IN THE HIGH COURT OF SOUTH AFRICA

(REPUBLIC OF SOUTH AFRICA)

PRETORIA

CASE NO: 32007/12

DATE: 2 OCTOBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

HUGO: SKAOLE JEREMIA **PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] On 11 November 2009, and at approximately 15H40, the plaintiff, on the Klerksdorp and Haartebeesfontein road, was the driver of motor vehicle G[...]. The motor vehicle was involved in a collision with motor vehicle B[...] which, at the time, was driven by M I Machatola (the insured driver). The plaintiff then instituted action against the defendant for recovery of damages he suffered as a result of the injuries he sustained in the accident.

[2] The injuries that the plaintiff sustained are more fully dealt with in the joint neuropsychological minutes of Ms E Tromp and Mr D S Ormond-Brown; and the report of Dr H J Edeling a specialist neurosurgeon. These form part of the plaintiffs expert bundle. I shall refer to the injuries later in my judgment.

[3] The plaintiff, a trained paramedic by profession, received intensive hospital surgical and medical treatment which included five surgical procedures for the injuries. He returned to work in January of 2011 which was fourteen months after the accident.

[4] The matter first served before my brother Bam J, on 2 June 2014. He ordered that:

> 1. The issues of liability and quantum, as regards loss of earnings/earning capacity only, be separated in terms of the provisions of Rule 33 (4);
>
> 2. The defendant pay 100% of the Plaintiffs damages arising from the collision that occurred on 11 November 2009;
>
> 3. The defendant pay the sum of R800 000.00 in general damages to the plaintiff;
>
> 4. The defendant provide the plaintiff with an undertaking as envisaged in section 17 (4) (a) of Act 56 of 1996, for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home and such treatment, services or goods as the plaintiff may require as a result of the injuries that the plaintiff sustained as a result of the accident which occurred on 11 November 2009;
>
> 5. That any award made to the Plaintiff be protected by means of the creation of a trust, into which trust all funds awarded to the plaintiff be placed;
>
> 6. The defendant pay the plaintiffs taxed or agreed party and party High Court costs as defined in the order;
>
> 7. The issue of plaintiffs loss earnings/earning capacity be postponed to a preferential date to be arranged with the Registrar.

[5] This left for determination the issue which was limited to the plaintiffs loss of earnings/earning capacity only. The parties efforts helped narrow the issue to the question of contingency deduction to be applied to the plaintiffs future loss of earnings/earning capacity regard being had to the value of income post-accident which simply means in his injured condition.

[6] Key to the determination of the issue is the joint minutes of Ms Lisa Roets (LR) and Ms Moipone v Kheswa (MK) which is the result of their telephonic joint meetings between 27 and 29 May 2014. They are the plaintiffs and defendant's industrial psychologists respectively.

[7] They agree that:

1. The plaintiff matriculated in 1995; completed his security officer training; worked as security officer and worked after hours as ambulance assistant at Orkney Fire and Rescue; worked as a Recovery Room Theatre Assistant at Wilmed Park Private Hospital and thereafter joined Matlosana EMRS in March 2003; qualified as an Ambulance Emergency Assistant in August 2003 and worked in this capacity for 5 years; acted as station manager at Matlosana EMRS between 2004 and 2008 albeit for brief periods; for a brief period between 5 December 2007 and 21 December 2007 acted as Acting Assistant/Director at Dr Kenneth Kaunda District EMRS; functioned as facilitator/instructor at Impact Technologies College between January and July 2007 and performed volunteer work in disaster risk management for the Dr Kenneth Kaunda District in April 2009.

2. On 11 November 2009, the time of the accident, the plaintiff worked as a shift Senior Grade 3 at Matlosana EMRS earning a basic salary of R 8 597.50 and a housing allowance of R500.00 per month.

3. The plaintiff, before the accident, would have completed the two- year Emergency Care Technician programme and thereafter completing a B Tech qualification in Emergency Services. The plaintiff would probably have progressed to the level of Disaster Risk Management Official at Kenneth Kaunda Municipality or Station Manager at Mafikeng by 2010 when he would have been 33 years old. The two positions fall within Salary Level 10.

4. The plaintiff would probably have been able to work until the retirement age of 65 years which is the official retirement age of employees in the Department of Public Service.

5.1. The plaintiff is no longer suitable to working as a paramedic the job he did prior to the accident.

5.2. He is now capable of performing the current job of Acting Head of Auxiliary Services from both a physical and cognitive perspective.

5.3.he is compromised by cognitive, emotional and communication deficits as well as physical factors such as chronic pain. He will continue in this condition.

5.4. His productivity is likely to be affected by frequent breaks necessitated by the treatment which he, from time to time, will need.

6. The plaintiff will be unable to fulfil his pre-morbid potential. He no longer works in Emergency Services and this has resulted in his losing overtime pay and his shift allowance.

7. The plaintiff has reached the ceiling of his career potential as Acting Head of Auxiliary Services by

reason of the fact that his prospects for promotion have been substantially reduced and he is now less competitive in the open labour market. All these mean direct loss of earnings for the plaintiff. The plaintiffs annual salary is R176 430.00 indicative of the fact that he is currently on level 3 Notch 1 EMS Shift Leader Grade 3 of the salary scales of the Department of Public Services and Administration.

[8] LR noted that the plaintiff, according to Mr Ormond-Brown, the plaintiffs clinical neuropsychologist, prior to the accident, was "an extremely dynamic individual who was goal-driven, passionate about his job and highly focused". She further, in her report, refers to the collateral information that Mr André Smit (Mr Smit), Assistant Director/District Manager at Matlosana EMRS received. According to her, the plaintiff would have been able to progress to Assistant Director by 2017 when he would have been 40 years old. He also would have been able to progress to Deputy Director by 2027 at the age of 50. The two positions fall in Salary Levels 18 and 20 respectively.

[9] MK noted that it was not automatic for the plaintiff to be appointed Assistant Director or Deputy Director in the public sector. This, according to her, because the positions had to be vacant; the plaintiff had to apply; short listed and interviewed where he would have to sell himself whereafter the interview panel would decide if he had been successful.

[10] They both noted the various injuries and sequelae mentioned in the medico-legal reports available. They further noted that the plaintiff, according to the joint minutes of the neuropsychologists, sustained a mild head injury and has been left with neuropsychological deficits due to the combined effects of his head injury, mood disorder and chronic pain. Of significance is the fact that the experts agreed that the plaintiffs "ability to prosper in his line of work has been compromised and his chances of promotion are minimal."

[11] They further noted that the plaintiff, according to the joint minutes of the Occupational Therapists, is no longer suited to work as a paramedic, from a physical perspective and that he is best suited for work that is sedentary and light in nature. The two, Ms Morland and Ruth Eiser disagree. Their disagreement stems from the fact that Ms Morland holds the view that the plaintiffs neuropsychological and neurocognitive deficits negatively affect his productivity at work. Ruth Eiser, on the other hand argues that the plaintiffs functioning demonstrates no cognitive deficit and that he could continue meeting the cognitive demands of his current job as an Auxiliary Services Manager. They then agreed to defer the plaintiffs neurocognitive functioning and the effects thereof on his post-morbid potential to the neuropsychologists.

[12] Lastly, MK noted the opinion of Dr A H Van Den Bout, the defendant's orthopaedic surgeon, namely that the plaintiff be allowed to do light duty work, as in that way no shortened working life would come about. His view is that the plaintiff, even after a total knee replacement in about 20 years time, when he

would be 56 years old could still go on doing his light duty work. They both noted that the joint minutes of the Occupational Therapists reveal that the plaintiff could be able to work until his normal retirement age.

LR however, is of the view that the plaintiffs functioning will still be compromised even in this position, and recommends "that a higher than usual post-accident contingency deduction be applied over and above his direct losses." MK observed that contingencies "are the prerogative of the Court or negotiation between the parties involved".

[13] As alluded to above, the plaintiff called Mr André Smit (Mr Smit) as his witness. His evidence in brief is that the plaintiff, prior to the accident, had been a self-driven energetic passionate, dedicated and valuable employee. He had the ability to rise to the positions of Station Manager and thereafter Assistant Director and Deputy Director. He could have become, Emergency Care Technician and acquired a B Tech qualification. These are prerequisites for appointment to the positions of Assistant Director and Deputy Director. Two of such posts are presently available due to scarcity of suitable candidates with the necessary qualifications. He described, the plaintiff, post-accident, as someone who is no longer effective as he suffers from memory problems. He forgets to do work; does not meet deadlines; has constantly to be reminded to complete his work and no longer has management requirements which would then unable him to earn a promotion from the position in which he presently is. He now holds an administrative post for which he is not qualified and which he has no interest in. To support this he likened the plaintiff to Mr Ullyses Gaedingwe, the plaintiffs colleague who, but for the accident, could have qualified with the plaintiff. Mr Gaedingwe has already been promoted to a position higher than the plaintiffs.

[14] Ms Roets, in her evidence, steadfastly held the same view that a higher than usual post-morbid contingency deduction should be applied to the plaintiffs earnings in the calculation of his loss. She specifically referred to the plaintiffs career progression; the opinions of Dr H J Edeling, the plaintiffs psychiatris; Mr D S Ormond-Brown, the plaintiffs clinical neurologist; Ms Ida-Mariê Hatting, the plaintiffs speech/language Pathologist and Audiologist and the orthopaedic surgeons.

[15] The defendant led no evidence. Mr N Van Der Walt, on his behalf, and in cross-examination, endeavoured to show that it was not a certainty that the plaintiff would have been promoted to the positions of Assistant Director and Deputy Director but for the accident. Mr Smit, unshaken, testified that although not a certainty he was certain that the plaintiff would probably have been appointed to the positions.

[16] Expert evidence was introduced by way of reports of the various experts. I am well aware of the fact that these experts must give evidence on matters requiring specialised skill and knowledge. Admissible evidence must prove facts upon which the experts base their opinions. In fact, the witness has to be a qualified expert. There does not seem to be any problem with the expertise of those that are involved in this matter as experts.

The court is alive to the fact that it remains the duty of the court to draw inferences from the evidence of such witnesses. The court also has regard to the fact that experts' opinions must have logical basis and be based on logical reasoning. The conclusions that the experts reach in other words must be defensible. **See in this regard Holzhausen v Roodt 1997 (4) SA 766 (W) at pages 767 and 768 and Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 118 (SCA) at paragraphs [36 and [37].**

[17] Mr Van Bergen, for the plaintiff, submitted that Ms Roets, for the plaintiff, had vastly more information at her disposal when she prepared her report. She consulted with the plaintiff, the plaintiffs wife and Mr Smit before she prepared her report and formulated her opinion. The same, according to Mr Van Den Bergen, could not be said about Ms Kheswa, for the defendant, who only consulted with the plaintiff before she prepared her report. Ms Roets, as it was further argued, based her opinion on admitted opinions of other experts and the factual information from Mr Smit who worked with the plaintiff. She consulted with Mr Smit and listened to his evidence in court. It was for this reason that Mr Van Den Bergen finally submitted that Ms Roets' evidence which is based on admitted and proven factual evidence and logic ought to be preferred above that of Ms Kheswa which was unsupported by any factual or expert evidence. There is merit in the submission.

[18] CONTINGENCY DEDUCTIONS

This then brings me to the issue of contingency deductions. The parties, as alluded to, hereinbefore are not in agreement on one aspect which is the issue of contingency deductions to be upheld.

[19] Life, indeed is full of uncertainties. General contingencies denote various aspects such as all uncertainties, hazards and vicissitude of life. Contingencies which are normal consequences and circumstances of life which beset every human being and which directly affect the amount that a plaintiff would have earned, are brought in, in circumstances such as the plaintiff's. They include a number of situations and vary from case to case. These are, for instance, the likelihood of the plaintiff being fired or retrenched; the fact that the plaintiff has a satisfactory service record; the likelihood of illness, inflation and adjustment for costs of living allowance; accident which may affect the plaintiff's earning capacity and life expectancy to mention but a few.

[20] What is of paramount importance is the assessment of appropriate contingency deductions. The work of Robert Koch: Quantum Yearbook (2013) comes in handy in resolving the issues relating to this assessment. His view is that a sliding scale of half percent per year to retirement age be followed. The example given is 25% for a child, 20% for a youth and 10% for a middle aged. Experience has shown him that the Road Accident Fund usually agrees to 5% being fixed for past loss and 15% for future loss as a normal contingency. Of course Koch's view guides us in the assessment but regard must always be had to the fact

that each case has its own facts and merits that must not be lost sight of when an appropriate contingency deduction is made.

[21] To calculate the plaintiff's net loss of earnings/earning capacity, with regard to the claim for past loss and future loss the income values in the uninjured and injured scenarios are determined. From these, appropriate contingency deductions are made.

[22] The process is as follows:

1. Firstly, the plaintiffs value of income in the future, in the uninjured scenario, is determined. Using the figure, an appropriate contingency deduction is made.

2. Secondly, the value of the plaintiffs future loss of income in the injured scenario is determined. Using the figure an appropriate contingency deduction is made. Specific factors which may impact upon the plaintiffs ability to obtain the projected figure on the probabilities are considered.

3. The value of the plaintiffs prospective income in the injured scenario adjusted by the appropriate contingency deduction, is deducted from the value of the plaintiffs prospective income in the uninjured scenario. This then gives the nett future loss.

4. The total nett loss is arrived at by adding the past loss of earnings/earning capacity to the future loss of earnings/earning capacity.

[23] The parties agreed that:

1. the contingency deduction to be applied with regard to the plaintiffs past loss of earnings/earning capacity should be 5% in both the uninjured and injured scenarios.

2. 14% should be applied as a contingency deduction with regard to the value of the plaintiffs prospective income in the uninjured scenario i.e. if the accident had not occurred when the plaintiffs claim for future loss of earnings/earning capacity is calculated.

[24] The parties do not agree on the contingency deduction to be applied when the plaintiffs claim for future loss of earnings/earning capacity is calculated in the injured scenario i.e. post-morbid. The plaintiff holds the view that a deduction of 30% would be appropriate while the defendant feels that 25% will be in order.

[25] Two actuarial calculations marked "X1" and "X2" prepared at the instance of the plaintiff on the employment scenario proposed by Ms Roets (i.e. promotion in the uninjured scenario to Assistant Director by 2017and to Deputy Director by 2027 were handed up by agreement between the parties. Each calculation

has had regard to the agreed contingency deductions referred to above. "X1", has been calculated on the basis as proposed by the plaintiff while "X2" is based on the proposal of the defendant. They relate to the 30% and 25% contingency deductions respectively. According to "X1" the plaintiffs total nett loss amounts to R4.107.889.00 while the total nett loss, according to "X2", amounts to R3.884.134.00.

[26] Evidence evinces that the plaintiffs injuries are, inter alia:

1. A fracture at the junction of the proximal and middle thirds of the right femur;

2. A fracture at the junction of the middle and distal thirds of the left femur;

3. A fracture splitting the proximal femoral shaft on the left;

4. A fracture through the lateral tibial plateau of the right knee;

5. A laceration of his forehead;

6. A deep laceration of his tongue;

7. A head injury described as a mild head injury with a complicated traumatic brain injury of indeterminable degree as more appears from the joint neuropsychological minute of Ms E Tromp and D S Ormond-Brown and the report of Dr H J Edeling, specialist neurosurgeon; and

8. Soft tissue injuries of the neck, chest, left arm and lower back and pelvis, (my emphasis)

[27] That the plaintiff is now a changed and different person, after the accident, cannot be gainsaid. Evidence of Mr Smit reveals that:

1. Plaintiff is no longer the effective person he previously was

2. He now suffers from memory problems. This is understandable if regard is had to the extent of the brain injury.

3. He forgets to do work, does not meet deadlines and constantly has to be reminded to complete his work.

4. He is no longer promotable and will remain in his current administrative post which he is not qualified for and does not like.

[28] The consensus of expert opinions largely support Mr Smit's evidence.

[29] Indeed, as correctly pointed out by Mr Van Bergen, for the plaintiff, "markedly increased risks" have been created for the plaintiff by his orthopaedic and head injuries and the neuropsychological sequelae thereof. This then led him to agree with Ms Roets in her conclusion that the application of a contingency deduction of 30% in the post-morbid future loss scenario is indeed, warranted. I agree.

[30] Mr Van Bergen requested the court to order that the defendant pay the plaintiffs taxed or agreed party and party costs on the High Court scale and that such costs should include the costs of senior junior counsel, the qualifying and reservation fees, if any, of the plaintiffs expert witnesses Dr D A Shevel, Ms I M Hatting, Mr D S Ormond-Brown, Dr H G Edeling and Ms L Roets and that Mr André Smit be declared a necessary witness while all costs attendant to his evidence be paid by the defendant. There is, indeed, merit in the request which was not opposed.

[31] The following order, in the result, is made.

1. The amount of R4 107.889.00 is awarded to the plaintiff in respect of his claim for loss of earnings/earning capacity.

2. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, such costs to include the costs of senior junior counsel.

3. The defendant is ordered to pay the qualifying and reservation fees, if any, of the plaintiffs expert witnesses: Dr D A Shevel, Ms I M Hattingh, Mr D S Ormond-Brown, Dr H G Edeling and Ms L Roets.

4. Mr André Smit is declared a necessary witness and the defendant is further ordered to pay

M.W.MSIMEKI

JUDGE OF THE NORTH

GAUTENG HIGH COURT, PRETORIA

COUNSEL FOR THE PLAINTIFF: C H VAN BERGEN

INSTRUCTED BY: ERASMUS DE KLERK INCORORATED

C/o SURITA MARAIS ATTORNEYS

COUNSEL FOR THE DEFENDANT:

INSTRUCTED BY: A P LEDWABA INCORPORATED

DATE OF HEARING: 18 August 2014

DATE OF JUDGMENT: