

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 60209/2016

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
21 APRIL 2022

In the matter between:

RYAN ERIC ALDCORN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **21 APRIL 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The Plaintiff, Mr Ryan Eric Aldcorn, a 51 year old self-employed male from Durbanville, Cape Town was involved in a motor vehicle accident on 23 April 2015 while travelling on his motorcycle on the R45 Franschhoek Road, Franschhoek,

Cape Town. The details of the motor vehicle or its driver still remain unknown. As a result of the accident, the Plaintiff sustained the following injuries: left open femur fracture; right hand fracture; pelvic fracture; chest injuries; laceration to right leg and fractured right distal radius. He blamed the negligence of the unidentified driver of the unidentified motor vehicle (the insured driver) for the accident. On 29 July 2016 he caused summons to be issued against the Road Accident Fund (RAF) to recover the damages he suffered due to the injuries sustained in the accident and/or their *sequelae*. The claim amount was initially in the amount of R760 000, but through a subsequent amendment the claim amount increased to over R4 million. RAF defended the action and denied liability, whilst also pleading for apportionment of the damages suffered by the Plaintiff, due to alleged contributory negligence on his part.

[2] This matter came before me on trial on 26 November 2021, when Mr J Bam virtually appeared for the Plaintiff. There was no appearance for RAF. Proof of service (by hand and email) of the notice of set down directly on RAF has been filed, as far back as September 2021. As it appears to be the situation currently, RAF appears to have parted ways with its attorneys of record a while back. Counsel also alerted me to the fact that RAF's defence was struck out in terms of the order of this Division granted by Bam, AJ on 23 August 2021. The matter, thenceforth, proceeded on a default judgment basis. This judgment was reserved after I listened to brief oral submissions by counsel for the Plaintiff, who had also gratefully filed written submissions.

Evidence and submissions on behalf of the Plaintiff

[3] The issues to be determined in this matter are only those relating to the Plaintiff's loss of earnings or earning capacity and past medical expenses. I hasten to point out that there was no evidence led on the Plaintiff's past medical expenses. Issues to do with the merits or liability and general damages were disposed of in terms of another order of this Division *per* Raulinga J on 5 February 2019. In terms of this order, RAF was held liable for 100% of the proven or agreed damages of the Plaintiff and for payment in the amount of R700 000 in respect of the general damages. Also, RAF was ordered to make interim payment in the amount of R471

732 in respect of the Plaintiff's loss of earnings and to furnish the Plaintiff with an undertaking in terms of section 17(4)(a)¹ of RAF Act.

[4] Apart from the settlement amount stated above, the Plaintiff is still claiming the following amounts as damages resulting from the accident: R1 294 438.00 for past loss of income or earnings and R3 208 324.00 for future loss of income and, therefore, a total of R4 502 762.00. In respect of future medical expenses the Plaintiff seeks that RAF be directed to furnish an undertaking in terms of the RAF Act, although this aspect appears to have been finalised in terms of the Court order referred to above.

[5] The Plaintiff filed reports by the following experts: Dr Engelbrecht (orthopaedic surgeon); Dr Fredericks (disability and impairment assessor); Ms N September (an occupational therapist); Mr PD Zeeman (a chartered accountant); Ms T Talmud (an industrial psychologist), and Mr G Jacobson (an actuary). These experts deposed to affidavits in terms of which they confirmed their qualifications and the contents of their medico-legal reports filed on behalf of the Plaintiff.

[6] Mr Bam appearing at the trial for the Plaintiff made the following submissions regarding the reports filed on behalf of RAF. RAF has filed reports by an orthopaedic surgeon, an occupational therapist and an industrial psychologist. Consequent to the orthopaedic report, a joint minute was compiled by the orthopaedic surgeons employed on both sides. Mr Bam urged this Court to disregard the findings and conclusions by the experts retained by RAF as "*inadmissible hearsay evidence*" wherever they contradict those of the experts retained by the Plaintiff. The reason for this, Mr Bam further submitted, is the absence of confirmatory affidavits by RAF's experts. I partially agree with Mr Bam regarding the implication of the absence of confirmatory affidavits for RAF's medico-legal reports. But I respectfully disagree

¹ Section 17(4)(a) of the RAF Act reads as follows: "(4) Where a claim for compensation under subsection (1)(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or (ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d), in accordance with the tariff contemplated in subsection (4B)".

with him when he says the reports by RAF's experts should only be disregarded when their contents contradict those filed on behalf of his client, the Plaintiff. This would amount to some unjustifiable nit-picking. The reports filed on behalf of RAF stand to be disregarded in their entirety for the lack of evidential value, as correctly submitted by counsel for the Plaintiff. The same would apply to the joint minutes. For there are no admissible minutes if the views of the experts employed by RAF do not constitute evidence.

Dr Piet Engelbrecht (orthopaedic surgeon)

[7] Dr Piet Engelbrecht, the orthopaedic surgeon, appears to have examined the Plaintiff on 10 February 2017. He reported that the Plaintiff was a motorcyclist and had his helmet and an appropriate safety gear on when he was involved in the accident. He further stated that the Plaintiff "lost control of the motorcycle which ended up in a gully". The Plaintiff, reportedly, had a loss of memory of approximately 20 minutes prior to the accident and up to approximately two weeks after the accident. The Plaintiff was taken by ambulance initially to Paarl hospital, stabilised and transferred on the same day to the Tygerberg hospital, where he was hospitalised for a month, from 23 April 2015 until 25 May 2015. His Glasgow Coma Scale or GCS score stood at 15/15 upon admission at the hospital. But the Plaintiff himself indicated loss of memory upon admission at the hospital. The Plaintiff, thereafter, received further rehabilitation care for a period of about six weeks.

[8] Prior to the accident, the Plaintiff was self-employed as a construction and mobility builder. His job involved the modelling of houses to accommodate the elderly and frail persons requiring home-care. Yet, prior to that the Plaintiff worked for General Motors in the United States of America until 2012, when he relocated back to South Africa to commence his own construction business. He is a qualified chemical or mechanical engineer and has an N5 mechanical engineer certificate, as well as a national diploma in production management. However, at the time of assessment by Dr Engelbrecht, the Plaintiff was unemployed and acting as a caregiver of his paraplegic life partner or girlfriend. She was also injured in a motor vehicle accident in 2006.

[9] The Plaintiff previously injured himself with an electric saw which resulted in the amputation of the tip of his left small finger in 2002. Other previous ailments or medical procedures include a tonsillectomy and a healed ankle sprain, four months prior to the material accident. Also, he was previously involved in motor vehicle accidents in 1988 and 1991, although – according to him - no injuries were sustained.

[10] When he attended at Dr Engelbrecht for examination, the Plaintiff had a number of complaints including pain due to the injuries sustained during the accident. He was using a stick to walk and the movement of his right wrist, right hand and fingers was impaired. He stated that his memory was good and did not suffer from headaches, although he gets tired during the day and has to lie down in the afternoon. As already stated, his walking ability was with the aid of a walking stick or cane for approximately six minutes and he was able to stand for a few minutes.

[11] Dr Engelbrecht further expressed the following opinions regarding future prospects of the Plaintiff. He opined that when considering the Plaintiff's orthopaedic injuries, he has suffered a permanent loss of work capacity and even with further effective medical treatment, the Plaintiff maximally would be able to do administrative to supervisory type of tasks on occasion light physical type of duties. He concluded that the Plaintiff will not be able to take up his business again as a building contractor.

Ms Nokhuthula September (occupational therapist)

[12] Ms Nokhuthula September, an occupational therapist, assessed the Plaintiff on 6 February 2017. She reported that the Plaintiff completed the mechanical engineering degree he commenced in 1994 with the University of South Africa in 1998 with the Michigan University in the USA. Between 1996 and 2002 he worked in various capacities in USA and London. In 2003, whilst still in the USA, he obtained a licence to operate his own construction company. He returned to South Africa in 2010 following his brother's death and registered his own private construction company.

[13] During his assessment by Ms September, the Plaintiff's main complaints were lower leg ache and pain around the pelvic area. He was also easily fatigued by the end of the physical evaluation. He still walked with "a left legged limp" and with support from a walking stick, although he is able to walk slowly unaided, but still with the left limping gait.

[14] Ms September concluded that the Plaintiff's post-accident psychological and cognitive difficulties compromise his vocational pursuits and he needs psycho-therapeutic management. She also opined that his deficits have depleted his physical based competence to work apart from sedentary to occasional light work. She concluded that the reformation is unlikely as the Plaintiff's extensive work experience is in construction which requires the use of hands for erecting and manufacturing of structures. Further, that his incompetency in the open labour market is compounded by affective dysfunction and cognitive fallouts. He is unlikely to compete for sedentary to light occupations and he will remain functionally unemployable.

[15] Ms September made a number of recommendations regarding intervention by appropriately qualified experts; home assistance; transport, assistive devices that could be beneficial to the Plaintiff.

[16] Ms September rendered an *addendum* report dated 28 September 2020. In the addendum report she indicated that the Plaintiff quit his role as a caregiver to his partner. She attributed this decision to possible *burn-out syndrome* and immobility to mid- to long-term demands as a caregiver, which are occasionally heavy in nature. She concluded that when consideration is given to the fact that the Plaintiff had always competed in medium to heavy duties in production engineering and since 2010 in the construction business, mainly renovating residential and commercial buildings, it is reasonable that post-accident a re-entry in the open labour market remains unlikely. Further, that his new interest in religious or pastoral counselling is unlikely to bring the Plaintiff any income, as he has no intention of charging for his services. She repeated her other conclusions in her main report, including that the Plaintiff is "functionally unemployable".

Mr PD Zeeman (chartered accountant (SA))

[17] Mr PD Zeeman, a chartered accountant (SA), compiled a report dated 21 June 2017 on instructions from the Plaintiff's attorneys. He confirmed that he had been requested to "investigate the available documentation and advice... of [his] findings regarding plaintiff's earnings, pre-and post-accident, and any losses suffered by him". He also reported that he was furnished with documentation or information including copies of bank statements (for the period 25 October 2013 to 25 January 2017); the so-called "summary of accounts" (for the period ranging from September 2013 to July 2015) prepared by the Plaintiff, and the Plaintiff's particulars of claim. Mr Zeeman lamented the fact that no annual financial statements and the resultant tax assessments concerning the Plaintiff's business pre-and post-accident have been furnished, which documents or information are normally used for preparation of the report of the type required from him. He appeared to be dissatisfied with the quality and level of information available in terms of the so-called "summary of accounts", although he had to utilise this information for purposes of his report or opinion.

[18] Against the background of what appears immediately above, Mr Zeeman made calculations along the following lines. He accepted that the amount of R223 085, before tax, as a fair representation of the Plaintiff's annual earnings, but for the accident. Post-accident, he stated as the Plaintiff's loss of earnings the amount of R515 129, before tax, as at 30 June 2017. Ultimately, Mr Zeeman recommended that for purposes of the actuarial calculation of the Plaintiff's earnings, but for the accident, for the 2017 calendar year use be made of the amount of R225 410, before tax. He urged the Court to apply higher than normal contingencies due to the nature of the accounting information made available and his "robust approach".

[19] Three years later, Mr Zeeman furnished an *addendum* report to update his earlier report on the basis of the Plaintiff's income earning activities since 2017. He also considered the opinions expressed by the industrial psychologist and other information. He stated that the Plaintiff's post-accident loss of earnings up to 31 December 2020 was in the amount of R1 521 430, before tax. He recommended, for purposes of the actuarial calculation of the Plaintiff's future loss of earnings or earning capacity, that the figure of R31 288, before tax, for the 2020 calendar year be utilised for the Plaintiff's calculated "but for the accident earnings".

Ms Talia Talmud (industrial psychologist)

[20] Ms Talia Talmud, an industrial psychologist, interviewed the Plaintiff on 9 February 2017 and compiled a report dated 14 December 2018. The purpose of her report was stated as “to provide an opinion regarding [the Plaintiff’s] vocational potential” and “a basis for his potential loss of income as a result of the injuries he sustained in the accident on 23 April 2015”.

[21] Ms Talmud noted the opinion of Ms September, the occupational therapist, that the Plaintiff is not suited to perform his pre-morbid duties. Due to the fact that the Plaintiff’s business failed as a result of the intervention of the accident and further that his attempts to restart same after the accident were to no avail, Ms Talmud attributed the accident to be the sole cause of the Plaintiff’s past loss of earnings. After considering the opinions of the other experts and her own assessment of the Plaintiff and his prospects, Ms Talmud expressed the following opinions. The Plaintiff would have expanded his business further and therefore his earnings would have progressed until he reached his career ceiling by the age of 50, and after that he would have been earning in line with the basic salary at the Paterson C3/C4 median level. Thereafter, the Plaintiff would have earned inflationary increases until retirement age of 65. She recommended the application of appropriate pre-morbid contingency to cater for the many unknown variables regarding the success of the running of a business.

[22] Regarding the Plaintiff’s future loss of earnings, Ms Talmud, expressed the following opinions. She recommended that the Plaintiff should immediately cease to act or work as a caregiver for his girlfriend or partner, which was paid for by RAF, as he’s not suited to perform this work. She opined that the Plaintiff has been rendered practically unemployable in the open labour market, when among others, consideration is given to his age, unsuitability to run his own business since the accident; his suitability to sedentary to occasional light work (which according to Ms September, the occupational therapist, is an unlikely scenario) and his psychological and cognitive limitations.

[23] Ms Talmud furnished an *addendum* report dated 1 October 2020 upon request from the Plaintiff's attorneys. This was almost 2 years after her main report (dated 14 December 2018). She was furnished with additional information including the *addendum* reports by Ms September, the occupational therapist, and Mr Zeeman, the chartered accountant. She also received a letter from the Plaintiff indicating that he has undergone a number of medical procedures or operations from 2015 onwards. Ms Talmud added an alternative to her findings regarding the Plaintiff's pre-morbid prospects that had he re-entered the formal labour market he would have been able to progress to reach his career ceiling at the age of 55, at which point he would have earned an annual guaranteed package at Paterson C3/C4 median level and, thereafter, being entitled to inflationary increases until retirement at the age of 65. Regarding the Plaintiff's post-morbid career progression, Ms Talmud reiterated her opinion in the main report.

Mr Brendan Harris & R Immermann (Actuaries)

[24] Mr Brendan Harris and R Immermann, the actuaries from Gerard Jacobson actuaries, compiled the material actuarial reports. The main report by Mr Harris is dated 7 December 2018 and Mr or Ms Immerman provided an update on 14 June 2021. There were other *addendum* reports in between these two reports.

[25] Naturally, the actuarial calculations were in accordance with the postulation by Ms Talmud, the industrial psychologist, and her postulated two scenarios or basis for the Plaintiff's pre-morbid earnings, as included in the findings and conclusions of Mr Zeeman, the chartered accountant.

[26] Basis I is to the effect that the Plaintiff would have continued working in his pre-morbid capacity and, therefore, would suffer a net loss in the amount of R3 786 681. This figure is reduced to R3 730 928 to accommodate the statutory limitation or cap in terms of the RAF Amendment act 19 of 2005. Basis II postulated that the Plaintiff would have re-entered the formal labour market with his loss estimated in the amount of R6 054 552, reduced to accommodate the statutory limit to R4 502 762.

[27] The relevant experts were alive to the application of contingencies to the suggested figures. Counsel for the Plaintiff (regarding the application of contingencies) referred the Court to the holding in the decision of this Division in *Phalane v Road Accident Fund*² that the consideration of a claimant's circumstances, age, and the findings and conclusions of the various experts. He further submitted that the application of 5%/5% contingency deductions to the past loss scenarios (both for Basis I and Basis II) and 10% contingency deduction to the future loss scenario (for both Basis I and Basis II) to be reasonable and fair. Further, counsel ably reminded the Court of some of the principles applicable to the application of contingencies in delictual claims.³ But yet, there are no fixed rules as regards general contingencies although there is authority for the utilisation of the so-called "sliding scale" contingencies (i.e. Yz% per year to retirement age (i.e. 25% for a child, 20% for a youth and 10% in the middle age), and normal contingencies (i.e. in terms of which RAF usually agrees to the deduction of 5% for past loss and 15% for future loss).⁴ Also, counsel for the Plaintiff submitted that the Court should consider arriving at the Plaintiff's loss of earnings by a calculation which involves the average between Basis I and Basis II.

Conclusion

[28] I have considered the facts of this matter as represented by the circumstances (both pre- and post-morbid) of the Plaintiff with regard to the accident. I agree with the views particularly expressed by Ms September, the occupational therapist, and Ms Talmud, the industrial psychologist, that the Plaintiff is "functionally unemployable".

[29] Regarding the two basis or scenarios postulated in respect of the Plaintiff's future prospects, I consider the most probable basis or scenario to be Basis I to the effect that the Plaintiff would have continued working in his pre-morbid capacity, rather than that the Plaintiff would have re-entered the formal labour market. I will use the suggested figures subject to what I say next.

² *Phalane v Road Accident Fund* (48112/2014) [2017] ZAGPPHC 759 (7 November 2017).

³ *Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 965G-H and *AA Mutual Ins Co v Van Jaarsveld* reported in Corbett & Buchanan, *The Quantum of Damages*, Vol II 360.

⁴ Koch, R. 2017. *Quantum Yearbook*, p 126.

[30] I agree with the submissions by counsel, as supported by the legal authorities, regarding the application of contingencies. However, I respectfully part ways with counsel regarding the percentages of the contingencies to be applied in this matter. I have already accepted that the Plaintiff is “functionally unemployable”. I also appreciate that he is of a relatively advanced age. But I hold the view that the Plaintiff’s available academic and other qualifications, as well as vast international work experience do not totally or confidently exclude the likelihood of him utilising same to derive some form of income. This is not the same as what the Court was urged upon in terms of Basis II. Without much ado, I would apply a slightly higher contingency to the future loss of earnings, being 15% as opposed to the 10% suggested.

[31] The calculation of the Plaintiff’s future loss of earnings will be as follows: value of income but for the accident at the estimated amount of R3 052 572.00, less 15% contingency deduction in the amount of R457 885. 80 equates to the net future loss in the amount of R2 594 686. 20. I will slightly reduce this figure to the amount of R2 550 000 in order to represent the statutory limitation (also applied by the actuary) in order to not dilute the higher contingency deduction I chose to apply. I find that this approach and amount are fair and appropriate under the circumstances of this matter. My arrival at this figure may not carry with it any laudable or scientific accuracy, but I consider the amount of R2 550 000, in and of itself, to constitute a fair and adequate compensation for the loss of earnings or earning capacity suffered by the Plaintiff. Therefore, I will grant an award in the amount of R3 622 653 (i.e. R2 550 000 for future loss + R1 072 653 for past loss).

[32] Obviously the amount of R3 622 653 ought to be further reduced by the amount of R471 732 already advanced as interim payment to the Plaintiff. Therefore, the final amount to be awarded will be R3 150 921. Costs will follow this outcome as fully set out below.

Order

[33] In the premises, I make the order, that:

a) the Defendant pays to the Plaintiff an amount of R3 150 921 (three million one hundred and fifty thousand nine hundred and twenty one rand) in respect of the Plaintiff's claim for loss of earnings or earning capacity;

b) the amount in a) hereof shall be paid into the Plaintiff's Attorneys trust account with the following details:

Account Holder: Ehlers Attorneys

Bank Name: FNB

Branch Code: 261550

Account Number: [...]

c) in the event of either of the amount in a) and e) hereof not being paid timeously, the Defendant shall be liable for interest on the amount at the rate, as prescribed by the government gazette, calculated from 180 calendar days after the date of the order or the date of *allocatur*, whichever is applicable to date of payment;

d) the Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on the High Court scale, subject to the discretion of the taxing master, which costs will include, but will not be limited to the following:

i) the reasonable taxed fees for consultation with the experts mentioned below, together with delivery of expert bundles including travelling and time spent travelling to deliver such bundles, preparation for trial, qualifying and reservation fees (if any and on proof thereof), including the costs of all consultations (inclusive of telephonic consultations) with counsel and/or Plaintiff's attorney and the costs of all consultations between the Plaintiff's and Defendant's experts, as well as costs of the reports, addendum reports, joint minutes and addendum joint minutes and full day fees for court attendance (if at Court) of the following experts:

1. Dr Engelbrecht (Orthopaedic Surgeon);
2. Dr Potgieter (Plastic Surgeon);
3. Dr Fredericks (Disability and Impairment Assessor);

4. Ms N September (Occupational Therapist);
5. Mr P D Zeeman (Chartered Accountant);
6. Ms T Talmud (Industrial Psychologist), and
7. Mr GW Jacobson (Actuary).

ii) the costs for accommodation and transportation (as per the prescribed AA rates) of the injured as well as a family member, to the medico-legal examination(s) arranged by Plaintiff and the Defendant (if any);

iii) the costs for the Plaintiff's attorney travelling to (as per the prescribed AA rates) and spending time travelling to pre-trial conferences and attendance at pre-trial conferences by the Plaintiff's attorney;

iv) the costs for preparation of Plaintiffs bundles of documents for trial purposes, as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles and uploading same onto CaseLines;

v) the costs for preparation of Plaintiffs bundles of documents for experts, as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles;

vi) the costs of Adv J Bam briefed and appearing for trial, including but not limited to preparation for trial; consultations with Plaintiff's Attorney in respect of preparation for trial; drafting heads of argument, and for court appearances on 22 & 23 October 2020, 25 August 2021 and 26 November 2021;

vii) costs for all affidavits completed by the listed medico-legal experts in d)(i)1-7 hereof in order for the Plaintiff to proceed on default judgment basis.

e) the Defendant is ordered to pay the Plaintiffs taxed and/or agreed party and party costs within 14 days from the date upon which the accounts are taxed by the taxing master and/or agreed between the parties;

f) it is noted that there is a contingency fee agreement signed by the Plaintiff, which appears to be valid.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : 26 November 2021

Date of Judgment : 21 April 2022

Appearances:

For the Plaintiff : Mr J Bam

Instructed by : Ehlers Attorneys, Pretoria

For the Defendant : No appearance