

REPUBLIC OF SOUTH AFRICA

Case Number: 60125/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 27 September 2022

SIGNATURE: JANSE VAN NIEUWENHUIZEN J

In the matter between:

TALENT VILAKAZI

and

ROAD ACCIDENT FUND

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The plaintiff claims damages that he suffered due to injuries he sustained in a motor vehicle collision that occurred on 2 August 2019 at approximately 5:25 on the R456, Secunda Road.
- [2] The trial proceeded in respect of both the merits and quantum of the plaintiff's claim.

Plaintiff

Defendant

Merits

[3] It is common cause between the parties that the accident occurred on the date, time and place as alleged by the plaintiff. The dispute between the parties revolves around the issue of negligence.

Evidence

- [4] The only witness in respect of the manner in which the accident occurred was the plaintiff. The plaintiff testified that he was on his way to work on the morning of the incident. There was a lot of mist and visibility was poor. The plaintiff stated that he travelled at 60 k/h when he saw headlights in front of him. Shortly after seeing the headlights, he saw a trailer on the hood of his car.
- [5] It appeared afterwards that a truck entered the road from his left-hand side and turned across his lane of travel. The truck had two trailers and it was the second trailer that ended up on the hood of the plaintiff's motor vehicle.
- [6] The plaintiff testified that he has been travelling the same route for approximately 10 to 12 years and that he is aware of a poultry farm that is situated on the left-hand side of the road. Normally the trucks conveying goods would depart between 8:00 and 10:00 and a person or lights would be present to warn motorists that a truck will be entering the road. On the morning in question there was no person or lights to warn motorists that the truck was turning into the road.

- [7] The trailers, furthermore, did not have reflective tape and due to the mist, the trailers were not visible prior to the impact. The plaintiff testified that there was simply no time to take any steps to prevent the collusion from occurring.
- [8] During cross-examination it was put to the plaintiff that he did not see the trailers because he was travelling at a speed that was too high in the prevailing circumstances. The plaintiff denied the allegation and reiterated that, due to the heavy mist, he travelled at a reduced speed of only 60 km/h.

Submissions and discussion

- [9] Mr Zidel SC, counsel for the plaintiff, with reference to *inter alia Woods v* Administrator Transvaal 1960 (1) SA 331 T, submitted that a driver's fundamental duty when crossing a main road was to keep a proper lookout and to ensure and satisfy himself that it was safe to cross without causing harm to others.
- [10] In *casu* the insured driver executed a right-hand turn being fully aware that his manoeuvre would cause a complete obstruction of the road. Having regard to the heavy mist that was present, the insured driver executed the turn without keeping a proper lookout and without satisfying himself that it was safe to do so.
- [11] I agree with Mr Zidel. The plaintiff testified that visibility was limited on the day in question and that he only saw the headlights of the truck prior to colliding with the second trailer. This would entail that the insured driver could not properly have observed vehicles approaching from the opposite direction. The insured driver should have appreciated the fact that the available visibility had

to be sufficient to enable him to clear the truck and both trailers from the lane of oncoming traffic.

- [12] The insured driver should have foreseen the reasonable possibility that his conduct could injure another person and should have taken steps to guard against such an occurrence. This he failed to do.
- [13] In the result, I am satisfied that his conduct established the requisite negligence for delictual liability. [See: *Kruger v Coetzee* 1966 (2) SA 428 AD)]
- [14] Mr Sekgotha, counsel for the defendant, did not seriously challenge the aforesaid conclusion, but submitted that the plaintiff was also negligent and that his negligence contributed to the collision. Mr Sekgotha, *inter alia*, relied on *Smith v Road Accident Fund* [2004] 4 All SA 579 E, in which an accident occurred under similar circumstances. The driver of the vehicle ("the deceased") that collided with the truck that obstructed the roadway ("the insured vehicle"), could not apply brakes timeously or at all and hit the insured vehicle head-on. The court held that the deceased was, in the circumstances, negligent to some degree, but that it was not necessary to make a finding as to the percentage of the deceased's negligence, because it was a dependant claim.
- [15] Mr Sekgotha submitted that the speed at which the plaintiff was driving, to wit 60 km/h, was in the prevailing weather conditions too high. The aforesaid submission is, according to Mr Sekgotha, born out by the fact that the plaintiff only noticed the second trailer when the trailer was practically on the bonnet of his car. I agree with Mr Sekgotha. Had the plaintiff driven at a speed that would have enabled him to notice any obstruction in the road timeously, he would have had time to swerve or apply his brakes. In driving at a speed that was not

safe in the prevailing weather conditions, the plaintiff should have foreseen that his conduct could cause harm to others and should have reduced his speed.

[16] In my view, the plaintiff's negligence contributed 10% to the collision. In the result, the defendant is liable for 90% of the plaintiff's proven damages.

Quantum

- [17] The plaintiff, a 35 year old male at the time of the accident, and presently 38 years of age, sustained the following injuries in the collision;
 - 17.1 A compound midshaft & supra and intercondylar fractures of the right humerus;
 - 17.2 fractures of the right olecranon and radial head;
 - 17.3 fracture of the right distal ulna, and
 - 17.4 a mild head injury.
- [18] The injuries suffered by the plaintiff and its sequelae is not in dispute between the parties. From the expert reports filed on behalf of the plaintiff, it appears that the plaintiff was transported from the scene of the collision to Standerton Provincial Hospital where his wounds were debrided, and a back slab was applied. He was thereafter transferred to Steve Biko Hospital where he was admitted and remained as an in-patient for approximately 2 months. Extensive operative procedures were performed on the plaintiff's right arm including external fixators, multiple debridement of the wound and split skin grafts, however, sepsis set in. The sepsis persisted and became extremely malodorous

(unpleasant smell). Ultimately, in March 2020, the plaintiff was admitted to Medi-Clinic Highveld and underwent an above elbow amputation.

- [19] The injuries have markedly decreased the plaintiff's mobility of the right shoulder and causes right shoulder plain. The plaintiff also has extensive scarring of the abdomen due to a failed thoraco-abdominal flap.
- [20] Insofar as the head injury is concerned, the plaintiff suffered a diffuse axonal brain injury which leads to headaches and memory problems. The brain injury has effected the plaintiff's cognitive functioning, in that he has a decreased attention span, visual and psycho-motor problems and difficulties with his memory and his ability to retain new information.
- [21] Lastly, the plaintiff presents with symptoms of depression and Post Traumatic Stress Syndrome. This results in the plaintiff having difficulties socially, at home and at work.

General damages

- [22] Mr Zidel referred to two matters in support of the plaintiff's claim for general damages. In *Rens v MEC for Health* 2009 (6) QOD: D2-1, the plaintiff also underwent an above elbow amputation and was awarded an amount in current day value of R 1 046 000, 00.
- [23] in *Shadrack v RAF* 2013 (6) QOD: D2-15, the plaintiff underwent an above elbow amputation of his right arm as well as a compound fracture of his right femur, an injury to the knee, a urethral injury and an injury to his left foot. An

amount of R 1 567 000, 00 in current day value was awarded to the plaintiff in respect of general damages.

- [24] In view of the aforesaid awards and having regard to the plaintiff's injuries in *casu,* Mr Zidel submitted that an amount of R 1 200 000, 00 would constitute a fair and reasonable amount in respect of general damages.
- [25] Mr Sekgotha relied on the same authorities and submitted that an amount of R950 000, 00 would be fair and equitable.
- [26] The plaintiffs in respectively the *Rens* and *Shadrack* matters did not sustain a brain injury which caused cognitive problems. They, furthermore, did not suffer from depression or Post Traumatic Stress Syndrome.
- [27] Insofar as the orthopaedic injuries are concerned, the plaintiff in the *Rens* matter suffered less injuries than the plaintiff in *casu* whereas the injuries suffered by the plaintiff in the *Shadrack* were more severe.
- [28] The plaintiff in *casu* does not only suffer pain and suffering due to the orthopaedic injuries but has also lost some aspects of his enjoyment of life.
- [29] The enjoyment of social interaction and a positive work and home environment plays a vital role in one's overall sense of well-being and any award in respect of general damages should include compensation for this loss.
- [30] Taking the factors mentioned *supra* into account, I am of the view that an award of R 1 200 000, 00 in respect of general damage would be fair and reasonable.

Loss of earnings

- [31] The plaintiff was employed by Aurex Constructors as a safety officer at the time of the accident and was off work without pay until December 2019 and following the amputation, from March 2020 until August 2020.
- [32] Attempts were made by the plaintiff's employer to terminate his employment due to the sequelae of the injuries sustained in the collision but due to threatened litigation, the plaintiff was reinstated and continues his employment in an accommodated capacity. The plaintiff's position at the company is insecure and he is reliant on his current sympathetic manager to retain his employment.
- [33] The tests conducted on the plaintiff indicated that the plaintiff's pre-morbid cognitive abilities were in the superior/very superior range. Post-morbid there is a significant drop in the plaintiff's cognitive abilities and functioning.
- [34] Insofar as the plaintiff's physical abilities are concerned, the plaintiff will find it difficult to resume and retain alternative employment in his current field, should he lose his present employment. Due to his slower pace of work and increased error proneness, the plaintiff is no longer an equal competitor in the open labour market.
- [35] The fact that the plaintiff should be compensated for his loss of earning ability and the basis for the actuarial calculation of such loss is not in dispute between the parties. The parties are, furthermore, *ad idem* that:

- 35.1 a 5% contingency deduction in respect of the plaintiff's past loss of income is appropriate, resulting in a loss of R 94 787, 00 after the capping provisions of the Road Accident Fund Act, 56 of 1996, has been applied;
- 35.2 a 15% contingency deduction in respect of the plaintiff's future earnings but for the accident should apply.
- [35] The only dispute between the parties is the appropriate contingency deduction in respect of the plaintiff's future earnings having regard to the accident.
- [36] Mr Zidel proposed a 45% contingency deduction and Mr Sekgotha a 35% deduction.
- [37] Having regard to the plaintiff's orthopaedic injuries coupled with his decreased cognitive functioning, it is clear that the plaintiff is no longer an equal competitor in the labour market and needs to be compensated for his loss of earning ability.
- [36] Should the plaintiff loose his present sympathetic employment, there is a real prospect that the plaintiff may be rendered unemployable in future. This prospect justifies a higher contingency deduction and, in my view, a 40% contingency deduction in respect of his future earnings had the accident not occurred, is fair and reasonable.

ORDER

In the premises, I grant the following order:

1. The Defendant is liable for 90% of the Plaintiff's proven damages.

- 2. The Defendant shall pay to the Plaintiff a capital amount of R 2 513 478, 00
- Interest on the aforesaid amount *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.
- Payment will be made directly to the trust account of the Plaintiff's attorneys within a hundred and eighty (180) days from the granting of this order:
 Provided that interest shall start running on the capital amount within 14 days of the granting of this order

Holder	De Broglio Attorneys Inc
Account Number	1096 451 867
Bank & Branch	Nedbank – Northern Gauteng
Code	198 765
Ref	V759

5. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse 90% 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.

- 6. 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, the Plaintiff's reasonable travel and accommodation costs to attend the Defendant's and own experts, the costs of all the Plaintiff's expert reports, addendum reports, and confirmatory affidavits and costs of senior counsel. All past reserved costs, if any, are hereby declared costs in the cause.
- 7. The Plaintiff shall, in the event that the costs are not agreed:
 - 7.1. serve the Notice of Taxation on the Defendant's; and
 - 7.2. allow the Defendant fourteen (14) days to make payment of the taxed costs.

kuwentniaen

N. JANSE VAN NIEUWENHUIZEN JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

DATE HEARD: 24 August 2022 DATE DELIVERED: 27 September 2022

APPEARANCES

- For the Plaintiff: De Broglio Attorneys Inc
- Instructed by: Advocate Zidel SC
- For the Defendant: State Attorney
- Instructed by: Advocate Sekgotha