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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 41002/2011

Date: 24 April 2014

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

.....
DATE SIGNATURE

In the matter between:

T. K. M.

Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

PRETORIUS J.

- [1] The plaintiff claims from the defendant due to injuries he had sustained when he was a passenger in a train on 8 April 2011.

[2] The plaintiff was [.....] years old at the time of the incident. He was travelling to the Wonderboom Mall by train, when the train in which he was a passenger, was hit by a train from behind near Akasia Railway Station.

[3] The defendant conceded the merits of the matter prior to the commencement of the trial. All aspects of damages were in issue. During the trial future medical expenses were settled at an amount of R160 000.00. General damages were settled at an amount of R280 000.00.

[4] This court has to decide the issue of future loss of earnings and earning capacity.

[5] The plaintiff's evidence was that he had been standing in the train, felt a collision, fell onto the floor of the train and lost consciousness. He woke up after he had been removed from the train. According to him he was injured on his elbow and head. He was admitted to Odi Hospital for three weeks, after which he was discharged.

[6] At present he has an arm that gets sore if he carries heavy objects. He is also more forgetful than prior to the incident. His arm is deformed, a

so-called gunstock deformity. The plaintiff testified that he feels hurt, ashamed of his deformity and demoralized.

[7] He cannot proceed doing garden work to earn money with his deformed arm. The accident caused him to fail grade 10 more than once. He was then advised to attend a trade school. Prior to the incident he intended becoming a soldier, but due to the physical requirements he will not be able to do so. Although he expressed a wish to become an electrical engineer, he realised that with his scholastic record it would be impossible. He is currently not employed. The plaintiff is presently [.....] years old.

[8] The plaintiff reiterated under cross-examination that he had injured his arm, his leg as well as head during the collision. The result of all of this was that he missed classes at school as he could not earn transport money by doing gardening work, to enable him to attend school.

[9] The combined minutes by the orthopaedic surgeons, Dr Kumbirai and Theron, set out that:

"Both doctors agree that the major clinical findings were at 10° varus deformity (gunstock deformity) of the left elbow with a diminished carrying angle;

Both doctors agree that although the x-rays of the left elbow are reported as normal, however there is deformity in the long axis of the left humerus, thus causing the gunstock deformity of the left elbow."

- [10] Both occupational therapists, Succers Moagi and Sagwati Sebapu agreed in a joint minute that the plaintiff has suffered a loss of amenities and noted in a joint minute:

"We agree that Mr M. is best suited for sedentary, light to medium occupations.

We agree that he will have difficulties coping with any work outside of these parameters (i.e. heavy work). His employment prospects have thus been reduced. It's expected that he would be less competitive than his counterparts during periods of increased symptomology."

(Court's emphasis)

- [11] Ms Kheswa, the industrial psychologist, gave evidence that the plaintiff would probably have completed matric and even raised the possibility that he could have obtained a post matric qualification. She conceded that the plaintiff would not have been able to study engineering, both pre-morbid and post morbid. It was more likely that he would have become a soldier. Both Ms Kheswa, the plaintiff's

industrial psychologist and Ms du Toit, for the defendant, testified that it would not be possible for the plaintiff to pursue a career in the army as a soldier, even doing sedentary or administrative work, as the physical and academic requirements would be too strenuous for him to qualify.

[12] After evidence had been led the defendant requested a postponement to obtain the evidence of an educational psychologist. The postponement was granted and the matter finally heard on 31 March 2014 and 1 April 2014.

[13] The version on which the defendant relied in argument, that all the difficulties the plaintiff would have had to pursue a career in the army, is due to the fact that he is dyslexic, was never put to any of these witnesses. This version was not canvassed at all, before Ms Matheus, the educational psychologist for the defendant gave evidence. She made the diagnosis of dyslexia based on the plaintiff's scholastic performance and did not provide any tests that had been done to confirm this diagnosis. She was not prepared to make any concession that his poor performance may have other causes. She further concluded that the plaintiff had lied about his scholastic achievements, but at the same time she ignored his complaints of forgetfulness and memory problems. These complaints were not only articulated to her, but also to other experts.

[14] She could give no explanation as to why the plaintiff's scholastic performance deteriorated after the accident. She conceded that dyslexia is more evident in the early stages of childhood, but failed to explain why it was not detected as profound and evident prior to the accident, whilst the plaintiff was in the lower grades at school.

[15] Ms Mattheus evidence did not deal with the plaintiff's complaints and/or difficulties as articulated by him to her:

"K. reported the following difficulties relating to the accident in question:

- *Memory problems - he has difficulty to remember what he has read and struggles when he has to write exams.*
- *Difficulty concentrating - he is of the opinion that his ability to concentrate is less after the accident.*
- *Attention difficulties - he find it difficult to concentrate for long times and becomes forgetful.*
- *Misplacing or difficulty tracking things - He has become more forgetful after the accident in question.*
- *Mood swings - he goes from angry to sad "quickly".*
- *Headaches or head pains - this has increased after the accident.*
- *Weakness or loss of strength - he has difficulty with is left arm.*
- *Sleeping difficulties - he would often awake during the night."*

[16] Mr Nethavhani, a registered research psychologist, with special interest in education and training, assessed the plaintiff together with the registered educational psychologist, Dr van Niekerk on behalf of the plaintiff. He gave evidence in a straightforward, reasonable manner, making concessions where necessary.

[17] The court accepts the reasoned conclusion reached by Mr Nethavhani and Dr van Niekerk. The conclusion is:

"In the present assessment Mr M. had few difficulties in different intellectual but the imbalance in his results point to learning problems. Mr M. still has an above average intellectual ability and it is expected that he should be able to pass on a grade 12 or equivalent level post-accident with specialised remedial help. Had he not been involved in the motor vehicle accident he would probably have passed grade 12 level and even have studied further (highest IQ marks 15, 13, 12). As far as his vocational prospects are concerned I defer to the expertise of the Industrial Psychologists.

In general, it was found that Mr M. is a well-spoken sensitive individual who was doing well at school. However being intelligent and artistic person the accident affected his emotional life negatively. He will need emotional therapy as well as vocational guidance."

[18] The court has considered all the evidence and comes to the conclusion that both industrial psychologists were correct when they had agreed that the plaintiff would most probably have entered an apprenticeship or followed a trade.

[19] The calculations by the plaintiff's and defendant's actuaries differ vastly. The court is aware of the two methods that can be used to calculate the future loss of earnings as set out in **Southern Insurance Association v Bailey NO 1984 (1) 98 AD**. I am not prepared to make "a blind plunge into the unknown", but will rely on the mathematical calculations taking the evidence into consideration. Both industrial psychologists came to the conclusion that the plaintiff is expected to be able to perform secondary light to medium physical work, as he is excluded from strenuous work and would have to be more selective in future job choices. Therefore I will make use of the calculations by the actuary for the plaintiff.

[20] I agree that a higher contingency deduction should apply due to the plaintiff's youth at the time of the accident. The court will apply the principles as set out in the **Bailey case (*supra*)** at 116 G - 117 A where Nicholas JA held:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what

*he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. **The amount of any discount may vary, depending upon the circumstances of the case. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.**" (Court's emphasis)*

[21] The rate of contingencies cannot be assessed on any logical basis, but must take the vicissitudes of life into consideration. In assessing damages for loss of earning capacity the practice in the South African courts has generally been to take inflation into account and this practice was recognised by the Supreme Court of Appeal in **Legal Insurance Co Ltd v Botes 1963 (1) SA 608 AD.**

[22] In considering contingencies the courts have on numerous occasions used the sliding scale guideline, for example 25% for a child, 20% for a youth and 10% in middle age as set out in **Goodall v President Insurance 1978 (1) SA 389 (W)** and **Bailey's case (supra).**

In the present case the contingency deduction made in relation to the plaintiff's future earnings, having regard to his disability, should be substantial and more than 20% for a youth.

[23] In the present case the court is dealing with a youth and there are not many improbabilities about the future employment of the plaintiff. I have considered all the evidence, the arguments by counsel and the decisions I have been referred to. I come to the conclusion that a 30% contingency deduction will be fair to both the plaintiff and defendant. The loss of earnings, as calculated by the plaintiff's actuary, George Schwalb, which I accept, is R4 600 927.00, less a 30% contingency which amounts to R3 220 648.00.

[24] The amount which should thus be paid is R160 000.00 for future medical expenses; R280 000.00 for general damages and R3 220 648.00 for future loss of earnings.

[25] It is ordered that:

1. The Defendant must pay to the Plaintiff by way of delictual damages the amount of R3 660 648.00 (Three million six hundred and sixty thousand six hundred and forty eight rand) payable into the Plaintiff's attorneys of record trust account with the following particulars, who shall retain

these funds of the Plaintiff in trust pending the creation of the Trust referred to in paragraph 2 *infra*.

BANK :

ACCOUNT HOLDER :

ACCOUNT NUMBER :

BRANCH CODE :

BRANCH :

2. The attorneys of the Plaintiff are ordered:

- 2.1 To cause a trust ("the Trust") to be established in accordance with the Trust Property Control Act no. 57 of 1988 to the aforesaid funds of the Plaintiff;
- 2.2 To request the Master to appoint and issue Letters of Authority as trustee of the Trust to MARTHA MAGDALENA PRINSLOO as nominee of ABSA TRUST LTD.
- 2.3 To pay over all the monies held in trust by them for the benefit of the Plaintiff to the Trust as soon as Letters of Authority have been issued by the Master and the necessary Trust banking account has been opened.

3. The trust instrument contemplated in paragraph 2.1 above shall make provision for the following:
 - 3.1 That the Plaintiff is the sole beneficiary of the trust;
 - 3.2 That the trustee is to provide security to the satisfaction of the Master;
 - 3.3 That the ownership of the trust property vests in the trustee of the Trust in her capacity as trustee;
 - 3.4 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;
 - 3.5 That the amendment of the trust instrument be subject to the leave of this Honourable Court;
 - 3.6 That the trust property and the administration thereof be subject to an annual audit.

4. The Defendant is ordered to pay:
 - 4.1 The taxed or agreed party and party costs of the Plaintiff in this action to date hereof, on the High Court scale which costs shall include:
 - 4.1.1 Costs of Senior Counsel;
 - 4.1.2 Costs of Junior Counsel.
 - 4.2 The costs in connection with consultation of experts in preparation for trial, fees in connection with court attendance of experts, medico legal reports as well as the reservation and qualifying

fees (if any) of the following experts:

4.2.1 Dr P.T. Kumbirai, Orthopaedic Surgeon;

4.2.2 Sagwati Sebapu, Occupational Therapist;

4.2.3 Moipone Khwesa, Industrial Psychologist;

4.2.4 Masindi Nethavhani, Educational
Psychologist.

4.3 The cost of obtaining actuarial calculations and the
revised calculations of George Schwalb, Actuary.

4.4 Any costs previously reserved herein.

5. In the event that the above costs are not settled by
agreement between the parties the Plaintiff shall:

5.1 serve the notice of taxation on the Defendant's
attorneys of record; and

5.2 allow the Defendant 7 court days to make payment
of the taxed costs.

Judge C Pretorius

Case number : 41002/2011

Heard on : 31 March 2014

For the Applicant / Plaintiff : Adv Geach SC

Adv Seima

Instructed by : Mashapa
For the Defendant : Adv Musi
Instructed by : Makhubela
Date of Judgment : 24 April 2014