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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case number: 78615/2015

Date: 8/12/2017

Not reportable

Not of interest to other judges

Revised.

In the matter between:

SIBUSISO AUSTIN MBALATHI

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PRETORIUS J,

(1) The plaintiff instituted action against the defendant for damages suffered as a result of personal injuries sustained in a motor vehicle accident that had occurred on 30 October 2014 between two vehicles whilst the plaintiff was a passenger.

PARTIES:

(2) The plaintiff is an adult male, aged 22 years, who was a passenger in a car where the driver had lost control.

(3) The defendant is the Road Accident Fund, established by virtue of section 2(1) of the **Road Accident Fund Act**¹.

ISSUES:

(4) Initially, liability as well as quantum was in issue, but the defendant conceded, during argument, that the defendant was 100% liable for the damages suffered as a result of the injuries.

(5) Both counsel subsequently argued the issue of quantum without leading evidence. All the expert reports and joint minutes, by the experts, were admitted by both counsel for the plaintiff and the defendant as evidence. The only dispute remaining between the parties is the percentage of contingency that should be applied post-morbid. The amount of general damages, that should be awarded, is an issue as well.

FACTS:

(6) The accident happened on the Molefe Makinta Highway in Ga- Rankuwa, when the plaintiff was a passenger in a car that had lost control. The result was that the car rolled and he sustained injuries mostly to his chest and his back.

(7) He was examined by Dr Volkersz, the orthopaedic surgeon, on 2 November 2015. According to the RAF1 form the plaintiff was admitted to the Eugene Marais Hospital on 30 October 2014. The diagnosis was that he had sustained a left pneumothorax , left rib fractures 9 and 11, transverse process fracture *TB* to T10, L1 transverse process fracture and compression fracture of L1 and left pneumoperitoneum. The conclusion by Dr Volkersz was:

"The accident left this young student with a painful stiff thoracolumbar spine, causing him a lot of pain and discomfort, negatively influencing his

¹ Act 56 of 1996

psychologic make-up and career opportunities ."

In the updated report by Dr Volkersz, dated 10 July 2017, the plaintiff reported that his chest pain was better and the pain in his thoracolumbar spine had improved. Dr Volkersz concluded that the plaintiff's *"clinical situation has improved somewhat. His radiological situation remains the same."*

(8) The occupational therapists submitted a joint minute where they agreed *"that early retirement cannot be excluded when taking into account the very young age at which the claimant underwent spinal surgery"*.

(9) The educational psychologists, in their joint minute, referred to Dr Volkersz report where he stated:

"Mr Mbalathi will not be able to stand long, bend or extend his back, i.e. he will not be able to do any heavy physical labour or any profession where a lot of bending of the spine is required. He will be able to do light physical work and work in a sedentary type of position, which should not be much of a problem due to his high level of education."

(10) The industrial psychologists, in their joint minute, agreed that a higher post-morbid contingency should apply *"to accommodate increased employment vulnerability, delay in career progression, efficiency and productivity challenges, under performance, lower annual increases and incentives, slower earnings progress and possible burnout as a result of accident-related sequelae. Provision is to be made for early retirement as agreed by the medical practitioners ."* They further agreed that the plaintiff should be compensated for a total loss of earnings for a 5 year period, as a result of early retirement.

(11) In **Southern Insurance Association v Bailey N.O.**² Nicholas JA stated:

"In a case where a Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of

² 1984(1) SA 98 AD at p114 C-D

an actuarial computation may be no more than an "informal guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis."

(12) In the present instance the plaintiff furnished the court with actuarial calculations on which a finding can be made as set out in **Bailey**³. The defendant did not provide any actuarial report or evidence.

(13) I have been furnished with several authorities but I am aware that each case has to be considered on its own merits. In **Protea Assurance Co Ltd v Lamb**⁴ Potgieter JA found:

"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry to become a fetter upon the Court's general discretion in such matters."

(14) The amount to be awarded is still in the court's discretion and the court will use amounts awarded in similar cases only as a guideline to exercise its discretion. All the other facts of the matter must play a roll and I am mindful that no two matters are the same regarding facts and circumstances.

(15) The dispute relates to which percentage must be applied for the post- morbid scenario. Counsel for the plaintiff submits that a contingency of 35% is reasonable, whilst the counsel for the defendant is of the opinion that 20% will be reasonable.

(16) In this matter the court need not look into a crystal ball to determine the loss of income, as Mr Kramer, the actuary's report contains all the relevant information. In **Bailey's case**⁵ the court held:

³ Supra

⁴ 1971(1) SA 530 AD at p535 H - 536 A

⁵ Supra at 116G - 117A

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations ". He had "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."

(17) I have listened to both counsel, have studied the expert reports and joint minutes of the respective experts. I have taken note of the fact that there is a probability that the plaintiff will have to retire 5 years prior to retirement age. However, he will be able to do the work he has studied for, with probably some limitations as set out by Dr Volkersz. In these circumstances I find that the contingency that should be applied is 30%. In the result the amount to be awarded for future loss of income is R2 054 092.00.

GENERAL DAMAGES:

(18) In **Sandler v Wholesale Coal Suppliers Ltd**⁶ Watermeyer JA held:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge 's view of what is fair in all the circumstances of the case."

(19) The amount should be reasonable to both the plaintiff and defendant as found in **De Jongh v Du Pisanie NO**⁷ where Brand AJ admonishes on p 4741 to 475A:

⁶ 1941 AD 194 at 199

⁷ 2005(5) SA 457 (AD)

"Die bedrag van sodanige kompensasie moet ook billik wees teenoor die verweerder. Dit is juis in 'n geval soos hierdie waar die Hof moet waak teen die menslike geneigdheid om te oorkompenseer."

(20) And in **Hulley v Cox**⁸ where Innis J held:

"We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment."

(21) Having regard to these warnings and admonishments I will now try to determine an amount which would be fair to both the plaintiff and the defendant. Counsel for both parties referred me to several comparable cases to use in determining the amount of damages that should be awarded.

(22) In **Protea Assurance Co Ltd v Lamb**⁹ the court held:

"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry to become a fetter upon the Court's general discretion in such matters."

(23) In **RAF v Marunga**¹⁰ the Supreme Court of Appeal confirmed the dictum of Broom DJP in **Wright v Multilateral Motor Vehicle Accident Fund**¹¹:

"I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in the society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries."

⁸ 1923 AD 234 at 246

⁹ 1971(1) SA 530 AD at p535H to 536A

¹⁰ 2003(5) SA 164 (SCA) at 170 F - G

¹¹ 1997(4) SA (C)

(24) In **Ramelobeng v Lowveld Bus Service**¹² R550 000 was granted for a back injury where the claimant fractured one vertebrae. He was found to be unemployable, contrary to the present matter where the plaintiff only suffers a 5 year reduction in his career, as well as every day pain and suffering. The amount of R550 000 converts to R621 000 in today's values.

(25) In **Connolly v Road Accident Fund**¹³ the plaintiff sustained a compression fracture to L3 in his back and a rupture of the disc. In 2012 the award was R180 000 which converts to the present value of R245 000.

(26) In **RAF v Maasdorp**¹⁴ the plaintiff suffered a severe L5/S1 listhesis and a slight slip of the vertebrae at L3/L4. In 2002 the plaintiff was awarded R110 000 in general damages, which converts to the present value of R260 000.

(27) In **Stemmet v Padongelukkefonds**¹⁵ a 29 year old produce manager suffered damage to his cervical spine at 2 levels, where the fusion was strengthened with a plate and screws, which would have to be removed at some stage. In 2004 he was rewarded R150 000 with current value R320 000. The plaintiff in that case had similar symptoms as the plaintiff in the present case, although he was 9 years older and there was no indication that he had to retire at an earlier age.

(28) This court takes cognisance of these cases, but has to decide the present action on the particular facts and circumstances of the case.

(29) It is common cause that the plaintiff sustained serious injuries to his spine, his ribs and his left lung. Once more Dr Volkersz found that *"the patient obviously suffered extensive pain in the last years, which is likely to remain with him for a long period of time, possibly permanently"* and concluded that *"the patient ended up with a painful chest and a painful stiff thoracolumbar spine"*. He cannot

¹² 2015 Vol 7 Quantum C5 p29

¹³ (6090/2007) [2012] 2 AWCHC 105 (8 February 2012)

¹⁴ 2002 Vol 5 Corbett and Buchannan C4-31

run or walk for long distances and play sport.

(30) Having considered all the evidence, factors and circumstances relevant to the assessment of damages and having regard to past awards and the more modern approach of the Supreme Court of Appeal as expressed in the **Marunga case**¹⁶ I find that an amount of R450 000 will be reasonable and fair to both the plaintiff and the defendant. I do not set out separate amounts in respect of pain, disfigurement and loss of amenities.

(31) I make the following order:

1. The defendant is liable to the plaintiff for 100% of the plaintiff's proven damages.
2. The defendant shall pay to the plaintiff the amount of R2 504 092.00 (Two million five hundred and four thousand and ninety two Rand only) together with interest *a tempore morae* calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996.
3. Payment will be made directly to the trust account of the plaintiff's attorneys:
Holder: De Broglio Attorneys Inc
Account Number: [...]
Bank and Branch: Nedbank - Northern Gauteng
Code: 198 765
Ref: M3375
4. The defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse the plaintiff for the costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by plaintiff in the motor vehicle accident, after such costs have been incurred and upon proof thereof.
5. The defendant is to pay the plaintiff's agreed or taxed High Court costs as

¹⁵ 2004 Vol 5 Corbett and Buchannan C4-60

¹⁶ Supra

between party and party, such costs will include, but are not limited to the costs of Senior Counsel; and

5.1 The costs of all expert medico legal reports, addendum reports and joint minutes as well as the reasonable taxable qualifying and reservation fees, if any, of such experts; and

5.2 The costs of the actuarial report of Mr Ivan Kramer.

6. The plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation of the defendant's attorney of record; and
7. The plaintiff shall allow the defendant 14 days to make payment of the taxed costs.
8. There is no contingency fee agreement between the plaintiff and the plaintiffs attorneys.
9. The plaintiff is declared a necessary witness.

Judge C Pretorius