

SOUTH AFRICA / JUDGMENT

Laubscher v Road Accident Fund (98494/15) [2018] ZAGPPHC 592 (30 July 2018) [2018] ZAGPPHC 592

COURT

North Gauteng High Court, Pretoria

BEFORE

N Ranchod

CASE / FILE NUMBER

98494/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

N0 :98494/15

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDEGES

REVISED

In

the matter between:

ESTIAAN

LAUBSCHER

PLAINTIFF

and

ROAD

ACCIDENT

FUND

DEFENDANT

JUDGMENT

RANCHOD J:

[1] The plaintiff sustained bodily injuries in a collision between a motorcycle with registration BV 59 MB GP of which he was the driver and a motor vehicle with registration XRX 476 GP driven by a Mrs R Vermaak (the insured driver). The collision occurred on 9 October 2014 in Eldoraigne, Pretoria.

[2] The injuries the plaintiff sustained may be summarised as follows:

- Fracture of the left wrist;
- Tom ligaments of the left elbow and of the left knee;
- Dislocation of the left elbow;
- Soft tissue injuries to both knees and the right shoulder;
- Blunt chest trauma;
- Abrasions and open wounds;
- A severe head injury including frontal lobe contusions; a skull fracture in the right tempera-parietal area with epidural haematoma underneath the fracture; as well as base of skull fracture involving

the anterior cranial fossa.

[3] It appears that the following are the sequelae of the injuries sustained by the plaintiff:

- degeneration of the right shoulder;
- Left knee pain;
- Left wrist early degeneration;
- Back pain;
- Behavioural difficulties;
- Cognitive difficulties;
- Memory and concentration difficulties; Irritability
- Post traumatic stress disorder and depression;
- Complete anosmia (loss of smell);
- Loss of visual field of 10% in the right eye which equates to 3% loss of visual system;
- Academic difficulties -post accident decreased academic potential.

- [4] The issue of liability has been settled between the plaintiff and defendant on the basis of an 80% apportionment in favour of the plaintiff. All that remains for determination is the quantum of plaintiff's claim for damages as a result of the accident.
- [5] At the commencement of the trial on quantum I was informed that the only issues that are to be determined are the future loss of earnings or loss of earning capacity and general damages. It is not in dispute that the injuries sustained by the plaintiff in the accident are serious. He therefore qualifies for an award of general damages.
- [6] The plaintiff claims past medical and hospital expenses in the amount of R431 413.00. I was informed that the defendant undertakes to pay plaintiff 80% of his past medical and hospital expenses on satisfactory proof thereof. However, in the written heads of argument counsel for the defendant submitted that he does not have instructions to dispute the amount claimed and leave it in the hands of the court. I see no reason why the plaintiff should not be awarded this head of damages. The defendant also agreed to furnish an undertaking in terms of s17(4) of the Road Accident Fund Act 56 of 1996 for future medical, hospital and related costs (again for 80% of the expenses).
- [7] The plaintiff and the defendant procured the evidence of several experts and their medico-legal reports have been filed.
- [8] Joint minutes of the following experts of the plaintiff and defendant respectively were handed up:
- 8.1 Orthopaedic Surgeons Dr D. Mare & Dr N.S Ngcoya;
 - 8.2 Occupational Therapists W. Van Der Walt & D. Van Wyk;
 - 8.3 Educational Psychologists A Grobler & E. Monyela;
 - 8.4 Clinical Psychologists L. Roper & A Peta;
 - 8.5 Neurosurgeons Ors J.H Kruger & Dr J.A Ntimbane; and
 - 8.6 Industrial Psychologists N. Kotze and J. Buitendach.
- [9] Several actuarial reports compiled by Prima Actuaries (Pty) Ltd were part of the trial bundles handed up by plaintiff. The actuarial calculations are based on the assumption that the plaintiff potentially would have pursued a tertiary education and obtained either a diploma or a degree in the future. will revert to this aspect later.
- [10] I turn to the joint minutes I referred to earlier
- 10.1 There are no disagreements between the orthopaedic experts as regards the orthopaedic injuries sustained and the treatment received, the pain suffered after the injuries and post-morbid medical costs.

10.2 The respective occupational therapists assessed the plaintiff about one-and-a-half years apart, viz. Mrs Van Der Walt on 2 December 2015 and Mrs Van Wyk on 17 May 2017. While Mrs Van Der Walt had perused virtually all the plaintiff's medico-legal reports, Ms Van Wyk had only perused defendant's orthopaedic surgeon's report and Mrs Van Der Walt's report.

10.2.1 Both occupational therapists noted with regard to plaintiff's work ability that he had attained grade 12, had no vocational training, had work experience in carpentry, maintenance and installation of air conditioning, wireless internet installation and working as a shopfitter.

10.2.2 Mrs Van Der Walt says plaintiff returned to work after two and a half months while Mrs Van Wyk says it was after four months.

10.2.3 Mrs Van Der Walt says he was a technician at MRJ Consultants while Ms Van Wyk says he was an IT engineer at the time of their respective assessments of the plaintiff.

10.2.4 When interviewed by Mrs Van Der Walt, the plaintiff described his job as a physical type where he installed CCTV networks for retail companies and he did heavy load handling (cabling of 30kg). When assessed by Ms Van Wyk he stated that he worked in a classroom doing software design, research and development and he coordinated the installation of software systems.

10.2.5 While Van Der Walt said the physical demand of his work was medium to heavy strength Van Wyk assessed it to be sedentary to light demand.

10.2.6 The differences may be explained by the one-and-a-half year gap between the respective dates of assessment by Van Der Walt and Van Wyk. They noted that there appears to have been a deterioration in the plaintiff's functional abilities for tolerance at the right shoulder and the knees.

10.2.7 Both occupational therapists agreed that he would be able to do his current work for as long as his orthopaedic, neurological and psychiatric condition remains stable. He would likely perform the heavy physical demands at work with the assistance of a helper, because of his balance limitations. He would depend on the understanding of his employer for his slow work speed and memory difficulties. He might encounter strained interpersonal relationships at work because of his irritability.

10.2.8 Both occupational therapists agree that if he should lose his current employment, he might struggle to find suitable employment in the open labour market.

10.2.9 Mrs Van Der Walt notes that in time he might have to do work of light strength demand with intermittent sitting.

10.3.1 In the joint minutes of the educational psychologists, Ms Grabler and Ms Monyela, state that they were informed that plaintiff's father had obtained a senior certificate and had worked for the South African

Police Service; his mother had obtained a grade 12 and had reportedly been employed as a financial advisor; his older sister had reportedly obtained a degree in auditing while his twin sister had reportedly been studying towards a degree in music through 'TUT' (an apparent reference to Tshwane University of Technology). It seems this information was provided by the plaintiff.

10.3.2 Both experts were informed that plaintiff had obtained a senior certificate but no academic records were made available. They recommended that a copy of his senior certificate be made available but it was not produced at court nor was I able to locate it in the trial bundles. Ms Grabler indicated in her psycho- educational report that the school reports should be obtained in order to assess his most likely pre-morbid educational potential. In her medico-legal

report Ms Grobler says that results from a psychometric evaluation always need to be triangulated by objective information obtained from school reports. As I said, the school reports were not provided.

10.3.3 Both Ms Grabler and Ms Monyela were informed that plaintiff

was employed as an IT technician at the time of his involvement in the accident which involved field work. He informed them that post accident he was more office bound.

10.3.4 Both educational psychologists agreed that had the accident not

occurred and considering the plaintiff's reported academic performance as well as his siblings reported academic performance, Mr Laubscher probably had the potential to obtain a qualification at an NQF Level 6 (National Diploma) or NQF Level 7 (degree), in keeping with his aptitude and interest. This assumption was made without the school reports.

10.3.5 They also agreed that now that the accident had occurred and considering the medical experts' description and diagnoses of a significant traumatic brain injury, Mr Laubscher is not expected to reach his pre-morbid academic potential. They agreed that even though he probably still has residual cognitive ability that would likely allow him to obtain a qualification at an NQF Level 4 (equivalent to a grade 12) he is expected to require additional time, energy and effort in order to study further.

10.4.1 Neurosurgeon Dr Kruger was of the opinion that the claimant sustained

a severe head injury in the accident. Dr Kruger suggested a diffuse axonal head injury with an open skull fracture in the right

temporo-parietal area of the skull with an extradural haematoma in the right temporo-parietal part of the brain. Dr Kruger also

suggested that the claimant sustained a base of skull fracture involving the anterior cranial fossa.

10.4.2 Neurosurgeon Dr Ntimbane differed from Dr Kruger and suggested the claimant sustained a moderate to severe traumatic brain injury with open skull fractures and an extradural haematoma.

10.5 Clinical Psychologists Mr L. Roper and Ms A. Peta provided a joint minute.

10.5.1 Both experts referred to the diagnoses of Dr Kruger and agreed that a head injury of this nature is expected to result in long term neuropsychological difficulties, ranging from subtle to more severe.

10.5.2 Both experts also diagnosed symptoms of a Post-traumatic Stress Disorder as well as a Depressive Disorder due to traumatic brain injury with depressive features.

10.5.3 Mr Roper and Ms Peta agreed that plaintiff's self-esteem, quality of life and cognitive, interpersonal and occupational functioning have been negatively affected as a result of the head injury.

10.5.4 Both experts considered his prognosis to be guarded due to severity of the head injury he sustained.

10.6 Psychiatrist Dr Fine stated that the functional effects of on-going organic brain damage can be considered permanent and irreversible and leave him vulnerable to an array of organically-based psychiatric disorders over plaintiff's future lifetime, which would require treatment at those times. Although the two-year window of opportunity for recovery had not closed at the time of the consultation, most improvement occurs within the first six to twelve months , with any subsequent improvement not being that significant. Prognosis for good improvement would be poor even with on-going psychiatric treatment consisting of the use of medication and psychotherapy.

10.7 I turn, then, to the joint minute of the Industrial Psychologists Ms Nicolene Kotze and Professor J Buitendach.

10.7.1 They noted that the plaintiff had completed his "A+ and N+ studies and planned to enrol for a Microsoft Certification Course". This seems to have been gleaned from the plaintiff's employer's letter dated 6 November 2017. However, plaintiff did not mention to Ms Grabler that he intended to pursue a Microsoft Certification Course but rather that he wanted to become an electrician. In fact Ms Kotze says during a follow-up telephonic consultation with the plaintiff, he indicated to her as well that but for the accident he planned to enrol for further studies to qualify as an electrician. According to Ms Kotze's psycho-legal report the A+ and N+ certificates are regarded as entry level qualifications that would not necessarily increase his earning potential.

10.7.2 However, Ms Kotze referred to Ms Grobler's view that the plaintiff had the potential to obtain a diploma or a degree.

10.7.3 Ms Kotze and Professor Buitendag agreed that plaintiff would have been able to progress to salaries associated with Paterson level C5/D1 before reaching his career ceiling at age 45.

10.7.4 Buitendach opines that the plaintiff is physically suited for his current job demands. However, his optimal potential has been curtailed by the residual effects of the accident. He notes further that although from an orthopaedic point of view plaintiff remains employable in the open labour market, the accident and its sequelae have rendered him an unequal competitor.

10.7.5 Kotze, however, referred to the report of Dr Smuts (neurologist), who opined that plaintiff had sustained a significant head injury with and associated moderately severe brain injury and that should he lose his current job he is most likely not an equal competitor in the open labour market. She also referred to Dr Fine (psychiatrist) who opined that plaintiff has sustained a head injury with significant Organic Brain Damage.

10.7.6 The expert reports of Dr Smuts and Dr Fine had not been available to Prof Buitendach.

10.7.7 Kotze referred to the letter from the plaintiff's current employer, who indicated memory difficulties and aggressiveness and stated that his wife, the office manager, has to accommodate and support Mr Laubscher at work, remind him of tasks, etc. but despite that he would attempt to employ him for as long as possible to enable him to support his family financially. He is thus clearly employed on a sympathetic basis says Kotze. During the most recent consultation with the employer at the plaintiff's place of employment it became evident that his continued employment is a financial burden on the

business but more so, the adverse effect his mood swings has on the other employees are concerning. employer's letter and said it was evident that the plaintiff's services would be terminated upon settlement of this matter, from which date he can effectively be considered functionally unemployable.

[11] The plaintiff's pre-morbid work history does not indicate that he

would have pursued studies towards obtaining a diploma or a degree. The plaintiff informed Dr JH Kruger and Ms Grabler that between March 2012 and November 2013 he had variously worked as an 'aircon installer', as a shopfitter and as a Wi-fi installer. In December

2013 he commenced working for his current employer. He installed CCTV cable networks for retail companies.

[12] I note the view of Ms Grabler that the plaintiff had the potential to obtain a degree had the accident not occurred. It may be that the plaintiff had the potential to obtain a diploma or a degree but it does not translate into a probability. The plaintiff did not pursue studies towards a degree after presumably completing grade 12. Plaintiff himself told Ms Grabler that he had wanted to become an electrician but did not have the finances to do so. Ms Kotze proceeds to postulate about his future career path on the basis that plaintiff would have opted for diploma or degree studies in electrical engineering even though he told her he planned to become an electrician. As I understand it, no tertiary education is required to

become an electrician, but plaintiff had completed his A+ and N+ studies and planned to enrol for a Microsoft Certification Course. This seems to have been gleaned from the plaintiff's employer's letter dated 6 November 2017. However, plaintiff himself did not mention to Ms Grobler that he intended to pursue a Microsoft Certification Course but rather that he wanted to become an electrician. According to Ms Kotze's psycho-legal report the A+ and N+ certificates are regarded as entry level qualifications that would not necessarily increase his earning potential.

- [13] I have considered all the reports and the fact that some experts are of the view that the plaintiff has some residual earning capacity while others are of the view that he is functionally unemployable. It seems to me that pre- morbidly the plaintiff would either have continued to progress in his then occupation or, it seems more likely, become an electrician once he had the necessary finances. I raised a query as to why the plaintiff's desire to qualify as an electrician (which does not require a tertiary education) was not dealt with. By agreement, a further report from Ms Kotze was obtained and handed in regarding the scenario if plaintiff had opted to become an electrician. Ms Kotze explains that she had regard to the report of Ms Grobler (educational psychologist) when she opted to postulate 'the salaries associated with a diploma and degree qualification rather than his reported intention of qualifying as an electrician as there was at that stage no proof that he would indeed have followed such a career.' I find this explanation rather unconvincing to say the least as there was also no proof that he would have obtained either a degree or a diploma. What she have done is mention that scenario as well in her original report. In any event, it so happens, according to Ms Kotze, that salaries for a qualified electrician resort on Paterson level C2 which is on a par with salaries postulated for a diploma qualified individual.
- [14] As far as residual earning capacity is concerned I am of the view that this may be dealt with in the general contingency to be applied. It may be made by applying an increase in the deduction for general contingencies applied to the pre-morbid earnings. [See *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 (4) SA 95 (TPA) at 104H-105F]. I accept that on the probabilities, the plaintiff will lose his current job as, according to his employer he is merely being kept there until this matter is settled.
- [15] I turn then to the question of general damages. It is trite that no two cases are exactly a like and past awards can only serve as a guide. (See *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at para 24.)
- [16] Plaintiff's counsel, referred to *Bhekisisa Simon O/amini v Road Accident Fund* [Gauteng Division, Case No 59188/13 (date of judgment 3 September 2015)]; and *Megaline v Road Accident Fund* 2007 3 All SA 531 (W).
- [17] The cases I have been referred to by the defendant include *Brijalall v Naidoo* 1961 (1) QOD 266 (D) at 271, *Hutchings v General Accident Insurance* 1986 (3) QOD 266 (D) at 271 *Hutchings v General Accident Insurance* 1986 (3) QOD 737 (C) at 744 *Venter v Mutual & Federal Versekeringsmaatskappy* 1988(3) QOD (T) at 759; *Abraham Smith obo Duduzile*

Ngobeni 2011 (SGHC); Cordeira v Road Accident Fund 2010(6) QOD A4-A5 (GNP); Kgomo v Road Accident Fund 2011 (6A4) QOD 62 (ZAGPJHC); Raupert v Road Accident Fund 2011 (6A4) QOO 52 (ECP) and Schneider N.O. & Others v AA & Another 2010(5) SA 203 (WCC).

- [18] Plaintiff's counsel suggested that general damages should be in the region of R1 500 000 whilst defendant's counsel suggested R1 000 000 before apportionment. I do not deem it necessary to detail the facts of each case. Suffice it to say that I have considered them and a few others. I am of the view that an amount of R1 250 000 (One Million Two Hundred Fifty Thousand Rands) to be reasonable (prior to apportionment) for general damages.
- [19] Insofar as contingencies are concerned I am of the view that taking all relevant factors into account a general deduction of 35% would be appropriate in respect of future loss of income. I have taken the calculations of the plaintiff's actuary based on actuarial calculations premised on Diploma - Patterson Levels C2/C3 - Functionally Unemployable, but I also take into account that he has some residual earning capacity. The actuary has allowed income until May 2018 when, it is postulated, his employment will be terminated. I accordingly determine the following as the damages sustained by the plaintiff:

Past loss of earnings capacity

NIL

Future loss of earning capacity based on pre-morbid earning capacity

R7 496 995

Less 35% contingency deduction

2 623 948

Net pre-morbid earnings

4 873 047

Less Net post-morbid earnings

95 063

Net loss of earning capacity

4 777 984

Add General Damages

1 250 000

Add Past medical and hospital expenses

431 413

Total

R6 459 397

Less 20% apportionment Net total

1 291 879

Net total

R5 167 518

[20] In the result I make the following order:

1. The defendant shall pay the plaintiff the sum of R5 167 518 (Five Million One Hundred and Sixty Seven Thousand Five Hundred and Eighteen Rands Only).
2. The defendant shall furnish the plaintiff with an undertaking in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 for 80% of the costs of the plaintiff as provided for in the said section.
3. The defendant shall pay the plaintiff's costs either as agreed or taxed including the costs of those expert witnesses whose reports the plaintiff had delivered in terms of Rule 36(9)(b) and including the costs of the preparation of joint minutes as well as the attendance costs of those witnesses who testified for the plaintiff.

N.RANCHOD

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff

: Adv. RJ de Beer

Instructed by

Surita Marais Attorneys

Counsel on behalf of Defendant : Adv. AK Maluleka

Instructed by

: Tau Phalane Inc

Date heard

: 2 March 2018

Date delivered

: 30 July 2018

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