

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 73766/2016

Not Reportable

Not of interest to other judges

13/2/2018

In the matter between:

ADVOCATE JOHAN MALHERBE KILLIAN N.O.

as curator *ad litem* to

JOHANNES HENDRIK BARNARD (“*the injured*”)

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PETERSEN AJ

[1] This is a stated case. The parties are in agreement on the facts. The issue of liability (merits) has been resolved in favour of the plaintiff with the defendant undertaking to pay 100% of plaintiff's proven or agreed damages. The defendant has further given a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the future medical and related expenses of the plaintiff and payment of the past medical and hospital expenses in the sum of

R254 995.49.

[2] The plaintiff instituted action against the defendant for damages suffered as a result of injuries he sustained as a passenger in a motor vehicle collision that occurred on the 04th of September 2010 at approximately 20h30pmon the Sannieshof/Delareyville main road when a motor vehicle with registration number [...] driven by the insured driver lost control and overturned.

[3] The quantification of the loss of earnings and general damages remains in dispute.

[4] The parties are in agreement on the seriousness of the injuries sustained by the plaintiff, which include:

4.1 A severe traumatic brain injury;

4.2 Mandible fracture;

4.3 Cervical spine fractures involving the spinous processes C7, T1 and T2;

4.4 Fractures of the bilateral acetabula;

4.5 Blunt chest injury with lung contusion and rib fracture on the right 5-10 and on the left 8-10;

4.6. Soft tissue injuries to the forehead and right arm.

[5] The *sequelae* of the injuries to the plaintiff are as follows:

5.1 suffers from severe headaches;

5.2 has backache;

5.3 is forgetful and has a short memory;

5.4 procrastinates;

5.5 has concentration problems;

5.6 is easily irritated;

5.7 has post traumatic brain syndrome (moderate severity) with associated symptoms and signs consistent with a degree of frontal lobe dysfunction;

5.8 has neuro-psychiatric sequelae that can be summarised as follows:

- 5.8.1 post-accident occupational impairment;
- 5.8.2 slow reaction time and difficulty anticipating problems when driving;
- 5.8.3 difficulty understanding concepts;
- 5.8.4 increased appetite;
- 5.8.5 impulsivity;
- 5.8.6 emotional liability and tearfulness;
- 5.8.7 feelings of uselessness;
- 5.8.8 daytime fatigue;
- 5.8.9 recklessness with financial matters;
- 5.8.10 inability to multi-task;
- 5.8.11 naive childlike demeanour;
- 5.8.12 often smiles inappropriately and fatuously;
- 5.8.13 cognitive deficits;
- 5.9 suffers from neuropsychological and neurocognitive deficits which inter alia include difficulties with:
 - 5.9.1 visual scanning and attention;
 - 5.9.2 attention;
 - 5.9.3 sustained attention;
 - 5.9.4 speed of information processing;
 - 5.9.5 psychomotor speed;
 - 5.9.6 double tracking and more complex tasks;
 - 5.9.7 working memory;
 - 5.9.8 immediate recall;
 - 5.9.9 long term visual memory for complex material;
 - 5.9.10 long term memory retrieval of crystallized material;
 - 5.9.11 cognitive flexibility;

5.9.12 problem solving on more complex tasks;

5.9.13 initiation and productivity;

5.9.14 inhibition;

5.9.15 self-monitoring;

5.9.16 impulse control;

5.9.17 emotional maturity;

5.9.18 lack of insight into his situation;

5.9.19 Fatigue.

[6] The plaintiff passed Grade 12 and at the time of the accident he was in his second year of studies towards a boilermaking certification at an FET College. He was struggling to cope with Mathematics and Engineering Science and had in fact failed the subjects carrying them over from his first year. Whilst the defendant signed off on the stated case that the plaintiff would have completed his studies towards a boilermaker certification in 2013, followed by an apprenticeship of 3 years where he would have an earning capacity within the Paterson 81 level, counsel for the defendant in oral submissions to this court submitted that it cannot be said that the plaintiff would have completed his studies in 2013 bearing in mind his academic record in failing Mathematics and Engineering Science. The latter submission, however, does not accord with the opinion of the experts and it cannot be said to have been shown on a balance of probabilities that the plaintiff would not have completed his studies in 2013. Upon completion of his apprenticeship on the facts in the stated case, he would have earned an income within the Paterson C2 Level Guaranteed package with inflationary increases until retirement at age 65.

[7] The experts hold the view that the plaintiff is functionally unemployable as a result of the accident.

[8] The parties agree with the actuarial calculation of the plaintiff's actuary, Algorithm Consultants and Actuaries, save for the contingencies to be applied to future loss of income or loss of earnings. The quantum of general damages, which arose after the matter was allocated for trial, likewise remains in dispute.

[9] The joint minutes of the opposing experts were admitted as evidence in respect of the aspects on which the experts are in agreement. That in brief is the stated case.

[10] On the issue of general damages plaintiff's counsel submits that an amount in the region of R1 300 000 to R1 600 000 will be a fair amount, placing reliance on the unreported decision of *Ewan Opperman v RAF* (Case Number 07/276816) handed down by Jajbhay J in the Gauteng Local Division on 27 August 2009. In the *Opperman* case, it is noted at paragraph 15 that the plaintiff sustained "...a moderately severe brain injury as well as a range of orthopaedic injuries in the accident, inclusive of fractures to his left collar bone, his left scapula, a left hip injury, a left knee injury and a neck injury." An award of R800 000.00 was made in 2007. The court referred by way of comparison to the matter of *Zarrabi v Road Accident Fund* 2006 5 QOD 84-231 (T) where an award of R800 000.00 was similarly made. The award in *Zarrabi* translates to R1 655 000.00 in 2018 terms.

[11] The defendant's counsel holds instructions to tender an amount of R1 000 000.00 in respect of general damages and concedes that nothing less would suffice as a fair award. In proposing the said amount counsel referred to the award in *Torres v Road Accident Fund* 2007 6 QOD A4-1 (GSJ) and *Herbst v Road Accident Fund* 2007 6 QOD A4-7 (WLD) where an amount of R600 000.00 was awarded in 2007 in respect of each of the cases, translating to R1 159 000.00 in 2018 terms.

[12] The difficulty in quantifying the monetary value of loss in claims of this nature is succinctly stated in *Terblanche v Minister of Safety and Security and Another* 2016 (2) SA 109 (SCA) at paragraph [14]:

'The difficulty with claims of this nature is generally not so much the recognition that earning capacity constitutes an asset in a person's estate, but rather the quantification of the monetary value of the loss of earning capacity by a trial court. Each case naturally depends on its own facts and circumstances, as well as the evidence before the trial court concerned.' (my emphasis)

[13] It is widely accepted that no two cases present with the same factual matrix in matters of this nature. In *De Jongh v Du Pisani* 2004 (2) All SA 565

(SCA) at 682i it was reiterated that the court in determining quantum for general damages must have regard to previous comparable cases. The principle is that an award will be fair if it demonstrates consistency with previously decided cases of a similar nature. In doing so, however, it must not be overlooked that a court is vested with a discretion which is to be exercised with due regard to the peculiar facts of the matter it is seized with.

[14] Having regard to the case law referred and whilst bearing in mind that the injuries of the plaintiff in the present matter are distinct from those the *Opperman*, *Torres* and *Herbst* cases I am satisfied that an award in line with the decisions of *Torres* and *Herbst* would be justified.

[15] There is a dispute between the parties regarding the basis of the calculation of the loss of earnings in terms of the contingencies to be applied. The plaintiff relies on the actuarial calculation with a 5% contingency deduction being applied to past loss of income and 20% on future loss of income. The defendant takes no issue with the 5% pre-morbid contingency deduction but submits that the historical learning disability of the plaintiff inherent in him failing Mathematics and Engineering Science cannot be ignored. The argument is that the plaintiff cannot be compared with a student who has passed the said subjects and who would ordinarily complete the qualification within the usual time frame for the qualification. On this basis it is submitted that a higher contingency be applied to loss of earnings or future loss of income, by adding an additional 5% to the 20% contingency deduction. The submission, however, does not accord with the opinions of the expert which does not place the plaintiff at a disadvantage in the time frame within which he would complete the qualification. It would, in any event be purely speculative to suggest that the plaintiff would not complete the qualification in the prescribed period, when regard is had to his academic record as a whole.

[16] I am satisfied that the calculations with the contingencies applied by the actuary accords with the expert opinions based on the evidence and are sound.

[17] Having regard to the reasons stated above, I am satisfied that award the plaintiff is entitled to should be calculated as follows:

General damages

R1 159 000.00

Loss of earnings and earning capacity	R6 743 226.00
Past medical expenses	R <u>254</u> 995.00
Total	R8 157 221.00

[18] In the result I make the following order, as set out in the Draft Order marked "X", the contents of which is specifically set out herein as part of this judgment:

1. The defendant shall pay the amount of RB 157 221.00 (Eight million, one hundred and fifty seven thousand, two hundred and twenty one Rand) calculated as follows:

General Damages:	R 1 159 000.00
Loss of Earnings:	R 6 743 226.00
Past medical expenses	R254 995.00

to the Plaintiff in his capacity as *curator ad litem* to **JOHANNES HENDRIK BARNARD** ("the injured") which payment shall be made to attorneys, Du Toit Attorneys, in settlement of the Plaintiffs claim which amount shall be payable by direct transfer into their trust account, details of which are as follows:

DU TOIT ATTORNEYS

FNB

Branch code: 250130

Trust Account Number: [....]

Ref.: RAF1068/MJ DU TOIT

1. The amounts referred to above will not bear interest unless the Defendant fails to effect payment thereof within 14 (FOURTEEN) calendar days of the date of this Order, in which event the capital amount will bear interest at the rate of 10.25% per annum calculated from and including the 15 (FIFTEENTH) calendar day after the date of this Order to and including the date of payment thereof.

2. The Defendant shall provide the Plaintiff with an Undertaking as envisaged in Section 17 (4) (a) of Act 56 of 1996, 100% for the costs of the future accommodation of the injured **JOHANNES HENDRIK BARNARD** in a hospital or nursing home and such treatment, services or goods as the injured may require as a result of the injuries that the injured sustained as a result of the accident which occurred on 11 May 2013, as set out in the medico legal reports obtained on behalf of the Plaintiff, after such costs have been incurred and upon proof thereof, which costs shall include:

2.1 The agreed or taxed cost to be incurred in the establishment of a trust to *inter alia* protect, administer and/or manage the capital amount and the proceeds thereof referred to in paragraph 1 *supra*;

2.2 The costs of the trustee in administering the capital amount referred to in paragraph 1 *supra* as determined by the Administration of Estates Act, Act 66 of 1965 (as amended), according to the prescribed tariff applicable to *curators* as reflected in the Government Gazette Notice R1602 of 1 July 1991, and in particular paragraphs 3(a) and 3(b) of the Schedule thereto;

2.3 The costs of the furnishing of annual security in terms of section 77 of the Administration of Estates Act, Act 687 of 1965 (as amended);

2.4 The Plaintiff shall appoint Enonix Trust Administration in this regard..

3. That the attorneys for the Plaintiff, Du Toit Attorneys, are ordered:

3.1 To cause a trust ("the trust") to be established in accordance with the Trust Property Control Act No 57 of 1988 to administer the estate of the injured;

3.2 To pay all monies held in trust by them for the benefit of the injured, to the trust;

3.3 The trust instrument contemplated above shall make provision for the following:

- 3.3.1 that the injured is the sole beneficiary of the trust;
- 3.3.2 that the first trustee(s) shall be Marisca de Beer of Enonix (Pty) Ltd acting through its nominee(s) from time to time;
- 3.3.3 that the trustee(s) are to provide security to the satisfaction of the Master;
- 3.3.4 that the ownership of the trust property vest in the trustee(s) of the trust in their capacity as trustees;
- 3.3.5 procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;
- 3.3.6 that the trustee(s) be authorised to recover the remuneration of, and costs incurred by the trustee(s), in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant;
- 3.3.7 the suspension of the injured's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the injured;
- 3.3.8 that the amendment of the trust instrument be subject to the leave of this Honourable Court;
- 3.3.9 the termination of the trust upon the death of the injured *alternatively* upon the consensus of the trustees, in which event the trust assets shall pass to the estate of the injured;
- 3.3.10 that the trust property and the administration thereof be subject to an annual audit.

- 4. The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, including costs of senior-junior counsel and the following:-

- 4.1 The costs of senior-junior counsel (which is to include, *inter alia*,

preparation, perusal, and counsel's day fees for 12 February 2018);

- 4.2 The costs of attorney's, which includes reasonable travelling costs, costs for preparing for Pre-Trial Conferences, and costs for actual attendance to Pre-Trial Conferences, the costs of and consequent to compiling all Pre-Trial Agenda's and Pre-Trial minutes, including counsel's charges, the costs of holding round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials, all costs for preparing for trial, and the attorney's day fees in attending to trial on 12 February 2018, which shall include all costs previously reserved, the reasonable cost of consulting with the Plaintiff to consider the offer, the cost incurred to accept the offer and make the offer an order of Court;
- 4.3 All the cost in obtaining all medico legal/expert and actuarial reports as well as the Plaintiff's travelling and lodging costs in attending the Plaintiffs experts. The Plaintiff filed the medico legal/expert reports referred to in sub-paragraph 5.5 below.
- 4.4 The reasonable costs for preparation for trial and consultations with Plaintiff and witnesses and experts and Counsel;
- 4.5 The reasonable taxable preparation, reservation and attendance fees, if any, of the following experts of whom notice have been given, being:-

4.5.1 Dr. G. Marus (Neurosurgeon);

4.5.2 Dr. C. Barlin (Orthopaedic Surgeon);

4.5.3 Dr. Sulman (Radiologist);

4.5.4 Dr. D.A. Shevel (Psychiatrist);

5.5.5 Alison Crosbie Inc. - Kirsten du Toit (Occupational Therapist);

4.5.6 Dr. H. Roodt (Eye Specialist);

- 4.5.7 Stevens, Valer & Verster (Hearing & Balance Clinical Audiology);
 - 4.5.8 Dr. S. Bouwer (Ear, Nose and Throat Surgeon);
 - 4.5.9 Dr. A.P.J. Botha (Specialist Physician);
 - 4.5.10 CPRD Consulting - Riana De Villiers (Counselling Psychologist);
 - 4.5.11 Dr. L. Berkowitz (Plastic and Reconstructive Surgeon);
 - 4.5.12 Eleanor Bubb (Clinical and Educational Psychologist);
 - 4.5.13 Michelle Gaspar (Speech Therapy & Audiology);
 - 4.5.14 Prof. R. Lurie (Maxilla-facial and oral surgeon);
 - 4.5.15 L. Linde (Industrial Psychologist);
 - 4.5.16 G. Whittaker (Actuary).
- 5.6 The reasonable travelling costs of the Plaintiff, who is hereby declared a necessary witness;
- 4.7 The costs consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 4 (four) copies thereof;
- 4.8 The costs consequent upon the appointment of the *curator ad litem* and the further reasonable costs of the *curator ad litem*;
- 4.9 The above costs will also be paid into the aforementioned trust account.
5. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-
- 6.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;
 - 5.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;
 - 5.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25% on the taxed or agreed costs from date of allocator to date of final payment.
6. No contingency fee agreement was concluded between the Plaintiff and

her Attorney.

AH PETERSEN

**ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA**

APPEARANCES

For the Plaintiff: Adv.DJ Combrink

Instructed by: M du Tait Attorneys

For the Defendant: Adv. Magwane

Instructed by: Maluleke Msimang and Associates

Date Heard: 12 February 2018

Date of Judgment: 13 February 2018