Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

DATE SIGNATURE

CASE NO: 5240/2019

In the matter between:

ADV DEBBIE THEODORELLIS NO Plaintiff

***Curatrix ad litem* for M[...] B[...]**

and

ROAD ACCIDENT FUND Defendant

[Link no: 4544472]

Coram: Farrell AJ

Date of hearing: 29 November 2023 – (Courtroom 8E)

Handed down on: 05 February 2024

(*The matter was heard in open court judgment was handed down electronically by uploading the judgment onto the electronic file on CaseLines and circulating to the parties' representatives by E-mail. The date of judgment is deemed to be the date of uploading onto CaseLines)*

JUDGEMENT

FARRELL, AJ:

<u>INTRODUCTION</u>:

1.1 This is a claim against the Road Accident Fund in terms of the Road Accident Fund Act, 1996.[1] The action is brought on behalf of M[...] B[...].[2]

1.2 The patient was a passenger in a single vehicle accident that occurred on 30 December 2016.[3] The patient sustained severe bodily injuries during the accident, the most notable of which was a concussive head injury with an associated brain injury.[4]

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1 Act 56 of 1996 (as amended).

2 I shall refer to Mr Bopape hereinafter as "the patient". The patient was born on 25 August 1994.

3 I refer to this accident hereinafter as "the accident".

1.3 The claims brought on behalf of the patient are for the payment of: -

1.3.1 future medical, hospital and related expenses;

1.3.2 accrued and prospective losses of earnings; and

1.3.3 general damages.

1.4 The action served before me by way of an application for default judgement.

1.5 Although the proceedings were conducted in the default judgement court, the defendant was represented at the hearing and was afforded the fullest opportunity of addressing me during the course of the proceedings.

1.6 At the commencement of the default judgement application, I was informed by both parties that: -

1.6.1 the defendant conceded its liability to the patient to compensate him for 100% of any loss or damage which he suffered as a result of the bodily injuries due to and arising from the accident;

1.6.2 the defendant accepted its liability to compensate the patient for his non-pecuniary loss. This loss had been settled between the parties for an amount of R950,000.00 (nine-hundred and fifty thousand Rand);

1.6.3 the defendant agreed to issue an unlimited undertaking in terms of section 17(4)(a) of the Road Accident Fund Act.

Resultantly, the only remaining issue which I was called upon to determine was that of the patient's loss of earnings.

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[4] Dr J A Smuts, CaseLines, para 5.1, pg. F8. Dr F Colin, psychiatrist, differentially diagnoses the patient with "post-traumatic brain injury dementia", and states that the formal diagnosis notwithstanding, the patient sustained a significant brain injury that has left him with clear cognitive deficits. Dr F Colin, Caselines, para 8, pg. F58.

1.7 For purposes of determining the patient's loss of earnings, I granted an unopposed order in terms of Uniform Rule 38(2) in terms of which the evidence of the following expert witnesses be adduced on affidavit: -[5]

1.7.1 Dr J A Smuts, Neurologist;
1.7.2 Dr P R Engelbrecht, Orthopaedic Surgeon;
1.7.3 Dr J P M Pienaar, Plastic and Reconstructive Surgeon;
1.7.4 Dr P F Collin, Psychiatrist;
1.7.5 Ms A Cilliers, Occupational Therapist;
1.7.6 Ms M B du Plessis, Industrial Psychologist; and
1.7.7 Mr J J C Sauer, Actuary.

1.8 Having considered the affidavit evidence and the associated medico-legal reports and documents that were admitted into evidence in terms of Rule 38(2), I am satisfied that, to the extent that the reports contain opinion evidence, those opinions withstand logical analysis.[6] I have no reasonable basis to reject the opinions expressed by the experts. I am persuaded that I can confidently rely on those opinions for purposes of quantifying the patient's claim for loss of earnings.

THE ACCIDENT INJURIES AND THEIR AFTERMATH:

2.1 The injuries which the patient sustained in the accident can be divided into three main categories. These are: -

2.1.1 a head and brain injury;
2.1.2 multiple lacerations and abrasions; and
2.1.3 orthopaedic injuries.

2.2 As I have mentioned, the most significant of these injuries, are the head and brain injury. The expert evidence compellingly establishes that: -

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[5] The affidavits that were the subject of my order are those affidavits at Caeslines, pp. E1 to E13. The associated medico-legal reports and documents are those reports and documents at Caselines, pp. F1 to F153.

[6] See *inter alia* **Michael and Another v Linksfield park Clinic (Pty) Ltd and Another (1) [2002] 1 All SA 384 (A).**

2.2.1 the patient sustained a severe concussive head injury, and that the associated brain injury is also severe.[7]

2.2.2 the patient's brain injury has resulted in severe post-traumatic headaches,[8] possible urological and sexual dysfunction,[9] personality changes,[10] compromised executive function,[11] and clear cognitive deficits.

2.2.3 the patient's selective and sustained attention skills are moderately to severely impaired,[12] and Test of Information Processing Skills[13] demonstrated that the patient has significant visual and auditory processing skills.

2.3 The lacerations and abrasions were predominantly facial, involving the patient's eyelids, nose, lips, and nose, but also occurred over the patient's neck, left shoulder, left arm, and left chest, his anterior chest as well as his right back and right maxilla. The resultant scars from these lacerations and abrasions are largely visible and unsightly. The nasal scarring, the anterior chest scarring and the maxilla scarring are described as "mutilating".[14] The patient also has a scar from where tissue was harvested for a nasal skin graft.[15]

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7 Para 10, Caselines, pg. F13. I am satisfied that the reference to "moderate" in paragraph 5.1, Caselines, pg. F8 is an error. However, it matters not as the severity of a head injury is not always directly proportionate to the severity of the associated brain injury. Dr Colin also describes the brain injury as "significant". Para 8(iii), CaseLines, pg. F58

8 Para 5.2.3, Caselines, pg. F8.

9 Para 5.2.5, Caselines, pg. F9

10 Para 5.2.8, Caselines, pp. F9 and F10 and para 6.2, caselines F11.

11 *Ibid*.

12 This is a cognitive test. The purpose of the test, the patient's scores and the results are at para 2.2, Caselines, pp. F93 and F94.

13 This is a cognitive test. The purpose, scores and test results are explained at para 2.2, Caselines, pp. F94 to F96.

14 A description of the location, the size, and the severity of all the scars are outlined in paragraphs 11.1 to 11.5 and 11.7 to 11.10, Caselines, pp. F45 and F46. The photographs of the scarring are at caseLines, pp. F47 to F50. See also the description at para 8, Caselines, pg. F32.

15 Para 11.6, Caselines, pg. F45.

2.4 The orthopaedic injuries seem to entail a soft tissue injury to the neck and to the thoracic spine, as well as possible rib fractures.[16] These injuries are not severe and are not significant for purposes of what follows.

THE LOSS OF EARNINGS:

Future employability:

3.1 The patient's neurological status, according to Dr Smuts, is such that the patient is currently unemployable.[17]

3.2 I respectfully agree with Dr Smuts. The patient is, to my mind, undoubtedly unemployable in the open labour market solely due to the severe brain injury that he sustained. He is likely to remain unemployable. His neurological presentation is consistent with frontal lobe syndrome.[18] He likely has a major neurocognitive disorder with focus on memory and concentration, and he has clear cognitive deficits.[19] His major neurocognitive disorder is probably irreversible, untreatable, and permanent.[20]

3.3 My view is consistent with the opinions expressed by Ms Cilliers[21] and Ms Du Plessis.[22]

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16 Para 5.2.5, Caselines, pg. F9 and para 5(b), Caselines, pg. F35

17 Para. 7, Caselines, pg.F12.

18 Fn. 10 *supra*. This affects higher functioning processes of the brain such as motivation, planning, social behaviour and language/speech production. The frontal lobes are critical for difficult decisions and interactions that are essential for human behaviour.

19 Paras. 7 and 8, Caselines, pg. F58.

20 Paras. 9(d) and (e), Caselines, pg. 59.

21 Caselines, pp. F71 and F72

22 Para 2.4.3(b) and 2.4.4, Caselines, pp. F134 and F135.

3.4 The patient's severe to moderate impairment of selective and sustained attention skills, and his poor visual and auditory processing skills, according to Ms Cilliers, render him incapable of meeting the cognitive demands of the positions that he held both before and after the accident.[23] These cognitive impairments render him effectively unemployable.[24]

3.5 I interpolate to briefly dispose of the defendant's contention that the patient's post morbid employment history[25] is of itself evidence that the patient is and remains remuneratively employable. The argument: -

3.5.1 unjustifiably conflates ability and intent;
3.5.2 ignores the undisputed and accepted expert evidence;
3.5.3 overlooks the understandable[26] chequered nature of that history;

If anything is to be made of the patient's tumultuous post morbid employment history, it is that this history is tangible evidence that the plaintiff's cognitive limitations prevent him from successfully retaining employment in even rudimentary roles. His post-morbid employment history is congruent with the results of his cognitive tests.[27]

Loss quantification:

3.6 Accepting, as I do, that the patient is permanently unemployable, I turn now to the quantification of the loss.

3.7 As a point of departure, but subject to the question of contingencies, I have no meaningful, principled quarrel with the actuarial and factual

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23 Fn. 21.

24 Fn. 22.

25 This is outlined in para. 3, Caselines pp. F119 and F120. The information was correctly obtained from a collateral source in light of the patient's cognitive deficits and his memory problems.

26 It is understandable given his cognitive deficits arising from the brain injury.

27 Caselines, pg. F72

assumptions[28] based on which both the patient's accrued as well as his prospective losses of income have been actuarially calculated.[29]

3.8 My concern lies only with the contingency deduction[30] that has been applied to the gross actuarially calculated prospective loss of earnings.

3.9 I see no significant and sufficient reason to interfere with the contingency deduction that has been applied to the gross pre-morbid accrued loss or to the actual post morbid earnings.

3.10 Contingency deductions are a matter for judicial discretion.[31] There are variable approaches which the courts have adopted to determining the appropriate contingencies which should be applied to a calculation of loss of earnings.[32]

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28 Paras 1 to 9, Caselines, pg. F148 and F149.

29 The defendant also aligned itself with that calculation. The defendant however contended that the same calculation should also be used for determining the post morbid gross, prospective earnings, and that a contingency spread of 10% should simply be applied. I have already disposed of the argument concerning the post morbid earnings. I mention this only to point out that the defendant was aligned with and did not dispute the factual and actuarial assumptions used in the calculation.

30 A 10% contingency deduction has been applied to the gross, prospective earnings had the accident not occurred.

31 It is a discretion on what is reasonable and fair. See *inter alia* **Southern Insurance Association Limited v Bailey 1984 (1) SA 98 (A)** at 116-117, **Van der Plaats v SA Mutual Fire and General Insurance Co. Ltd 1980 (3) SA 105 (A)** at 114.

32 Concerning the proposition that the "normal" contingency deduction on prospective losses is 15%, see **Bartlett v Mutual and Federal 1989 (4) QOD A4-20 (T), Matthyssen N.O. v Padongelukkefonds 1999 (4) QOD B4-23 (T); De Bruyn v Road Accident Fund 2003 (5) QOD J2-69 (W), Zarrabi v Road Accident Fund 2006 (5) QOD B4-231 (T)** and **Radebe v Road Accident Fund 2013 (6A4) QOD 220 (GNP).** For the proposition that a contingency deduction should be based on a sliding scale of 0.5% for every year of the future loss, see *inter alia* **Road Accident Fund v Guedes 2006 (5) SA 583 (SCA), Bismilla v Road Accident Fund 2018 (7B4) QOD 64 (GSJ) and YZ v Road Accident Fund 2019 (7E2) QOD 14 (WCC)**. For the proposition that the "normal" contingency deduction on prospective losses is 20%, see *inter alia* **Khoza v MEC for Health, Gauteng SCA case no. 216/2017; PM obo TM v MEC for Health, Gauteng Provincial Government [2017] ZAGPJHC 346; Mashinini v MEC for Health Gauteng 2022 JDR 0352 (GJ).** Ultimately, the contingency should be determined by the conservatism or the generosity of the assumptions upon which the calculation is based. See **Van Staden v President 1990 (4) QOD L2-1 (W); Sgatya v Road Accident Fund 2001 (5) QOD A2-1 (E); Claassen v Road Accident Fund 1999 (5) QOD C4-1 (ARB), Road Accident Fund v Reynolds 2005 (5) QOD D3-1 (W)**.

3.11 Given my finding that the patient is unemployable, his future earnings having regard to the accident must be taken to be zero.

3.12 As I have no material difficulty with the basis for the actuarial determination of the patient's gross prospective earnings but for the accident, the gross loss of earnings of R1 854 692.00 is accepted.

3.13 Concerning the contingency to be applied to the patient's gross, prospective loss of earnings but for the accident, I find that a contingency deduction of 30% should be applied to the calculated figure of R1 854 692.00. The following considerations have informed my view: -

3.13.1 the patient's youthfulness at the time of the accident. The loss of earnings is calculated over a period in excess of 40 years.[33]

3.13.2 the patient's educational and vocational history.

3.13.3 the lack of documentary substantiation of the patient's actual pre-morbid earnings. Whilst I have no reason to doubt the credibility of the collateral information outlined in paragraph B3 of Ms Du Plessis' report,[34] the earnings information may not be completely reliable.[35]

3.13.4 the fact that the patient had been unemployed for seven months immediately prior to the accident;

3.13.5 the pervasive unemployment of unskilled persons and the high unemployment rate;[36]

3.13.6 the patient's persistent and consistent attempts to obtain and retain employment in the post-morbid period, despite his frontal lobe syndrome.[37]

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33 For illustration, if one prefers to calculate a contingency on a sliding scale of 0.5% per annum for every year of future loss, that in itself would result in a contingency of approximately 21%.

34 Caselines, pg. F118.

35 There are conflicting reports concerning the patient's pre- and post-morbid earnings. Also, the earnings from Jackson Restaurant are assumed to have been the same as those received from Mugg and Bean.

36 Para 1.6(a), Caselines, pg. F131.

37 This suggests to me that he would have been equally, if not more, intent on finding remunerative employment were it not for the accident.

3.13.7 the patient's employment as a petrol attendant, despite his frontal lobe syndrome, for a reported salary of between R5000.00 and R6000.00 per month.[38]

3.13.8 The relative generosity of the factual assumptions upon which the calculation is based.

3.14 I therefore find that the patient's net prospective loss of earnings amounts to R1 298 284.40.

3.15 The net accrued loss of earnings is R328 580.00. The net prospective loss of earnings of R1 298 284.40 must be added to this figure. I thus find that the patient's claim for loss of earnings amounts to R1 626 864.40.

THE ORDER:

In the result, I grant an order in terms of the Draft Order marked **"A"** which I have signed and dated **31 January 2024**, and which has been uploaded to Caselines under **"section 000"**.

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FARRELL AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

APPEARANCE:

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[38] This suggests to me that were it not for his cognitive deficits due to the brain injury, he would likely not only have been able to acquire, but would have been able to retain, the same or a similar position. See also para 1.5.2, CaseLines, pg. F131.

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