REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 1382/2014

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

DATE 4/06/19 SIGNATURE:

In the matter between:

MARAKALALA HENDRICK **PLAINTIFF**

AND

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] The plaintiff has instituted action against the defendant for damages and ancillary relief arising from a motor accident which occurred on the 27th August 2013.

[2] The merits of this matter have been disposed of and liability on the part of the defendant has been resolved on the basis of 80% in favour of the plaintiff's proven damages.

[3] The parties have agreed to dispose the matter on arguments only. The experts employed by the parties are in agreement on most of the issues and there was no need to file joint minutes. The plaintiff has conceded to the defendant's actuarial calculations and to the contingency deduction as suggested by the defendant's actuary. However, the defendant does not agree with the contingency deduction as applied by its own actuary and submit that a higher deduction should be applied.

[4] The court is called upon to determine two issues. The first issue is the general damages suffered by the plaintiff, and the second issue is the appropriate contingency deduction to be applied.

[5] The background facts are that on the 27th August 2013 the plaintiff was a pedestrian when he was hit by the insured vehicle. As a result of the accident, the plaintiff suffered bodily injuries consisting of fracture of the tibia, concussion, traumatic cerebral oedema, open wound on the scalp and traumatic pneumothorax. He was admitted to hospital for two months.

[6] At the time of the accident the plaintiff was 18 years of age and was repeating grade 7. The plaintiff was struggling academically and had to repeat some of the grades. After the accident he was condoned to grade 8. He failed grade 8 and dropped out of school. The reason why he dropped out was that his teachers had informed him that he had exceeded the age requirements for grade 8.

[7] The plaintiff has submitted the following expert reports.

7.1 Report by Dr T.P Moja Neurosurgeon;
7.2 Serious injury assessment report by Dr T.P Moja;
7.3 Report by Dr K.S Bila Orthopaedic surgeon;
7.4 Serious injury assessment report by Dr K.S Bila;
7.5 Report by C. Sampson Clinical Psychologist

7.6 Report by Dr M. Mayaven Psychiatrist;
7.7 Report by W.M Khumalo Educational Psychologist
7.8 Report by L.Mashishi Occupational Therapy
7.9 Report by Sonnet Industrial Psychologist; and
7.10 Actuarial calculations by G.W Jacobson

[8] The defendant submitted the following expert reports:
8.1 Report by Dr S. M Mbili Neurosurgeon;
8.2 Serious injury assessment report by Dr SM Mbili;
8.3 Report by Dr N. Mhlongo Orthopaedic Surgeon;
8.4 Serious injury assessment report by Dr N. Mhlongo
8.5 Report by M. Anokwuru Clinical Psychologist
8.6 Report by Dr Mojapelo Educational Psychologist
8.7 Report by N. Machete Occupational Therapist;
8.8 Report by F Chamisa Industrial Psychologist; and
8.9 Actuarial calculations by IAC Consultants.

[9] The plaintiff's counsel submitted that the plaintiff has sustained severe diffuse brain injury and that as a result of that he is in vegetative state due to the permanent damage to the brain. According to the counsel for the plaintiff prior to the accident, the plaintiff was a soccer player, and as a result of the accident he will no longer be able to play soccer. He further submitted that according to their Clinical Psychologist C Sampson, the plaintiff appears to have developed organically based symptoms and anxiety with hyper-arousal elicited and will require chronic psychiatric treatment. He therefore, submitted that for general damages a fair compensation would be between R1 350 000-00 and R 1 500 000-00.

[10] With regard to contingency deduction, counsel for the plaintiff submitted that the deduction of 5% for past loss and 15% for future loss as suggested by the defendant's actuary is fair under the circumstances taking into consideration that the plaintiff is in a vegetative state as a result of the severe brain injury that he had sustained.

[11] Counsel for the defendant has submitted that the plaintiff's head and brain injuries are severe but the sequelae are not that severe. According to the counsel for the defendant as per the expert reports, the plaintiff had a pre-existing mental condition. He further submitted that there is no future medical attention required for the plaintiff, and that under the circumstances an amount of R700 000-00 will be fair and reasonable in compensation for the plaintiff's general damages.

[12] With regard to the contingency deductions, the counsel for the defendant submitted that the plaintiff has failed each school grade he was in. He would not have progressed beyond grade 9, and therefore in the labour market he would have to rely on his physical condition. He dropped out of the school not because of the accident, but as a result of the fact that the teachers have told him that he was over age for that grade. They conceded that the accident had compromised him, but that it is not the accident alone, he had pre-existing conditions that also contributed. Counsel for the defendant submitted that a contingency deduction of 5% for past loss of earnings and 50% for future loss of earnings will be appropriate under the circumstances.

[13] With regard to the awarding of general damages, it is settled law that the trial court has a wide discretion to award what it in the particular circumstances, considers to be fair and adequate compensation to the injured party for his bodily injuries and their sequelae. **(See AA Mutual Insurance Association v Maqula 1978 (1) SA 805 (A) at 809 B).**

[14] In **NK obo ZK v MEC for Health, Gauteng ZASCA 13** (15 March 2018) Willis JA at para 9 said:

"As was said by Nicholas JA in Southern Insurance Association Ltd V Bailey NO, this court has not adopted a 'functional' determination as to how general damages should be awarded. It has constantly preferred a flexible approach, determined by the broadest general considerations, depending on what is fair in all the circumstances of the case. We do not have to determine what the award will be used for –its purpose or function. What we must consider is the child's loss of amenities of life and his pain and suffering."

[15] It is not in dispute that the plaintiff has sustained serious injuries as a result of the accident. It also not in dispute that the plaintiff has to be compensated for general damages. What is in dispute is what will be the appropriate award for him.

[16] In substantiating his claim for general damages plaintiff relied on the following unreported cases, (a) Msimanga v RAF where in 2011 an amount of R800 000-00 was awarded to a minor child. However this was an agreed amount and it is therefore distinguishable from the present case, (b) Nhlapo vs RAF where Bhika AJ in 2011 awarded R800 000-00; (c) Ramatseba v RAF during 2011 Victor J awarded R800 000-00 ; (d) Pieterson vs RAF in which Bava AJ on 11 August 2011 awarded R750 00-00; (e) Nepgen NO vs RAF in which Eksteen J on the 15th March 2012 awarded R900 00-00 and (f) Dlamini v RAF in which Mali AJ as she was then on 3rd September 2015 awarded R1 350 000-00.

[17] The defendant has relied on the cases of (a) Abrahams vs RAF in which in 2014 an award of R500 000-00 was awarded; (b) AA Mutual Insurance Association v van Jaarsveld in which in 1974 an award of R12 000-00 which was confirmed on appeal was made. According to the defendant this amount is equivalent to R642 000-00 in 2019 as per the 2019 Quantum year book by Dr Robert Koch; (c) van der Mercht v RAF in which during 2010 an award of R400 000-00 was made. According to the defendant in 2019 as per the Quantum Year book by Dr Robert Koch this amount is equivalent to R642 000-00.

[18] It is trite that past awards are merely a guide and are not to be slavishly followed, but they remain a guide nevertheless. It is also important that awards, where the sequelae of an accident are substantially similar, should be consonant with one another, across the land. (See **NK obo ZK v MEC for Health, Gauteng** *supra*).

[19] With the cases that the plaintiff and the defendant had relied on, in my view the most relevant one is that of Dlamini v RAF as the issues raised is that case are substantially similar to the case before me. In Dlamini's case the Sports Physician has concluded that the plaintiff was deemed to have suffered irreversible brain damage which renders him unsafe to himself and to others especially in a working environment. The Occupational Therapist in Dlamini's case has opined that Mr

Dlamini live in a home with supervision and that a support worker should be appointed for him.

[20] In the case before me the plaintiff was not deemed to have irreversible brain damage, he is not regarded to be unsafe to himself and others in a working environment. He does not need supervision and a support worker. Counsel for the plaintiff has submitted that the plaintiff is in a vegetative state. I do not agree with this submission. The plaintiff is still able to talk without problems; he is aware of his surroundings; he can walk on his own and do things on his own. He can still work. He was able to continue with his studies after the accident. That in my view are not the signs of a person who is in a vegetative state.

[21] It is not in dispute that the plaintiff has sustained serious injury and that he should be compensated for pain and suffering and also for loss of amenities of life. Taking into consideration the totality of the evidence, circumstances surrounding this case, as well as the past awards for general damages in similar cases, such as Dlamini's case, I consider R1000 000-00 to be fair award for general damages with regard to the plaintiff's case.

[22] Turning to contingency deductions, it is trite that the application of contingency deductions is essentially a matter of judgment resting on the judge's view of the likelihood of the expenses allowed actually being incurred. **(See Singh and Another v Abrahim ZASCA 14 (26 November 2010).**

[23] In **Bee v RAF [2018] ZASCA 52, 2018 (4) SA 366 (SCA) at para 116 Rogers AJA said:**

> *"I do not think with respect that one can speak about a normal contingency deduction for loss of future earnings, at least not without taking into account the age of the claimant. For obvious reasons, the younger the victim, the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path."*

[24] The same path principle was followed in **RAF v Kerridge 2019 (2) SA 233 (SCA)** where Nicholls AJA at para 44 said:

"Some general rules have been established in regard to contingency deductions, one being the age of the claimant. The younger the claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include inter alia, a downturn in the economy leading to the reduction in salary, retrenchment, unemployment, health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing in mind, courts have, in a pre- morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in Guedes, relying on Koch's Quantum Yearbook 2004, found the appropriate pre-morbid contingency for a younger man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This of course, depends on the specific circumstances of each case but is a convenient starting point."

[25] The defendant's actuary has suggested a contingency deduction of 5% for past loss and 15% for future loss. The plaintiff has accepted the defendant's actuarial calculations. Five and 15% for past and future loss, respectively, have become accepted as normal contingencies. (**See RAF v Kerridge supra at para 30).** Therefore, absent special circumstances, 5% and 15% for past and future loss will be the high end. (**See Bee v RAF at para 116).**

[26] The plaintiff at the time of the accident was 18 years old and was in grade 7. The plaintiff has been struggling academically and was repeating almost every grade. After the accident he went back to school. The plaintiff dropped out of school in grade 8 after he failed it. He did not drop out of school because of the accident, but because the teachers told him that he was over age for that class.

[27] According to the plaintiff's Educational Psychologist, the plaintiff has failed grade 6 thrice and grade 7 prior to the accident which according to psychologist suggest pre-existing learning difficulties. The plaintiff's Educational Psychologist is further of the view that the plaintiff would have been pushed through the system until he

reached grade 12 and would have failed it dismally. The defendant's Industrial Psychologist is of the view that the plaintiff would have schooled up to grade 8 or 9.

[28] Both experts are in agreement that the plaintiff would not have progressed beyond grade 12, and not as a result of the accident but due to his own pre-existing learning problems. In the likelihood he was employed, he would have been employed in the semi-skilled or unskilled sector. Without proper education, it will be difficult for the plaintiff to be employed in a higher income bracket. With struggling economy at the moment, most companies are also struggling financially and it becomes difficult to employ unskilled workers.

[29] The plaintiff is now 24 years of age and is still unemployed and has never being employed after dropping out of school at the age of 19 years. It is therefore difficult to assess his career path due to his non- existent employment history. There is no evidence that after he dropped out of school he attended any institution to try and skill himself.

[30] Taking into consideration his age, that he dropped out of school due to his pre-existing learning problems and not as a result of the accident, and that 5 years has lapsed after he dropped out of school without being employed, in my view are special circumstances which militate against a general contingency deduction of 15% in respect of future loss of earnings. In my view an appropriate contingency deduction for future loss of earning will be 35%.

[31] In my view, the following calculations are fair and adequate.

(a) Past loss	R8811-00
Less 5% contingency deduction	R 440-55
Net future loss	R8370-45
(b) Future loss	R1041 831-00
Less 35% contingency deduction	R 364 640-85
Net future loss	R 677190-20

Add General damages	R1000 000-00
	R1685 560-60
Less 20% apportionment of damages	R 337 112-12
Total loss	R1348 448-50

[32] I therefore make the following order:

32.1 The plaintiff succeeds in his claim for compensation against the defendant.

32.2 The defendant is to pay the plaintiff the sum of R1348 448-50 representing the plaintiff's general damages, past and future loss of earnings.

32.3 The defendant to pay plaintiff's costs.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPERANCES

COUNSEL FOR THE PLAINTIFF	**: Adv N. Phatudi**
INSTRUCTED BY	**: Mafori Lesufi Inc**

COUNSEL FOR THE DEFENDANT	: Adv T.I Ngwana
INSTRUCTED BY	: Mathobo, Rambau & Sigogo Att
DATE OF HEARING	: 02 May 2019
DATE OF JUDGEMENT	: 4th June 2019