longer do. I am therefore inclined to accept the first scenario provided by the Actuary except for the contingency percentage deduction applied therein.

[10] As far as the contingency is concerned, I am of the view that a higher contingency of 25% deduction should apply. Although the current salary should not be taken into account on the basis of the **Fulton** principle, it is also a fact that the plaintiff may continue to receive his salary until retirement age of 65 or beyond. The fact that the Wimpy business has survived the extreme period of the COVID-19 regression ought to be an indication of its reliability and likelihood to flourish when things return to normality. The business also survived while it was

being led by the plaintiff as general manager, though with a reduced salary and with the imperative assistance of the office assistant.

[11] In the peculiar circumstances of this case, I find the contingency deduction of 25% as appropriate.

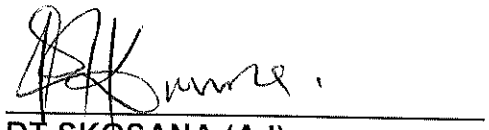
General damages

[12] There is no gainsaying the fact that the plaintiff was seriously injured. The defendant never disputed that the plaintiff suffered such serious injuries including head injuries. Dr Nel, the Psychiatrist, found that the plaintiff has sustained moderate to serious brain injury. Mr Grobler for the plaintiff provided a series of comparable cases, all pointing to the fact that in the present circumstances an award of R1 250 000-00 for general damages is fair and reasonable.

[13] The defendant could neither point to empirical evidence or comparable cases to negate the plaintiff's amount of claim under this heading.

[14] In the circumstances, I find the claim of R1 250 000-00 for general damages as fair and reasonable in the circumstances.

[15] In the premises, the draft order which has been amended in accordance with my findings above and which I shall mark X, is hereby made an order of this court.



DT SKOSANA (AJ)
Acting Judge of the High Court
Pretoria

Date of hearing: 03 November 2021

Date of judgment: 04 November 2021

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