

SOUTH AFRICA / JUDGMENT

Phakathi v Road Accident Fund (14783/2017) [2021] ZAGPPHC 351 (31 May 2021) [2021] ZAGPPHC 351

COURT

North Gauteng High Court, Pretoria

BEFORE

D Pick

CASE / FILE NUMBER

14783/2017

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

CASE NO: 14783/2017
REPORTABLE:NO
OF INTEREST TO OTHER
JUDGES:YES/NO
REVISED
DATE:31/05/2021

In the matter between: LW
PHAKATHI
Plaintiff
and
THE ROAD ACCIDENT
FUND
Defendant

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 31 MAY 2021 AT 12H00

Introduction:

1 The subject case arises from a claim against the Road Accident fund.

The Court was addressed by the Plaintiff's legal representative and was called upon to adjudicate on the claim for loss of income, as the Plaintiff rejected the Defendant's offer in settlement at trial. Merits were settled between the parties on a 80/20 basis in favour of the Plaintiff. The matter was to be decided by way of papers. The Defendant was unrepresented. The evidence before this Court for the purposes of adjudicating on quantum are the expert witness reports and salary advises.

The Plaintiff's case:

2 The Plaintiff was found next to the road. He was run over by a motor

vehicle at about 01h00 on the N2 Piet Retief Road, Ermelo district, Mpumalanga when coming back from a funeral. The last thing he remembers is crossing the road before he woke up in hospital. The Plaintiff states that the driver of the motor vehicle who ran him over did not stop at the scene of the accident.

3 The Plaintiff was taken to hospital by an ambulance. The Court was not placed in possession of ambulance records. The hospital records indicate the Plaintiff was intoxicated at the time of admission.

4 At the time of the accident the Plaintiff was employed by Transnet as a general worker. His scope of employment entailed maintenance on the rail tracks which required heavy lifting on occasion. The Plaintiff claims to have earned R 7000, 00 per month at the time of the accident. Four salary advises were made available to Court,

5 The Plaintiff claims to have been off work convalescing for 3 or 4

months after the accident. He utilised a wheelchair and spent some time on crutches. He could mobilise independently at the time of his returning back to work in June 2015. The Plaintiff claims he was not compensated for the time he spent off work.

6 The Plaintiff lost his employment when his contract terminated at the

end of April 2017, more than two years after his return to work following the motor vehicle accident. Plaintiff claims his contract

was not renewed as a result of the physical disadvantages he suffered after the accident.

7 It is not clear what Plaintiff's highest level of education is.

He reported grades varying between a grade 7 and a grade 10 qualification. According to the industrial psychologists' reports, the Plaintiff qualifies as being between unskilled and semi-skilled labour.

8 This Court is not prepared to accept the 5th and final amended Particulars of Claim dated 21/02/2017 with the Filing Notice dated 17/02/2021 (18 days before trial) in the amount of R 3 300 000, 00. I could not find proof of same having been served on the Defendant or filed with the Registrar. The matter was certified trial ready on 06 October 2020 with the claim amount of R 2 650 000,00.

9 The Plaintiff's final claim is for the purposes hereof therefore is considered to have been served on 03/09/2019 and filed on 04/09/2019 in an amount of R 2 650 000, 00. The claim is compiled as follow:

The Expert Evidence:

10 No less than 11 expert witness reports were placed before of this

Court. For the purposes of this judgement all 11 of these reports need to be addressed.

11 The Plaintiff fractured his left tibia and fibular and his left humerus. As per the hospital records, the fractures were treated by open reduction and internal fixation. Dr Ziervogel (the orthopaedic surgeon) examines the Plaintiff on 07 June 2017. He tells Dr Ziervogel he did not return to work after the accident. Dr Ziervogel rates Plaintiff's whole body impairment (WPI) at 6%. He reports the discomfort Plaintiff is still complaining about is in the area of a protruding nail. This is confirmed by the hospital records which read as follow: "X-rays 25/05117 Protruding nail irritating a muscle".

12 Dr Ziervogel, after consideration of the x-rays concludes the

fractures have healed well and that the instrumentation can be removed. In time the pain Plaintiff experiences when trying to lift heavy things will probably subside. Once the instrumentation is removed the pain should

disappear.

13 The Plaintiff consults with Ms L Toerien, the occupational therapist on the 16th of November

2017. He reports to have a grade 10 qualification. He tells Ms Toerien he continued in the same capacity (of work) after the accident until his contract ended. He experienced some difficulties though. Ms Toerien concludes as follow: "Client meets the inherent demands of his pre-accident employment, although the instrumentation might continue to cause discomfort."

14 The Plaintiff reports no psychological difficulties and expresses only travel related anxiety to her. She advises he would benefit from clinical psychological intervention as he might be experiencing “an emotional overlay related to his pain”.

15 The Plaintiff presents with the following scars when examined by Dr Patel on 20 March 2018: lacerations at the lateral corner of his left eye and behind his head, abrasions at the back of his neck, his left shoulder and his chest. He has a 5 cm hypopigmented scar where his neck and the left shoulder get together. He presents with a 3 cm visible scar on the left shoulder, a 23 cm scar on the left upper arm, various scars between 2 and 6 cm long on the left lower leg and a 4 cm transpatellar scar over the anterior knee.

16 Dr Patel remarks these scars present “severe deconfiguration and are permanent in nature’. She suggests surgical scar revision and fractionated laser therapy. Dr Ziervogel remarks apart from the patellar scar, none of the other scars are still painful or sensitive.

17 In February 2018 the Plaintiff consults with Ms F de Ritter, a clinical psychologist. He reports to have a grade 9 qualification. He tells her he was employed with Transnet until April 2017 when the contract ended. He experienced dizziness when it was hot and pain when lifting heavy objects and had to take frequent breaks. She is unable to contact his former supervisor with Transnet, as he is unable to recall his surname or his contact details.

18 The Plaintiff reports he suffers behavioural disturbances, he is angry and irritable. He tells her his mobility is impaired and he needs assistance with household chores. His sister states that she doubts he will be able to work again.

19 She finds he represents with mild neurocognitive disorder, major depressive disorder on a mild level and chronic post traumatic stress disorder. She recommends clinical psychological treatment for individual psychotherapy and psychiatrist intervention. She assesses the Plaintiffs whole person mental and behavioural disorder

impairment rating at 12%.

20 Ms de Ritter concludes Plaintiff should receive compensation for pain and suffering experienced over the years following the accident, any future pain and suffering as well as possible loss of income and loss of quality of life.

21 On 21 May 2018 Plaintiff consults with Ms Tromp, a clinical psychologist. He tells her he has a grade 9 qualification. He tells her he returned to his post as a general worker until he was retrenched in April 2017. He complains since the accident he inter alia suffers episodes of dizziness, pain in his left shoulder, left arm, leg and back. He suffers from a depressed mood, loss motivation and feels hopeless and helpless.

22 He reports he suffers from travel anxiety. He has also become highly irritable, short tempered, and socially withdrawn. He experiences low self- esteem and self-image. He struggles to remember and concentrate and is suffering of sleeping disorders. He eats less since the accident and has anger outbursts. He has nightmares at least once a week.

23 Ms Tromp diagnoses him with depressive disorder symptoms and anxiety

which impacts on his interpersonal relationships and day to day functioning. She advises he should consult a clinical psychologist for psychotherapeutic intervention for at least 25 sessions. She further suggests he should consult a psychiatrist for psychotropic medication and undergo physiotherapy.

24 The Plaintiff tells Ms Mathabela, an industrial psychologists on 21 May 2018 his highest scholastic qualification is grade 8, which he obtained in

2006. He tells her upon returning to work after the accident, he was put on light duty for two months and thereafter resumed his former position until April 2017, when his contract ended.

25 He tells her his work performance however was slow due to “the challenges” he faced after he returned. if it was not for the accident his contract would have been renewed. Before the accident he could be promoted to driver earning R13 000, 00 per month and was in the process of obtaining his driver’s licence at the time of the accident. He reports he did eventually obtain a code 10 driver's licence in 2017 and is actively seeking employment as a driver.

26 After she could not reach Transnet to confirm his employment prior to the accident. She manages to contact one Happy, a former colleague of the Plaintiff who informs her Plaintiff was employed on a year-to-year contract basis. After the accident Plaintiff’s job performance was slow as he complained of pain in his legs. He was placed on light duty with the same salary until his contract ended. He was a good worker and had a prospect of being promoted to driver or supervisor. The prerequisites to such promotion were work experience in the company and job availability. He cannot recall when the Plaintiff’s contract ended.

27 During the consultation, Plaintiff reports inter alia he suffers pain in his left knee and shoulder, experiences discomfort when he sleeps on his left side and when lifting heavy objects. He reports he is short tempered, irritable, quiet and chooses to stay at home. She opines that Plaintiff suffers from depressive disorder symptoms.

28 In her report, she recommends that he should seek alternative

employment as a driver or general worker with less physical demands than his employment prior to the accident. Ms Mathabla concludes that he is operating at diminished capacity due to his impaired state which will most likely result in decreased employment opportunities and a lower earning capacity.

29 On 22 May 2018 the Plaintiff consults Dr Okoli, a neurosurgeon. He tells Dr Okoli that he has a grade 8 qualification. During the consultation he reports inter alia that he has pain in his left leg, his left shoulder and when he sleeps on his left side. He reports that he has no friends, and this

is the way it has always been. He remarks “friends are no good”. He reports no sleeping disturbances, he does not suffer any memory problems, he is not short-tempered or violent and has no anxiety disorders. Dr Okoli reports that Plaintiff suffers no neurophysical disorders and has no neuropsychological complaints. Dr Okoli concludes that Plaintiff is able to secure employment in the open labour market without reduction in his retirement age.

30 On 23 May 2018 the Plaintiff consults with Ms Elouise du Plooy from Reintegrate. She is an occupational therapist. He reports his highest scholastic qualification to be a grade 8. He tells her he was placed on light duty for 2 months after the accident. After this period he could not resume his normal duties and was given lighter physical work.

31 He does not report any cognitive, psychological or emotional

difficulties to her during the interview. She remarks that Plaintiff’s cognition, psychosocial- and emotional functioning displayed on the day of the evaluation is not expected to inhibit his occupational performance. His employment skills are classified as unskilled to semi-skilled.

32 Ms du Plooy concludes “... given his present physical limitations and low level of education. Mr Phakathi is no longer as competitive in the open labour market as his counterparts ... Note is made however that even with the intervention it is not expected to return to his pre-accident level of functioning.”

33 The Plaintiff consults Dr Pretorius Industrial Psychologists on the 26th of September 2018. He reports his highest scholastic qualification is grade 7 which he passed in 2007. He tells them he was placed on light duty until April 2017. His contract was not renewed, whilst all his co-workers’ contracts were renewed. He gives no reason why his contract was not renewed. They manage to speak to his former supervisor, one Happy, whose version of the Plaintiff’s work performance pre- and post-accident is set out and discussed hereinunder.

34 It is observed that the Plaintiff’s employment profile falls into the unskilled category. His salary at Transnet was higher than the Upper Quartile of R 82 000, 00 per annum as set out in Koch’s guide for Unskilled Workers (2019). He would most likely not be able to earn this salary in the open labour market again.

35 Apart from feeling saddened by the accident, he reports no other

psychological- or cognitive related complaints. He reports he is actively seeking employment as a gardener, cleaner or general worker. It is concluded that the psychological and neuropsychological impact of the accident disadvantaged him. The impact of the accident would now render him a “disadvantaged job-seeker in a higher competition environment”.

36 It is further concluded that his physical impairment could likely be dealt with by removal of the internal fixtures. Four weeks’

recuperation time is needed to be provided for after each removal. I quote: “Based on the expert opinions, Mr Phakathi remains suited to the work of general labourer, but with some discomfort I pains due to internal fixtures still being in place. However, following removal of the fixtures, he is not foreseen to present with any significant limitations and the expectation is then created that he would be able to engage in physical work (such as pre-accident) without curtailment”.

37 On 06 December 2018 the Plaintiff consults with Dr Mokabane, a neurologist. He reports to have a grade 7 qualification. He reports he was initially on light duty when he went back to work but returned to his normal position after some time. His contract ended in 2017 and he has been unemployed since then.

38 He denies any emotional disturbances and a history of headaches. He reports inter alia forgetfulness but does not perceive same as a problem. Dr Mokabane concludes that no mention or suggestion is made of head injuries in the hospital records. The Plaintiff suffered pain and continue to suffer pain since the accident and should be fairly compensated for the injuries he suffered in the accident.

39 The Joint Minute of the industrial psychologists, Ms Mathabela and Mr Jooste was compiled on 13 August 2019. They agree the Plaintiff has a grade 7 qualification. They agree he lost his employment when his contract was not renewed at the end of April 2017, most likely as a result of his physical drawbacks. This information was derived from collateral sources.

40 They resolve he is operating at a diminished capacity. As a result of the disagreement between the occupational therapists, they advise two scenarios for the calculation of future loss of income, namely, that a national minimum wage of R 42 000, 00 per annum be used as the basis for calculation of future loss of income as opposed to the highest quartile for unskilled workers, being R 82 000,00 per annum at the time.

41 They advise he should be compensated for the recuperation period (past loss income) of 4 months in the amount of R 7 500, 00 per month. They also advise he should be compensated for risk of future loss of earnings as his earning potential has been restricted and he is more vulnerable.

Issues to be decided by the Court:

42 This Court was requested by the Plaintiff’s legal representative to adjudicate on the loss of earnings only. I will address past- and future loss of earnings and past- and future medical expenses as well, as they form part of the claim before Court as set out in the Plaintiff’s Particulars of Claim.

43 The merits have already been settled between the parties on 80/20% basis in favour of the Plaintiff. The Parties already settled the general damages in the amount of R 450 000, 00. Is the settlement justified in the circumstances? The Court is not merely a “rubber stamp” and has a wide discretion in ensuring a justified outcome for all the Parties concerned.

44 How much weight should be attributed to the expert witness reports in the Court's reaching its final conclusion herein?

Case Law applicable to the evidence:

45 It was held in *Coopers (South Africa) Ltd v Deutsche Gesellschaft fur Schadelingsbekampfung MBH* 1976 (3) SA 352 (A) 371G-H:

"As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause or established by his own evidence or that of some other competent witness" (my emphasis)

46 In *Rudman v Road Accident Fund* (370/01) [2002] ZASCA 129;

[2002] 4 All SCA 422 (SCA) 26 the Court stated at 16:

".... it must be remembered that in the final analysis an award cannot be based on speculation. It must have an evidential foundation.

It was further held that "earning capacity is a complex of abilities which together make up an asset in a claimant's estate" and the abilities must therefore be considered as a whole. One should guard against isolating the individually compromised elements of the ability to earn a living and place a monetary value on them. Instead it was held, one should consider whether the individually compromised element brings about a "diminution in the claimant's earning capacity as a whole".

47 Judge Fisher in *MS v Road Accident Fund* (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019) held that the Judiciary should not be blind to the manner in which the Road Accident Fund is being exploited. She held that too often the plaintiff seeks to prove the motor vehicle accident as the causation of his injuries by filing an array of expert witness reports (at great costs), which reports are compiled by way of facts related by the plaintiff to the expert and some clinical findings. This is especially prevalent in cases where injuries are less obvious.

48 The judgement further sets out a four tier enquiry by which Road Accident Fund matters should be evaluated. Firstly and in order to justify the merits, it should be established whether the accident was caused by the negligence of the insured driver. The second and third legs of the investigation involve establishing whether the plaintiff sustained the alleged injuries in the accident and how the proven injuries have affected the Plaintiff? Only once this has been established can quantum be addressed. The fourth leg of the investigation entails determining how the plaintiff should be remunerated for the effects of such injuries.

49 At 36 it was held that the quantum for the loss of future income to

be awarded to the plaintiff is a matter of estimation to be dealt with by the Court in its wide discretion, as it is based on uncertain future events. The learned Judge remarks at 37:

“The parties routinely seek to assist the court in this assessment of the amount payable by resort to the expertise of an actuary. This is not an obligatory approach to the quantification of damages and a court should be careful not to treat these reports as if they are scientific data and the approach directive.”

50 At 41 the Judge remarks on the actuarial manner of calculation of quantum and the application of contingencies as follow:

“... This mechanism should not be understood as being prescriptive or confining of the assessment that the court is called on to make. The court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, intuition and general right thinking.”

51 I must align myself with Judge Fisher who at 78 cautions that the funds in the Road Accident Fund are “precious public monies”. I also take heed of Judge Fishers warning that “Court should be alert to a lack of circumspection in the briefing of experts and the employment of other resources in the conduct of a case, on the basis that it is assumed that RAF will absorb all the costs as a matter of course.”

Applicability of case law to the Evidence:

52 A well rounded, reasoned and rationally acceptable judgement is the result of sifting through all the evidence which was placed before the Court and weighing the probabilities against the improbabilities

after having distinguished the reliability of the evidence.

53 It is reasonable to accept the Plaintiff was injured in a motor vehicle accident. The Plaintiff provides the contact details of the ER24 member who transported him to the hospital on his statement to

the Police. The hospital record reads as follow:

“A 26 year old male brought forward with the history of being found on the road. Looks like being hit by the car and ran away. Patient is intoxicated with alcohol consuming ...

- 28/02/2015”.

54 At this point I pause to point out that the Plaintiff would have benefited from discovering the ambulance records as well. The value thereof is evidentiary and could have provided information such as whether the Plaintiff was conscious or unconscious, the circumstances in which he was found as well as the Plaintiff’s glasgow index.

55 The Plaintiff reported the motor vehicle accident to the Police who investigated the matter and resolved that the motor vehicle which drove the Plaintiff over could not be tracked down. In his affidavit the investigating officer indicated there were no eyewitness to the incident. The case was consequently closed on 20 August 2015

56 It follows that the Defendant would be liable to compensate the Plaintiff for injuries he so suffered and can proof in terms of section 17(1)(b) of the Act, “.... provided that the obligation of the Fund to compensate a third party for non- pecuniary loss shall be limited for compensation of serious injury as contemplated in subsection (1A) and shall be paid by a lump sum.”

Ad General Damages:

57 I was notified general damages were settled in an amount of R 450 000, 00. The Particulars of Claim served and filed on 03/09/2019 and 04/09/2019 respectively makes provision for a claim in the amount of R300 000, 00 only. The claim for general damages is curbed at the amount of R300 000,00 and the settlement therefore rejected. General

damages now become a matter to be decided in the Court's discretion.

58 Serious injuries are defined in regulation 3 of the Road Accident Fund Regulations, 2008 and requires the completion of a Serious Injury Assessment Report (RAF 4 form). Dr Patel completed two RAF 4 forms dated 2018/03/20 and 2021/02/25 (14 days before trial) respectively. The RAF 4's so completed mentions the severeness

of the scarring and shortly refers to the other injuries.

59 The aforementioned RAF4 reports read as follow:

4.2. Medical treatment rendered from date of accident to present: 2018/03/20 “Ermelo Provincial Hospital: RIF of left humerus and left leg” 2021/02/25: “Ermelo Provincial Hospital- emergency and surgical care for left humerus and left tibia fracture.”

60.1 The heading to the RAF4 form reads as follow:

(a) A claim for non-pecuniary loss (“general damages” or “pain and suffering”) will not be considered unless this report is duly completed and submitted”

.....

(e) If any section of this form is not applicable, mark that section “N/A”.

60.2 Dr Patel drew a line through Annexures A, Band C of the 2018 RAF4, writing N/A over the Annexures. The Annexures A, B and C forms were omitted from the 2021 RAF4 completed by Dr Patel.

61 This Court could draw no conclusion on the seriousness of the remainder of the injuries from the RAF4's. Dr Ziervogel rates the Plaintiff's whole body impairment (“WPI”) at 6%. He concedes in his report the Plaintiff has- and is still suffering pain. This takes us to the narrative test for the

determination

of general damages.

62 The narrative test involves an enquiry into whether the injuries sustained

- (a) Resulted in serious long term impairment or loss of bodily function;
- (b) constitutes permanent serious disfigurement;
- (c) resulted in severe long term mental or severe long term behavioural disturbance or disorder; and
- (d) resulted in the loss of a foetus.

(Regulation 3(1)(b)(iii) of the Road Accident Fund Regulations, 2008).

63 Dr Patel's RAF4's however does deal with the scarring, which might qualify in terms of the narrative test as "serious injuries" for the purposes of Regulation 3, provided such scarring constitutes "serious permanent disfigurement". Dr Ziervogel and Dr Patel provide photos of the scarring. These photos are attached to their reports dated 07 June 2017 and 20 March

2018 respectively. The latest (2021) RAF4 completed by Dr Patel indicates "scarring of a severely disfiguring nature, amenable to a certain improvement with some management". She further indicates that MMI (maximal medical improvement) has been reached and indicates "however the scarring will change with future treatment".

64 I find myself in the peculiar position that I have been placed in possession of an expert report, two RAF4 reports and photos some 3 years old. I am no expert and therefore resolve to the case law for guidance on the meaning of "serious permanent disfigurement". In this regard I have perused the judgement of Davis, J in *Mashigo v Road Accident Fund* (2120/2014) [2018] ZAGPPHC 539 (13 June 2018). The magnitude of precedents referred to in this Judgement was of great assistance in this regard.

65 I am not convinced that the Plaintiff's scarring in itself warrants an award of R 300 000, 00 in general damages. In order to complete the narrative test we now turn to the evaluation of the remainder of the evidence in this matter.

Ad evaluation of the evidence on the Plaintiffs injuries:

66 At this juncture it would be prudent to start interrogating the expert witness evidence reports in order to test the value derived therefrom for the purposes of adjudicating on this matter as far as both the narrative test and the loss of earning capacity and consequential possible loss of future earnings are concerned. It is noteworthy that the Plaintiff reported contradictory evidence to the different experts.

67 Fisher, J in *MS v Road Accident Fund* (citation above) at 20 stated:

"Loss of earning capacity is generally the largest head of damages in monetary terms and generally runs into millions of Rands. A Court is

called upon in this enquiry to determine how the injury will be likely to affect the long term functioning of the plaintiff. In the field of neurology and psychology, diagnosis and prognosis is often difficult to establish with any certainty. In cases such as this, opinion evidence should ordinarily be looked at together with reference to the plaintiff's evidence and other relevant fact. In this background evidence is not presented, which is regrettably is common practice in these cases, the matter can be difficult of determination."

68 At 21 Judge Fisher quoted *S v Mthethwa* [2017] ZAWCHC 28 at 98

"The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value." (my emphasis)

69 The Plaintiff reported his highest scholastic qualifications to the experts as being between grades 7 and 10. He reported a grade 10 qualification to Ms Toerien (occupational therapist) - the second expert he sees. He consulted the orthopedic surgeon first. His report is silent on the Plaintiff's level of education. He reports a grade 9 qualification to Ms de Ritter (clinical Psychologist), Ms Tromp (clinical psychologist), the third and fourth experts he sees. He reports a grade 8 qualification to Ms Mathabela (industrial psychologist), Ms du Plooy from Reintegrate (occupational therapist) and Dr Okoli (neurologist), the fifth and sixth experts and a grade 7 qualification to Dr. Mokabane (neurologist), Dr Pretorius Industrial Psychologists - the last two experts he consults.

70 The Plaintiff reported different versions on his emotional well-being at will. His cognitive-, emotional- and psychological abilities were tested and evaluated against the information he provided. It follows that the outcomes of the reports dealing with these abilities were substantially influenced by the information volunteered by the Plaintiff. In turn the experts relied on each other's reports for collateral information in compiling their own reports.

71 The Plaintiff' statements to the experts are contradictory in itself. He purports to be suffering from travel related anxiety, yet is actively seeking employment as a driver. He informs Ms de Ritter that he is immobilised, complains of pain when bending, kneeling, standing or walking for extended periods of time, dizziness when it is warm and yet is seeking employment as a gardener.

72 He complains of nightmares and yet tells Dr Okoli that he suffers of no sleeping disorder. He complains of various psychological problems, such as being moody, short tempered and having outburst of anger, but tells Dr Okoli, Dr. Mokabane and Ms du Plooy from Reintegrate that he has no emotional disturbances. After having complained of anxiety and regular headaches, he tells Dr Okoli he does not suffer from anxiety and Dr Mokabane that he has no history of headaches.

73 The Plaintiff purports to have become socially withdrawn and exclaims that his social life has deteriorated, yet he tells Dr Okoli that he does not have friends. That is the way it has always been. Friends are no good.

74 The Plaintiff complains to Ms de Ritter and Dr Mokabane that he is forgetful. He tells Dr Mokabane that he does not consider the forgetfulness as being a problem. Yet he tells Dr Okoli that he has no memory problems.

75 Notwithstanding the contradictory versions put forward by the Plaintiff, the overall findings in six of the reports, inclusive of the joint minutes by the industrial psychologists that the Plaintiff will not be able to lead a normal life post-accident. The general finding is also that his quality of life and employability was negatively affected by the psychological after-effects of the accident. All these experts advised that the Plaintiff would benefit from psychological intervention as he is suffering from post-traumatic- stress and depressive mood disorder.

76 Both Neurosurgeons, Drs Okoli and Dr. Mokabane found no proof of neuro-psychological disorders or brain injuries and find that the Plaintiff's functioning is within the normal scope. Dr Okoli goes as far as saying that there is nothing keeping the Plaintiff from resuming employment in the open labour market. Dr Mathabane was silent on the matter.

77 The above represents but a few of Plaintiff's contradictory statements found in the expert reports. The immediate question arises as to how reliable the results of such clinical testing and the subsequent evaluations can be when the experts rely on adaptation

by the Plaintiff, who is hardly "a reliable subject" and the experts rely on each other's reports as collateral information to comply their own reports. I am of the opinion that the only independent and noteworthy reports are those of the orthopaedic surgeon and the two neurologists. Ms Toerien also did not have access to any of the other expert reports to refer to as collateral information.

78 It was held by Fisher, J in *MT v Road Accident Fund; HM v Road Accident Fund* (37986/2018) [2020] ZAGPJHC 286; [2021] 1 All SA 285 (GJ); 2021 (2) SA 618 (GJ) (16 November 2020) at 38

"Of particular pre-eminence in the expert coterie is the industrial psychologist. The task of the industrial psychologist is to work closely with the other experts in order to set up probable scenarios as to how the injuries as identified and reported on by the other experts are likely to affect the plaintiff in the workplace. By far the largest claims are those for loss of earning capacity. It is in this realm of suppositions, projections and contingencies that there should be assessment of the court of how the individual plaintiff should be compensated for his or her loss, accepting the opinions of the experts who are qualified in the particular field such as orthopaedic surgeons and neurologists. These experts are of importance in the enquiry as by far the most common injuries are broken bones and brain injuries ..."

Was the accident the cause of the Plaintiff's loss of his employment?

79 Here also the Plaintiff had different versions which he expressed to the experts at will. In respect of his employment post-accident the Plaintiff initially held to Ms Toerien and Ms de Ritter (occupational therapist and clinical psychologist) he was employed in the same capacity immediately on his return to work until his contract terminated in April

2017. He told one neurologist, Dr. Okoli he was retrenched in April 2017.

80 Then he says to the other neurologist, Dr Mokobane and the clinical psychologist Ms Tromp he was initially placed on light duty for two months and thereafter returned to his original position as a general worker until his contract terminated in April 2017. Then there is yet another version which surfaces in May 2018 and is “substantiated” by one Happy - first portrayed as a former colleague and then as a former supervisor of the Plaintiff.

81 Happy tells the industrial psychologists that the Plaintiff never returned to his original position but was placed on light duty, with the same salary, until his contract was terminated in April

2017. Happy takes the story even further therein that but for the Plaintiff’s, all the other workers’ contracts were renewed. Happy says the employer would not renew the Plaintiff’s contract as he was no longer physically fit for the purposes of the position he was employed at pre-accident.

82 Happy goes on to say was it not for the accident the Plaintiff could have been promoted to supervisor of driver, earning between R15 000,00 and R19 000,00 per month.

83 At this point it is prudent to annunciate Happy’s version was never volunteered by the Plaintiff until Happy entered the scene in May 2018, this after Ms de Ritter was unable to contact the Plaintiff’s supervisor in February 2018, as the Plaintiff could neither recall his supervisor’s surname nor his contact details.

84 The question arises which version is the to be accepted and whether the Plaintiff’s employment was jeopardised following the accident?

Happy’s version cannot be accepted. In amplification of the above it is held that on the same date as the Plaintiff told the one industrial psychologist Happy’s version, he told the clinical psychologist that he returned to his post as general worker after the accident. He held the same to the one neurologist, Dr Mokobane, in December 2018, albeit after a period of lighter duties. I am not convinced that there is any evidence, other than the corroboration by Happy, that the Plaintiff lost his employment due to physical constraints.

85 The Plaintiff placed the Court in possession of four salary advises dated 27/05/2013, 24/04/2015, 26/06/2015 and 26/06/2016. The salary advises show two dates of employment, namely 16/07/2012 and 07/04/2015.

The salaries reflected on these payslips are the following:

The earnings above are indicated before deductions and include some overtime and allowances. All the payslips indicate that the Plaintiff was employed as a general worker at the track coal line.

86 The salary advises dated 2015 fall within the period of the accident. It is clear the Plaintiff went back to work in June 2015, 3 months after the accident. Dr Pretorius Industrial Psychologist filed an addendum to their report, indicating they were placed in possession of a payslip dated June 2015, in the amount of R3 306, 26. It is not clear whether the Plaintiff was remunerated for March, April and May 2015. The Plaintiff was re-employed by Transnet on 07 April 2015, following the

accident. No salary advise was supplied for the period of April 2017. However, the payslip dated a year after the accident indicated that the Plaintiff earned R 3 452, 34 MORE per month than he did pre-accident.

87 In the circumstances and having considered the evidence on this aspect as a whole, a scenario where the Plaintiff after the accident returned to his former employer in a lesser capacity on the same salary, and the employer then, as a result of his diminished physical ability deciding not to renew his contract after him having been so employed for a period of two years post-accident is simply not plausible. Plaintiff earned almost R 3500,00 more per month a year post-accident which in itself speaks to the improbability of such a scenario. I am not convinced that there is any evidence, other than the corroboration by Happy, that the Plaintiff lost his employment due to physical constraints. This version of events only surfaced in May 2018 and was only held to three of the eight experts whose reports reflect on this matter.

88 Neither Happy's- nor the Plaintiff's version that he could have been promoted to a driver or supervisor holds water. The Plaintiff was at the date of the accident only 3 years in the service of his employer and not even in possession of a valid driver's licence. He obtained a code 10 driver's licence in 2017 only- two years post accident.

89 For the reasons as set out herein, this Court cannot align itself with the industrial psychologists' joint minutes which I was referred to by the Plaintiffs legal representative during his address, insofar as it singles out the accident as having been the sole cause of the Plaintiffs loss of employment.

90 It was held in *Bee v Road Accident Fund* (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018) at 30 that joint minutes must be treated as expert opinion.

“ The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the Court is consequently part of the evidential material which the court must consider to arrive at a just decision. The court, in such instance, shall be entitled to test the reliability of the joint report, and if the court finds the joint opinion to be unreliable, the court will be entitled to reject the joint opinion. The court is entitled to reject the joint report or agreed opinion if the court is of the view that the joint report or opinion is based on incorrect facts. incorrect assumptions or is unconvincing.” (my emphasis)

Ad the Plaintiff's future earning capacity and loss of future income:

91 It is common cause that the Plaintiff complains of physical pain in his left lower leg, his left knee, left shoulder and when sleeping on his left side to almost all the experts. It is not in dispute that the Plaintiff suffered physical injuries, the most serious thereof being the fractures to the tibia, fibula and humerus. Dr Ziervogel reports that once the instrumentation has been removed the pain should disappear and the Plaintiff should be able resume similar kind of employment as he had before the accident. Ms L Toerien, the occupational therapist, Dr Pretorius' Mr Jooste and Dr Okoli, the neurologist concurs.

92 Ms Tromp, the clinical psychologist remarks that Plaintiff's depression is due to diminished physical capabilities, pain and lack of employment. This opinion is supported by a couple of the experts. Once the instrumentation has been removed, the Plaintiff will be able to return to a pre-accident scenario. Should Plaintiff need psychological services going forward, an undertaking by the Defendant to pay Plaintiff's psychological expenses should suffice.

93 In *Dippenaar v Shield Insurance Co Ltd* 1979

(2) SA 904 (A) it was held that:

"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:

"In later Roman law property came to mean the universitas of the plaintiff's rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland."

Conclusion:

94 Merits was settled 80% in favour of the Plaintiff who was an intoxicated pedestrian and should not have been on the road, not even speaking of crossing the road. Pedestrians should publicly and openly

be seen to be discouraged from travelling whilst intoxicated. It was reported by the South African Automobile Association on 7 December 2020 that 33% of road fatalities are pedestrians. Drunken pedestrians should not be seen to be rewarded for their irresponsibility.

95 Settlement on General damages are not merely for the taking and the court is not a rubber stamp. Although I cannot reconcile myself with the amount of R 300 000, 00 in general damages being awarded for the Plaintiff's scarring which will improve in time, I am however conscious of the fact that justice must be served to both Parties.

96 The Plaintiff has been suffering pain and discomfort since the

accident, which pain and discomfort is still persistent as a result of the instrumentation not having been removed as yet. It is noted that the constant pain might affect his quality of life, his emotional- and psychological wellbeing. It is accepted that the Plaintiff suffered post-traumatic stress disorder after the accident.

97 The Court is not convinced of the motor vehicle accident having been the cause of the Plaintiff's loss of employment. The Court is however mindful of the motor vehicle accident and the delay in the

adjudication of this matter having negatively impacted on the Plaintiff's physical and emotional wellbeing to such an extent

that he might have found himself not as competitive as his counterparts in the open labour market. This matter came before Court

six years post-accident. Any allocation off past loss income will be calculated at R7500,00 per month which is higher than the national minimum wage and the salary of unskilled labour, but lower than the Plaintiff's Transnet salary in 2016.

98 Once the instrumentation has been removed, it is expected that the Plaintiff would most possibly be able to resume something similar to pre-accident employment. Taken from the experts, his emotional state would improve. I therefore conclude that Plaintiff's future earning capacity has not been impaired. An undertaking from the Defendant to assume responsibility for payment of all future medical expenses (inclusive of psychological expenses) would suffice.

99 The Court also recognises that the Plaintiff would need some financial assistance in this time of convalescence. Four weeks was foreseen for each of the operations removing the internal fixtures. Having perused and considered the evidence before Court, the Court is convinced once the Plaintiff's health needs have been so attended,

the effects of the motor vehicle accident will no longer diminish the prospects of his being successfully employed.

100 No past medical expenses were included in the Plaintiff's trial bundle or discovery.

101 The Plaintiff needs to be compensated for the 3 months he spent off work, convalescing after the motor vehicle accident which he was not remunerated for.

Order:

1 80/20% apportionment of merits in favour of the Plaintiff;

2 General damages are awarded in the amount of R 300 000, 00;

3 The Defendant is ordered to pay the Plaintiff an amount of R 22 500, 00 in past loss income for the months of March, April and May 2015 he spent convalescing after the motor vehicle accident;

4 The Defendant is ordered to pay the Plaintiff loss of pass income in the amount of R 360 000, 00 for the years of May 2017 to date of Order;

5 The Plaintiff is awarded loss of future income in an amount of R45 000,00 for the period he will spend off work convalescing after having the internal fixtures removed;

6 The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund, Act 56 of 1996, which shall include the reasonable costs associated with treatment of the Plaintiff's psychological health;

7 The Defendant is ordered to pay the Plaintiff's taxed party and party costs inclusive of the costs of advocate / Mr Lardo Eloff for preparation and appearance, and the expert witnesses' reports but exclusive of the costs of their reservation for trial.

D PICK

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Heard on:

08 March 2021

Judgement

on: 31 May 2021

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