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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 1535/2017

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

DATE..... SIGNATURE.....	

In the matter between:

KATLEGO PAUL RAMASHALA : PLAINTIFF

And

ROAD ACCIDENT FUND : DEFENDANT

JUDGMENT

SEMENYA J:

[1] The plaintiff issued summons against the defendant for damages he has suffered as a result of a motor vehicle accident that occurred along R71 Tzaneen-Polokwane road on the 27 March 2016. The plaintiff was a passenger in a motor vehicle with registration letters and numbers [....] which was then and there driven by Ramashala P (the insured driver). The plaintiff was 17 years old and in Grade 12 as at the date of the accident. According to the police accident report, the vehicle the plaintiff was travelling in overturned when the insured driver was avoiding a collision with another vehicle. The plaintiff did not return to school after the accident.

[2] The parties informed me that the defendant admitted 100% liability in favour of the plaintiff and that the issue of general damages has also been resolved. This court is called upon to determine the issue of loss of earnings only. The parties have agreed that the issues will be argued on the basis of the reports filed by experts and will not tender any oral evidence. There is a disagreement between the parties on whether the parties have agreed to argue loss only on the joint minutes filed by

industrial psychologists, S Vos and T Maitin, or on other reports as well. During opening address counsel for the plaintiff stated that the parties have agreed that no other report will be referred to during argument. However, counsel for the defendant insisted on addressing the court on other expert reports as well, stating that the court cannot ignore crucial evidence that is meant to assist it.

[3] The parties agree on the following facts:

- a. That pre-accident the plaintiff never failed a Grade and was capable of achieving a diploma or a degree;
- b. that he sustained L1 fracture and suffered 30-33% whole body impairment;
- c. that he did not sustain a head injury and his cognitive functioning post-accident falls within the average range, same way as it was pre-accident;
- d. that post-accident, the plaintiff requires accommodation in the following:
 - aa) rest breaks during tests/examination due to the lumber corset that he has to wear;

bb) a separate room from that of other students for test/examination;

[4] The guiding principle underlying the determination of loss of earnings or earning capacity has been enunciated as follows in **Dippenaar Shield Insurance Co (Pty) Ltd 1979 (2) SA 904 at 908 A:**

“When damage for personal injuries has to be assessed, personal patrimony includes, inter alia, the capacity to earn money through his work and skill, i.e his mental and physical efforts. The loss or impairment of his capacity is therefore also an element of acquillian damages, if it has in fact led to a diminution of plaintiff’s patrimony.”

[5] Counsel for the defendant argued that the plaintiff failed to prove that he has suffered loss as a result of the accident. He contended that the Court cannot rely on the actuarial calculations tendered by the plaintiff in that they were arrived at on the basis of incorrect information. Counsel argued, with reference to **S v Gouws 1976 (4) SA 527 at 528D**, that the prime function of an expert is to guide the Court to a correct decision on questions falling within his specialised field and that this decision should not displace that of the tribunal which has to determine the issues to be tried. In this regard, counsel submitted that the Court should disregard

the industrial psychologist's opinion that states that the plaintiff is unemployable. The ground upon which counsel made his submission is that the plaintiff sustained orthopaedic injuries only, which falls within the expertise of the orthopaedic surgeon, who according to counsel, would be the best expert to determine whether the plaintiff is still employable. Counsel argued that the plaintiff has the duty to prove his loss and was bound to lead oral evidence to prove that he is unemployable.

[6] Counsel for the defendant further argued that the court cannot rely on Dr Lerato Hlelele (educational psychologist)'s opinion that the plaintiff will struggle to find employment post-accident. It was argued that Dr Hlelele submitted two conflicting opinions in this regard. In her initial report, Dr Hlelele stated that the plaintiff will not be in a position to pass matric post -accident. However, in the joint minutes, she agreed with Dr R J Phetla that the plaintiff will be in a position to pass matric and tertiary education with the assistance of special accommodation. It was submitted that the court will have to resort to probabilities in order to deal with this inconsistencies or mutually distractive versions.

[7] In response to the submissions made by counsel for the defendant, counsel for the plaintiff contended that the parties have agree to argue the matter based on the joint minutes of the industrial psychologist only. He submitted that the plaintiff cannot be penalised for failing to call

witnesses when the parties have agreed that it would not be necessary to do so. I agree with the plaintiff on two reasons. Firstly, the defendant does not deny that an agreement was reached that no oral evidence will be led. The plaintiff was entitled to hold the defendant to this agreement. He cannot be taken by surprise in this regard. Secondly, having read the reports filed, I am of the view that the issues between the parties can be resolved without oral evidence.

[8] The defendant's argument that the Court cannot rely on the opinion of industrial psychologists on the basis that it is not their speciality is misplaced. These experts stated clearly that they relied on the opinion of the orthopaedics as well as other experts. The orthopaedic surgeons agree that the plaintiff suffered impairment in the range of 30-33% whole person impairment. The industrial psychologists noted the educational psychologists' opinion that the plaintiff's cognitive function is not affected by the accident and that he can pass matric and further education, with the necessary accommodation. The industrial psychologists further considered the occupational psychologists' opinion that the plaintiff will benefit from physical adaptation and assertive devices with regular breaks if he secures employment. They further agree that even with further education that suits his needs he is unlikely to be effective and productive as his counterparts and that his status will cause hardships

for employers and further limit his chances of securing employment. It is on this basis that I accept the industrial psychologists' opinion that the plaintiff is unemployable. This conclusion was not reached in a vacuum. On the contrary, it is in line with the opinion held by other experts. It will be difficult if not impossible, in my view, for the plaintiff to find a sympathetic employer in the time of high unemployment rate of able bodied persons. The actuary's reliance on this opinion cannot be faulted.

[9] What remains to be determined is the calculation of the award of damages that would reasonably compensate the plaintiff's patrimonial loss. In relation to the calculation of loss the Appellate Division in **Southern Ins Ass Ltd v Bailey 1984 (1) SA 98 (A) at 113-114** stated that the judge may either make a round estimate of an amount which seems to him to be fair and reasonable which is entirely a matter of guesswork, a blind plunge into the unknown, or try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The court said the validity of this approach depends of course upon the soundness of the assumption, and these may vary from the strongly possible to the speculative.

[10] Gerard Jacobson actuary made provision for two scenarios, one where the plaintiff would have completed a Diploma and where he would have completed a Degree. Counsel for the plaintiff submitted that the

court should make an award which will be somewhere between the two scenarios by adding the amount suggested in the scenarios and dividing it by two. Educational psychologists did not provide this Court with the plaintiff's school reports I therefore did not have the advantage of making an independent assessment of his academic performance to satisfy myself that he would have made the credential of obtaining a civil engineering Degree, a Degree he had aspired to obtain. Counsel for the plaintiff made a letter from the school principal available to the Court during argument. Unfortunately the letter served to inform the Court that the plaintiff was a Grade 12 learner at the school and was hospitalised for three months after the accident. It further states that the plaintiff suffered from a spinal and backbone injuries and had since not recovered in full. Nothing is said about his academic performance. I will however accept that the plaintiff would have passed Grade 12 and a Diploma in view of the fact that he has never repeated a Grade.

[11] In **Carstens v Southern Ins Ass Ltd 1985 (3) SA 1010 (C) at 1021** it was held that 'While the Court will generally have regard to arithmetical calculations and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and the evidence accord with what is fair and reasonable.

[12] Counsel do not agree on the contingencies that should be applied to the calculations. Counsel for the plaintiff submitted that a deduction of 20% will be reasonable in view of the plaintiff's youthful age. Counsel for the defendant submitted that 50% would be an appropriate deduction. In **Mehlo and Another v Road Accident Fund Corbett and Buchanan Vol 5 A2-30 (C)** a contingency deduction of 20% for future loss and 5% for past loss was applied in respect of a 20 year old boy who was rendered functionally useless and completely unemployable as a result of a motor vehicle accident. The distinction between that case and the one before me is that the plaintiff in this case was not functionally useless. He can still function, albeit to a limited degree. He still retains his cognitive function and the ability to pass matric and tertiary education with the assistance of a corset and special accommodation. It is in any event common cause that his IQ is still intact. The only hiccup is that it will be difficult for him to find a sympathetic employer. I am however of the view that a deduction of 50% as suggested by the defendant is too unreasonable.

[13] The plaintiff was 17 years old when the accident occurred. He has not yet completely healed. His life expectancy has not been reduced. Dr Aden stated that the calculated impairment will gradually deteriorate due to the abnormal distribution of forces and the resultant fatigue of

muscles it may cause. In the result, I find that a contingency deduction of 30% to future loss will be the most reasonable and fair calculation.

[14] The following calculations will apply in this case:

For future loss of earnings the defendant is ordered to compensate the plaintiff as follows:

Value of income but for the accident:	R8 356 140
Minus 30% contingency:	R2 506 842
TOTAL FUTURE LOSS:	R5 849 298

[13] In the circumstances I make the following order:

1. The defendant shall pay the plaintiff the sum of R5 849 298 in full and final settlement of the plaintiff's claim and the said amount is payable into the following bank account:

Account holder:	Mafetse Mogashoa Attorneys
Bank name:	Standard bank
Branch code:	001805
Account number:	[....]
Type of account:	Trust Account;

2. The defendant will not be liable for interest on the above amount provided that same is paid within fourteen (14) days, failing which interest at the rate of 10% per annum will be payable calculated from the date on which this order is made;

3. The defendant is to pay the plaintiff's taxed or agreed party and party costs on a High Court scale. In the event that the costs are not agreed, the plaintiff agrees as follows:

3.1. The plaintiff shall serve the notice of taxation on the defendant's attorneys of record;

3.2. The plaintiff shall allow the defendant fourteen (14) court days to make the said payment of the taxed costs; and

3.3 Should payment not be made timeously, the plaintiff will be entitled to recover interest at the rate of 10% on taxed or agreed costs from date of allocation to date of final payment;

4. The above costs will also be paid into the above trust account, which costs shall include the following:

4.1 The costs of counsel including travelling for the 13 May 2019

4.2 The costs of obtaining reports, reservation and reasonable taxable preparation fees, if any, for the following:

4.2.1. Dr A A Aden-Orthopaedic surgeon;

4.2.2. Ayanda Sodi-Occupational psychologist;

4.2.3. D J Phetla-Educational psychologist

4.2.4. S Vos-Industrial psychologist

4.2.5. Gerard Jacobson-Actuary

**M.V SEMENYA
JUDGE OF THE HIGH COURT;
LIMPOPO DIVISION.**

APPEARANCES:

ATTORNEYS FOR THE PLAINTIFF : MAFETSE MOGASHOA ATT.

COUNSEL FOR THE PLAINTIFF : ADV. S.K MOJAMABU

ATTORNEY FOR THE RESPONDENT : NOKO MAIMELA ATTORNEYS

COUNSEL FOR THE RESPONDENT : ADV.

RESERVED ON : 15 MAY 2019

JUDGMENT DELIVERED ON : 05 AUGUST 2019