

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

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO: 81703/2015

2/3/2018

In the matter between

Scheepers, JA

Plaintiff

And

Road Accident Fund

Defendant

Judgment

Van der Linde, J:

Introduction

- [1] This is a claim against the Road Accident Fund for damages arising from injuries sustained in a motor vehicle collision that occurred on 13 April 2012. The merits have been settled on a 50% apportionment basis, leaving quantum in dispute. After the trial commenced further settlements

were reached. These further settlements were recorded in a draft order handed up at the end of the trial on 1 March 2018, and included (after apportionment) general damages in the amount of R600 000, and past medical and hospital expenses in the amount of R97,154.09.

- [2] After these settlements the only dispute that remained was in respect of future loss of income, and here the only issue was whether the contingency allowance in the having regard to scenario should be 50% as the plaintiff contends, or 40% as the defendant contends. This difference comes to as little as R144 994, since on the plaintiff's argument the loss is R2,917,601, and on the defendant's argument it is R2, 772,607.
- [3] The parties called no *viva voce* witnesses and having placed three bundles in front of me by agreement, both closed their cases. The bundles, which included the medico-legal reports, were admitted for truth of contents. The plaintiff's position was that where any difference of opinion might remain on any issue between the experts, he would defer to the more conservative of the opposing opinions expressed. In argument, plaintiff's counsel took me to the passages in the expert's reports on which the plaintiff relied, and similarly, the RAF's counsel.

The appropriate contingency provision

- [4] The plaintiff's injuries include a head injury - said to be a moderate concussive head injury, a chest injury, cervical spine fracture, lumbar spine fracture, right shoulder girdle injury, a T12/L2 compression fracture, and a central spinal cord injury. The opinion of Dr Birrell for the plaintiff that this left him with a 40% loss of work capacity, meaning that he is 40% less productive than before, is uncontested. It is also uncontested, as appears from the joint minute of the orthopaedic surgeons, that he is a very vulnerable individual in the open labour market, and that he is absolutely reliant on a sympathetic employer.
- [5] Before the collision and the injuries he had been employed with the South African Police Services for some 20 years. After the accident he tried out a private investigative business, but this failed. SAPS then re-employed him

after a probation period of one year, and that is his current employment disposition. He is involved in an anti-hijacking unit, and half of his time is spent in sedentary surrounds and the other half on the road.

- [6] Although many reports summarise his sequelae, perhaps the commendably succinct summary of Dr Odette Guy on 31 January 2017 is best suited for current purposes:

"He stated that he suffers from pain on a constant basis, every day. He stated that this makes him feel irritable and frustrated. He also has days when he feels depressed with the constant pain that he suffers from. His ability to sit, stand, or lie down, for periods of time, is negatively affected as he experiences pain. His hands are no longer functional and he has difficulties performing tasks that he used to be able to do before the accident. He is no longer able to participate in social activities, such as karaoke or sports. He also indicated that he is angry and shouts at people, particularly his family. With regard to communication, he stated that he has become more direct, and he has been described as being rude".

- [7] Do these sequelae mean that the prospects of the plaintiff being forced to give up his work before his anticipated retirement age are evenly balanced? Or is it more likely than not that he will not be forced to give up his work before his anticipated early retirement age? The plaintiff relied mostly on the agreements between the orthopaedic surgeons, that between the industrial psychologists, and the opinion of Dr Guy quoted above, whereas the defendant relied mostly on Dr Birrell's assessment to which I have referred.

- [8] In *Van Vuren v Road Accident Fund* (16295/2013) [2014] ZAGPPHC 1039 (28 November 2014) Legodi J (as he then was) had occasion to reflect on the issue that arises in this case. The learned judge underscored the wisdom that cases differ and also that contingencies are difficult to fix because they are based on uncertainties. I would, with respect, share those reflections.

- [9] For me, in this case the parameters have been mapped out by counsel. They are so close, that I believe there is no principled basis for saying that

the truth lies in between, and that it should be 45%. It seems rather that I must make a call between the two opposing submissions, and that is the approach I follow below.

- [10] To start off, I should say that I do not believe that Birrell's view that the plaintiff 's work capacity has been reduced by 40% has; any bearing on what I have to decide. It is one thing to say that the plaintiff can now longer do everything he used to do, and by 40%; it is quite another to say that even that which he can still do, will likely (by 40%) cease earlier than the already reduced retirement age of 54 for which provision is made; see Algorithm dated 27 February 2018, p344.4, para 2.2.2.
- [12] By the same token, I am not persuaded that merely because the plaintiff "*may be at risk*" of being boarded, therefore the chances of him being boarded early are 50%, as the two industrial psychologists agree. The first goes to whether there is a chance at all; the second goes to rating that chance.
- [12] What ultimately weighed with me are two features. The one is that the plaintiff's disposition is said by Dr Mazabow to be "*stoic*", and the other is that his employer reported to Ms Noble (for the plaintiff) that in the plaintiff's current employment disposition, his *sequelae* have the potential of disqualifying his prospects of advancement. This is not language that speaks to a person who is likely to be boarded early for his psychological problems, not his orthopaedic problems, which is what his counsel submitted.
- [13] My overall impression, having been referred to extracts of the plaintiff's expert reports but not having had the advantage of seeing the plaintiff in the witness box, is that he is tough and resilient (compare his remark about being depressed at times but would not consider suicide) and intelligent, and that he will resist being boarded if he can. His current employer speaks very highly of him, as reported to Ms Noble. Ms Noble herself applauds him for his motivation and commitment to work. His head, Lt Col Kruger, says as an investigator he is top class ("*puik*") , and that he has substantial knowledge and experience.

Conclusion

- [14] It seems to me then that the probabilities are that the plaintiff will hang on, for so long as he can, to his employment, because he realises that it gives him a *raison d'être*. This leads me to the conclusion, not that in fact the plaintiff will keep working until he is 54 years old, but rather that it is more likely than not that he will. The defendant's submission is accordingly in my **view** to be preferred, and the contingency that he won't work until 54 is less, and the deduction should be 40% and not 50%; the plaintiff's future loss of earnings then comes to R2,772,607.
- [15] In the result I make an order concomitantly in terms of the draft annexed hereto, initialled, dated, and marked "X".

WHG van der Linde

Judge, High Court
Pretoria

Dates trial: 26 February 2018-1 March 2018

Date judgment: 2 March 2018

Appearances

For the Applicant: **Adv. G.W. Alberts SC**

Instructed by: **Adams & Adams**
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Lynwood MANOR
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Tel: 012 432 6000

Ref: DBS/ SVD/ ilm/ P710

For the Respondent:

Adv. T.G Ramatsekisa

Instructed by:

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262 Vermeulen Street Pretoria

Tel: 012 324 2203

Ref: s23489/P . Moonsamie/RAF

IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

**ON THIS THE 28th DAY OF FEBRUARY 2018 AT COURT 8F BEFORE THE
HONOURABLE JUDGE VAN DER LINDE (J)**

CASE NO: 81703/15

In the matter between:

SCHEEPERS, JA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

AFTER HAVING HEARD COUNSEL for the Plaintiff and the Defendant:

THE COURT GRANTS JUDGEMENT in favour of the Plaintiff against the
Defendant in the following terms:-

1. The Defendant shall pay the total sum of R **3, 469, 761 (Three million four hundred and sixty nine thousand, seven hundred and sixty one rand)** to Adams & Adams Attorneys in settlement of the Plaintiff's action, which amount is calculated as follows:

Past Medical, Hospital and related expenses: R97 154.09

Past and Future Loss of Earnings: R **2, 772, 607**

General damages: R600 000.00

The aforementioned total sum of R3, 469. 761 shall be payable by direct transfer into the trust account of Adams & Adams, details of which are as follows:

Nedbank

Account number : [...]

Branch number : 198765

Pretoria

Ref: DBS/SVN/P710

2. The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, to compensate the Plaintiff for 50% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of any services or supplying of any goods to him resulting from the injuries sustained by the Plaintiff as a result of the accident which occurred on 13 April 2012.
3. The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs of the action on the High Court scale, which costs shall include, but not be limited to the following:-
 - 3.1 The fees of Senior Counsel, inclusive of, but not limited to Counsel's full day fees for 26, 27 and 28 February 2018;
 - 3.2 The reasonable, taxable costs of obtaining all expert, medico-legal and RAF4 Serious Injury Assessment Reports from the Plaintiffs experts which were furnished to the Defendant;
 - 3.3 The reasonable, taxable preparation, qualification, travelling and reservation fees, if any, of the following experts of whom notice have been given, being:-

- 3.3.1 Dr DA Birrell, Orthopaedic Surgeon;
- 3.3.2 Dr M Mazabow, Clinical Neuropsychologist;
- 3.3.3 Dr K Truter, Clinical Psychologist;
- 3.3.4 Ms O Guy, Speech and language pathologist;
- 3.3.5 Dr DA Shevel, Psychiatrist;
- 3.3.6 Dr JC Pearl, Neurologist;
- 3.3.7 Ms C Pretorius, Occupational Therapist;
- 3.3.8 Ms E Noble, Industrial Psychologist;
- 3.3.9 Mr G Whittaker, Actuary;

- 3.3 The reasonable costs of all consultations between the Plaintiff's attorneys, and/or counsel and/or the witnesses, and/or the experts and/or the Plaintiff in preparation for the hearing and to discuss the terms of this order;
- 3.4 The reasonable, taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the Plaintiff in attending all medico-legal consultations with the parties' experts, all consultations with his legal representatives and the court proceedings, subject to the discretion of the Taxing Master;
- 3.5 It is recorded that the Plaintiff's Klerksdorp attorneys act in terms of a contingency fee agreement in this matter;
- 3.6 The above costs also be paid into the abovementioned trust account of Adams & Adams Attorneys.
- 4. The following provisions shall apply with regards to the determination of the aforementioned taxed or agreed costs:-
 - 4.1 The Plaintiff shall serve the notice(s) of taxation on the Defendant's attorneys of record;
 - 4.2 The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;
 - 4.3 Should payment not be effected timeously, Plaintiff shall be entitled

to recover interest at the rate of 10.50% per annum on the taxed or agreed costs from date of allocator or settlement thereof to date of final payment.

BY ORDER OF THE COURT

Counsel for Plaintiff: Adv GW Alberts SC- 082 499 2000

Counsel for Defendant: Adv Ramatsikis 082 222 8427