



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: 4470/2018

In the matter between:

YASEEN SURTIE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 26 NOVEMBER 2021

DELIVERED ON: 7 MARCH 2022

This judgement was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 10H00 on 7 March 2022.

- [1] The plaintiff instituted an action against the defendant for damages in respect of bodily injuries sustained in a motor vehicle accident on 11 September 2013. The merits previously served before this court and were settled on the basis that defendant is to pay 90% of the plaintiff's proven or agreed damages.
- [2] The defendant has since agreed to pay an amount of R79 428.60 to the plaintiff for past medical expenses and further undertook to provide an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of the plaintiff's future medical expenses.
- [3] In these proceedings this court is only called upon to adjudicate the claim in respect of general damages and loss of earnings.
- [4] The following background information is relevant: The plaintiff's father took him (the plaintiff) out of school at an early age and caused him to join him in the family furniture business. His father taught him the furniture business trade. When his father passed on

in 2000, he took over the business and became the owner and manager of Yasmin Investments (Pty) Ltd. His work entailed loading and off-loading the furniture and other goods. He also handled the sales of the stock.

[5] The plaintiff became successful in the running of this furniture business to such an extent that the turnover of the business was more than R1.4 million in 2013 and 2014. This was a year before the accident. The turnover of the business gradually decreased after the accident until it was an amount of R454 338.00 in 2018 and eventually an amount of R277 230.00 in 2019.

[6] According to the financial statements admitted into evidence the income of the plaintiff as the director of Yasmin Investments was as follows for the respective years:

Financial Year	Earnings
2011,2012 and 2013	R 300 000.00
2014	R240 000.00
2015,2016,2017 and 2018	R180 000.00

2019	R 120 000.00
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- [7] During 1997 the plaintiff was attacked with a baseball bat and sustained a head injury. He had a brain haematoma. After the assault, his left hand was totally paralysed as the haematoma put a strain on the nerve. The haematoma was surgically removed and according to the evidence, he recovered well.
- [8] The plaintiff was again assaulted in 2011 and sustained a second head injury. The evidence reveal that he recovered and also returned to work.
- [9] On 11 September 2013 the plaintiff was involved in the motor vehicle accident. He sustained a fracture of the right humerus and also bumped his head.
- [10] It is the testimony before court that since the collision the plaintiff struggled with depression. He chose not to be treated but was only assessed in 2016. He hired a manager who used to work for his father. Initially the business did well but he later released the manager as according to his version the manager failed to perform

according to his expected standards. The business later closed down. Hence a claim for loss of earnings.

[11] Dr Botha, a psychiatrist, testified that the plaintiff had symptoms indicative of neuro cognitive impairment relating to the frontal lobe. She testified that the plaintiff was unable to prioritize, could not sift information and had no insight and no judgment and could also not act appropriately to information gathered.

[12] The psychiatrist further in her report indicated that the plaintiff had impaired cognition. According to her, there was a clear decrease in the plaintiff's ability to plan his daily activities. He had challenges in prioritizing his thoughts and his activities and definitely in his concentration and ultra-short term memory. She diagnosed the plaintiff with post-traumatic stress disorder, mild depression and impaired cognitive functioning. According to her, the impaired cognitive functioning is indicative of a head injury.

[13] Mr Janecke, a neuro psychologist, performed certain neuro psychological tests on the plaintiff. According to him the tests reveal that the plaintiff experienced fluctuating attention; he had impaired ability to sustain his visual concentration and process

information quickly and efficiently; he had impaired working memory; slowed motor functioning; poor perceptual motor and constructional functioning; he had poor planning ability; was impulsive. According to him the plaintiff's chronic cognitive impairment difficulties are consistent with a mild traumatic brain injury.

[14] Me Van Jaarsveld, an Industrial Psychologist stated in her report admitted into evidence that in light of the opinion of the various medical experts and further taking into account the core activities of a business owner, she supported the opinions of the other medical experts that the plaintiff is no longer able to perform the duties of a business owner and manager. According to her the plaintiff was functionally unemployable and will not be able to secure alternative employment in the open labour market.

[15] For the purposes of a claim for general damages it has to be borne in mind that the plaintiff sustained a fracture of the right hand humerus as well as a head injury when he bumped his head at the front. Following the accident, the doctors inserted a titanium rod in the arm. A screw protruded causing inflammation and fluid build-up just above the elbow.

[16] Before the accident the plaintiff played squash, did swimming and high jump. Dr Oelofse, an orthopaedic surgeon diagnosed the plaintiff with, inter alia, a traumatic head injury with residual symptoms. He further diagnosed a mid-shaft humerus fracture with painful instrumentation, non-union of fracture; biceps tendonitis and upper arm muscle spasm.

[17] In the assessment for damages the court may have regard to past awards. The previous awards may serve as useful guides in awarding damages but they can hardly be solely relied upon. In this instance the correct approach is to have regard to all the facts of the case and determine the quantum of damages for such facts.

In *Road Accident Fund v Marunga*¹ the court said the following:

“This court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party...”

¹ [2003] 2 All SA148 (SCA) at 23.

[18] In my view having regard to the past awards and the facts and circumstances of this case an amount of R720 000 (being 90% of R800 000) will be adequate compensation for general damages for compensation herein.

[19] The enquiry into damages for loss of earning capacity is by its nature speculative.²It is argued on behalf of the defendant, based on *Rudman v Road Accident Fund*,³ that the assumption that plaintiff suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity and that all that remains is to quantify the loss, is an assumption that cannot be made.

[20] In my view the *Rudman* case is distinguishable to the case before me. In *Rudman* the claimant was a CEO and not owner of the business. He continued to receive the same salary benefits after the accident after his physical injuries. He suffered no neuro cognitive impairment. In contrast, the plaintiff in this case suffered serious neuro cognitive impairments relating to the frontal lobe. As indicated above he is unable to prioritize, he is unable to sift

² Southern Insurance Association v Bailey N.O. 1984(1) SA 98(AD) on page 113G.

³ [2002] 4 All SA 422(SCA).

information. He has no insight and no judgment and does not act appropriately to information gathered. His business declined after accident and concomitantly his earnings also decreased.

[21] Although the plaintiff was the owner, it is clear that he was hands on with his business. He made orders and did sales. He drove to Durban from Lesotho to fetch trading stock. He did the pricing of the merchandise to be sold. He loaded and off loaded the goods on his bakkie. He did not only do 'white collar' work. It is argued on behalf of the defendant that the business could have been continued under the supervision of the manager. This argument does not take into account the neuro cognitive impairment of the plaintiff. He clearly has no judgment and this affected his ability to manage business. This would also include the hiring and firing of staff including the manager. In my view the plaintiff demonstrated loss of earning capacity.

[22] In calculating the loss, the actuary assumed that the plaintiff's total income is the salary indicated in his personal income statement plus the profit or loss from Yasmin Investment. He applied 5% contingency to past loss of earnings and 15% to the future loss of earnings in the pre-morbid scenario. In this scenario the past loss

of earnings is an amount of R2 347 800.00 and future loss of earnings an amount of R5 822 585.00 which add to a total loss of earnings of R8 170 385.00. I agree with the calculation of the actuary and taking into account the RAF cap, the plaintiff's past loss of earnings, R1 591 900.00, future loss of earnings R4 267 400.00 and the total loss of earnings R5 859 300.00.

[23] The question of contingencies falls squarely in the discretion of the court as to what is fair and reasonable. There are no direct rules to be followed in the calculation of contingencies. I have no reason to reject the contingency percentages suggested by the actuary. Having regard to the circumstances of this case I make the following order:

ORDER.

1. Defendant is to pay the plaintiff the sum of R6 064 855-74 (six million sixty-four thousand eight hundred and fifty-five rand seventy four cents), which amount is made up as follows taking into account 90% concession of liability:

1.1 R720 000 in respect of general damages;

1.2 R5 273 370 in respect of loss of income;

1.3 R71 485-74 in respect of past medical expenses.

Into the following bank account:

Bezuidenhouts Inc.

ABSA BRANDWAG

BRANCH CODE 334334

Account no [...]

2. Interest on the aforesaid amounts calculated at the prescribed rate of interest from date of judgment to date of payment.
3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 1996, for payment of 90% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to him, arising out of the injuries that he sustained in the motor vehicle collision which occurred on 11 September 2013 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.
4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on a High Court scale to date of this order, which shall

include the reasonable qualifying, preparation, reservation and appearance fees (where applicable) of the following experts:

- 4.1 Dr K Botha;
- 4.2 Ben Janecke;
- 4.3 Susan van Jaarsveld;
- 4.4 Dr LF Oelofse;
- 4.5 Karen Swanepoel;
- 4.6 Juané Raats;
- 4.7 Munro Actuaries (Charl du Plessis).

P.E. MOLITSOANE, J

Appearances:

For the Plaintiff : Adv M.D.J Steenkamp

Instructed by: Bezuidenhouts Inc

BLOEMFONTEIN

For the Defendant: Adv I Sander

Instructed by: The State Attorney

BLOEMFONTEIN

