IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: 2802/2017

In the matter between:

I K MOHAI Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: MTHIMUNYE, AJ

HEARD ON: 16 FEBRUARY 2022

DELIVERED ON: 16 MAY 2022

JUDGMENT BY: MTHIMUNYE, AJ

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[1] This is a claim for damages against the Road Accident Fund arising from bodily injuries sustained by the Plaintiff as a result of a motor collision that occurred on 12 February 2016 between Bloemfontein and Dewetsdorp. The

injuries suffered by the Plaintiff were pleaded as a dense fracture type III of the cervical (C1/C2) vertebrae, facial and a chest injury.

[2] On 9th May 2018 the Defendant conceded merits one hundred percent in favour of the Plaintiff with costs. On this day however, the Defendant did not issue a certificate in terms of Section 17(4)(a) of the Road Accident Fund Act in respect of the Plaintiff's future medical expenses. The matter was then postponed for the determination of quantum.

[3] On 17th March 2020 the matter served before my sister Opperman J for the determination of quantum. In a turn of events, the Defendant disputed the seriousness of the injuries and argued that the Plaintiff does not qualify for general damages. This necessitated the matter to be postponed and a cost order was granted against the Defendant. In her order, Opperman J further directed that:

> "1.1 The parties to file Joint Minutes of all the experts within a month of this order;
> 1.2. If party causes undue delay in the finalisation of the Joint Minutes, such parties expert reports shall be ignored for the trial purposes;
> 1.3. Parties to obtain the resolutions of the HPCSA;
> 1.4. The Plaintiff to approach the Court for Rule 37A case management procedures to be held after reports and notices have been filed;
> 1.5. In the event that the Defendant does not perform in terms of any directions as indicated above or any further directions granted to the Plaintiff as contemplated in Rule 37A the Plaintiff will have the right to bring an interlocutory application to compel the Defendant to comply, which interlocutory application will form part of the case management procedure and the application will therefore not have to be brought before the normal motion court."

[4] Joint Minutes were filed in respect of Occupational Therapists (Ms J Friedrichs and Ms S Moagi) and Orthopeadic Surgeons (Dr LF Oelefse and Dr HL Moloto). No joint minutes were filed in respect of the other experts. A pre-trial was never held due to the Defendant's failure to attend. The Plaintiff further filed expert reports from an Actuary (JJC Sauer) and Industrial Psychologist

(Ben Moodie). The Defendant filed expert reports from a company called Independent Actuaries and Consultants (Actuarial Report).

[5] In terms of its amended particulars of claim, the Plaintiff claims damages to the amount of **R 6 630 927.00** (Six Million Six Hundred and Thirty Thousand, Nine Hundred and Twenty-Seven Rand) calculated as follows:

a.	Past medical and hospital expenses	R	5 000.00
b.	Estimated future medical treatment	R	45 000.00
c.	Past loss of income	R	20 216.00
d.	Estimated future loss of income	R	5 810 711.00
e.	General damages	R	750 000.00

[6] On the day of hearing the Plaintiff conceded that there can be no claim for past medical and hospital expenses since he was treated at a government hospital. This claim was thus abandoned and I need not deal with it any further. The Defendant also conceded to the seriousness of the injuries and to the issuance of the Certificate in terms of Section 17(4)(a) in respect of future medical expenses. It is to be noted that the seriousness of the injuries was confirmed in the joint minutes of the Orthopeadic Surgeons and they agreed that provision must be made for treatment, which included neck fusion. The Defendant issued a letter aligning itself with the joint minutes. In his heads of argument, Counsel for the Plaintiff relied on several authorities on the status of agreements by experts in joint minutes, including the case of **Glenn Mark Bee v Road Accident Fund 2018 (4) SA 366 (SCA)** where the Supreme Court of Appeal held that:

> "...Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants' respective experts'."

In light of the above, I also need not deal with this aspect any further.

[7] What remained in dispute was the quantification of the general damages and loss of earnings. At the onset and at the behest of the Plaintiff, the Defendant further agreed that the determination be made on the basis that the Plaintiff would retire at the age of 55.

[8] The Plaintiff called Benjamin Moodie, an Industrial Psychologist who testified to his report that at the time of the final report, the Plaintiff was still studying towards obtaining a Diploma in Cost Accounting and as anticipated in the report, he subsequently passed and obtained his Advanced Diploma in Applied Management on 01 April 2021. A copy of the Diploma was handed up as Annexure "1". He said based on the Plaintiff's drive and capabilities, he was capable of obtaining a PhD and as such all other previous evidence had become redundant as the previous proposal was that he could go up to NQF Level 6 but he has achieved that and is progressing towards NQF Level 8.

[9] He opined that because of the chronic pain that the Plaintiff endures as a result of the injuries and the resultant depression, he cannot work as hard as his co-workers and there are much more cognitive demands placed on him. On this basis, he cannot be on the same footing with his peers. His position will deteriorate and in terms of the report of the Orthopaedic Surgeon, he can work up to the age of 55 where he will not be able to take it anymore. Even if the pain is managed, the degeneration. It was also stated and not disputed, that by the time the Plaintiff retires; he would have had two neck fusions.

[10] Under cross-examination, Mr Moodie was asked if there is not a possibility that the Plaintiff could end at C4/C5 Paterson grade given the reality of unemployment. Mr Moodie said that would mean the Plaintiff will enter the market and stay at entry level for the rest of his life. He said for the Plaintiff's drive and qualifications, D4/D5 is the only possible scenario and is conservative.

[11] The Plaintiff also testified that he was currently enrolled for a Postgraduate Diploma in Project Management which will take him two years to complete. He enrolled in 2021 and, all things being equal, he would complete it at the end of 2022. Due to financial constraints, he had to deregister in the second semester in 2021 and will now roll over those modules to this year in order to finish his Post Graduate Diploma at the end of 2022. If he is not successful, the Diploma might roll over to 2023 but he would ask for a special examination so that he still obtains his qualification in 2023. The Defendant opted not to cross-examine the Plaintiff.

[12] The Defendant did not lead any evidence to rebut the Plaintiff's evidence. This court is alive to the fact that this does not mean that the Plaintiff's evidence should then be accepted as a matter of course.

[13] Counsel for the Plaintiff pointed out that in respect of general damages, the quantum book is not yet out and he relied on the case of **Moloi v Road Accident Fund (5881/2017) [2019] ZAFSHC**. He lamented that cases similar to what is before court are not always available but this is as near as possible even though Moloi had no fracture of the vertebrae which makes the case before court more serious than that of Moloi. Further, Moloi had no future operation whereas, *in casu*, the Plaintiff anticipates two neck fusions. Moloi was also older at the time of injury whilst the Plaintiff herein was 24 years old and as a result of the injuries early retirement is anticipated as well as loss of amenities.

[14] The Defendant's Counsel also conceded that she could not find any cases dealing with C2/C3 injuries but could only find ones dealing with C4/C5 injuries. In **Damana v Minister of Safety & Security (1418/2011) [2016] ZAECPEHC**, my sister Majiki J, in a C5/C6 injury, awarded R 275 000.00 for general damages after applying contingencies. In **Smith v Road Accident Fund (57226/2016) [2019] ZAGPPHC 181**, in a C5/C6 injury, an award of R 345 000.00 was made for general damages. Counsel for the Defendant

conceded however that *in casu*, an award of R 300 000.00 might be unfair and submitted R 400 000.00 to be just and fair.

[15] In respect of Loss of Earnings, Counsel for the Defendant submitted that she had no instructions and leave the matter in the hands of the court to apply contingencies.

[16] I have taken into consideration that the Plaintiff suffered a dense fracture type III of the C1/C2 vertebrae, which was followed by a non-union of the C2 where the fracture was. There was also a C1/C2 malalignment resulting into local kyphosis. He was hospitalised for a month and he developed spondylosis on the C1/C2 as a result of the injury and also antero-occipital spondylosis. Although I agree with Counsel for the Plaintiff that the injuries *in casu* are more serious that in the Moloi case, I am not persuaded, having considered the facts and comparable cases that an amount of R 750 000.00 is justified as general damages.

[17] With regards to loss of earnings, I have considered the joint minutes of the orthopaedic surgeons and noted that, contrary to the earlier postulation by the Industrial Psychologist Mr Benjamin Moodie in the 2020 report, relying on Dr Oelofse's report, that it was expected that the Plaintiff would start his career path on Paterson level B3, progressing in a straight line, to the median of Paterson level C3/C4 before reaching his career ceiling at the age of 45; in the past two years the Plaintiff has exceeded the expectations of the Industrial Psychologist in that he is now expected to enter the market with an NQF Level 8, 9 or 10 qualification on a Paterson B4 level.

[18] In the addendum, Mr Moodie postulates a pre-accident income potential as well as a post-accident income potential. This postulation was then forwarded to the Actuary, Mr Johan Sauer who did his calculations in two scenarios. The first scenario is based on a 5% contingency differential and the second on 10%, upon which the Plaintiff relies. The Actuary also applied the cap resulting

in Plaintiff's loss of income being R 5 610 861.00, with a post-morbid contingency of 35% having being applied.

[19] No alternative scenario was put before court by the Defendant in terms of calculations in respect of loss of earnings. As pointed above this does not necessarily mean the Plaintiff's version should just be accepted as a matter of course however, I have no reason not to rely on the calculations by Mr Sauer.

[20] Consequently, **I make the following order:**

1. The Defendant is liable for payment to the Plaintiff in the amount of:
   (a) R 5 610 861.00 (Five Million Six Hundred and Ten Thousand, Eight Hundred and Sixty-One Rand) in respect of loss of earnings, having applied a post-morbid contingency of 35%.

   (b) R 450 000.00 (Four Hundred and Fifty Thousand Rand) in respect of General Damages.

2. The amounts referred to above are payable within 180 (One Hundred and Eighty) days from the date of this order, into the Trust Account of the Plaintiff's Attorneys.

3. The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996, to pay 100% of the cost of the Plaintiff's future accommodation in a hospital or nursing home, or the treatment or the rendering of a service or the supplying of goods to the Plaintiff arising out of injuries sustained by him in the motor vehicle collision mentioned above. In terms of the undertaking, the Defendant will be obliged to compensate him in respect of these costs after the costs have been incurred and on proof of these costs being provided.

4. The undertaking referred to above shall be delivered to the Plaintiff's attorneys of record being VZLR Incorporated within 14 (fourteen) days from the date of this order.

5. The Defendant shall pay the Plaintiff's taxed or agreed costs on the scale as between party and party until the date of this order, including costs of experts and those of Senior Counsel.

6. Should the Defendant fail to pay the Plaintiff's party and party costs as taxed or agreed within 14 (fourteen) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at the prescribed rate per annum, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

7. The Plaintiff shall, in the event that the parties are not in agreement as to the costs referred to in paragraph 4 above, serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs.

Appearances:

For the Plaintiff:	Adv F Diedericks S.C. Pretoria Society of Advocates Instructed by VZLR Incorporated
For the State:	Ms Charlene Bornman State Attorney, Bloemfontein