REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 8651/2019

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

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In the matter between:

NESANE, PHUMUDZO Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

KILLIAN AJ

1. This is an application for default judgment, where the plaintiff seeks relief in his personal capacity, claiming damages resulting from bodily injuries that the plaintiff sustained in a motor vehicle collision that occurred on 25 September 2016. At the time of the collision, the plaintiff was a passenger in the insured vehicle.

2. On 1 June 2018, this court granted an order in terms whereof the defendant was held liable for 100% of the plaintiff's proven or agreed damages resulting from the collision. It was also ordered, on that day, that all issues of quantum were postponed *sine die*.

3. On 26 October 2021 the trials interlocutory court granted an order to the plaintiff in terms whereof the defendant's defence was struck out and the matter was referred to the default judgment trial court.

4. The plaintiff duly filed his application for default judgment and served the notice of set down on the defendant.

5. When the matter was called, there was no appearance on behalf of the defendant and counsel for the plaintiff proceeded to present his client's case.

6. At the outset, counsel for the plaintiff made application in terms of Rule 38(2) of the Uniform Rules of Court that this court accepts evidence on oath. Having regard to the nature of the claim and the nature of the proceedings, together with the fact that the affidavits of the various experts and their reports are filed on record, I exercised my discretion to accept the evidence on oath.

7. Before addressing the court on the content of the various medico legal reports, and other documents filed on record, counsel for the plaintiff informed me that the defendant has, to date hereof, not agreed that the plaintiff qualifies for general damages or otherwise made its position known to the plaintiff in respect of the claim for general damages.

8. The assessment of a "*serious injury*" has been made in terms of the RAF Regulations, 2008. The decision whether the injuries of the plaintiff are serious enough to meet the threshold requirement for an award of general damages was conferred on the defendant and not on this court. The assessment of damages as "*serious*" is determined administratively in terms of the manner prescribed by the Regulations made under the Road Accident Fund Act and not by the courts.[1]

9. Counsel for the plaintiff correctly stated that this court cannot, now, consider the plaintiff's claim for general damages to be awarded in respect of the minor and that the claim for general damages ought to be separated and referred to the Health Professions Council for determination.

10. I intend granting that order as will be set out in what follows.

11. Regarding the quantification of the damages suffered by the plaintiff, because of the collision, I accept the evidence that the plaintiff suffered the following bodily injuries and *sequelae*:

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[1] *see: RAF v Leboko [2012] ZASCA 159; RAF v Duma & three similar cases 2013 (6) SA 9 (SCA); RAF v Faria 2014 (6) SA 19 (SCA) and RAF v Botha 2015 (2) SA 108 (GP).*

11.1. a head injury with laceration;

11.2. right index finger, middle finger, and ring finger metacarpophalangeal joint dislocation. It bears to mention that the plaintiff is right hand dominant;

11.3. the direct trauma to the plaintiff's head resulted in features of a mild concussive brain injury, but without any neuro-physical impairments;

11.4. neuropsychological testing evidenced that the plaintiff was of average intellect, prior to the collision, and the cause of the mild concussion the plaintiff presented with some deficits with regards to his higher mental functions.

12. The plaintiff was born on 31 July 1981. He has a Grade 12 school education, a degree in IT and a post-graduate degree in IT management. At the time of the collision, the plaintiff was self-employed as the managing director of a firm called Shedo Business Enterprise and Lutale Solutions.

13. Following the collision, the plaintiff spent some time to recuperate and recover from his physical injuries. He was able to resume work approximately 5 months after the collision and then only conducted light work.

14. The injury to the plaintiff's right hand has an obvious impact on the functionality of that hand. According to the occupational therapist, the plaintiff's right hand has impaired hook and cylindrical grasp which are a moderate occupational

impairment. The pain in the right hand is exacerbated by lifting and carrying heavy objects.

15. However, according to the occupational therapist, the plaintiff has retained physical functionality in all other areas.

16. The only real limitation in the plaintiff's physical capacity and mobility relates to when the plaintiff conducts elevated work. But then, according to the occupational therapist, that is an activity that the plaintiff only "*rarely*" engages in.

17. Physically, thus, the plaintiff seems to be able to continue with his premorbid occupation, even though he has difficulty with his right hand, but only on a limited basis. He also struggles with typing because of the limited range of movement in the right hand.

18. Pre-collision, the duties of a managing director can be classified as sedentary work with medium aspects of physical demands. Now, following the collision, the occupational therapist is of the view that the plaintiff currently can perform sedentary work and light physical aspects. His neuropsychological impairments (to whatever extent) may also play a negative role in performing his functions as a managing director.

19. It is trite that the general principle in evaluating medical evidence and the opinions of expert witnesses is to determine whether and to what extent their opinions advanced are founded on logical reasoning. The court must be satisfied that such

opinion has a logical basis and determine whether the judicial standard of proof has been met.

20. Having considered the medico legal reports prepared by the neurosurgeon, neuropsychologist, orthopedic surgeon, and the occupational therapist record, I am satisfied that the plaintiff has, on a balance or probabilities, demonstrated that the opinions by those experts are founded on logical reasoning and that the plaintiff met the judicial standard of proof regarding the onus that rests on him in respect of the claim for damages.

21. I have also considered the report prepared by the Industrial Psychologist. That report, in the main, supports the plaintiff’s case. However, I have some reservations regarding the logical reasoning insofar as it relates to the plaintiff’s likely levels of earnings, both pre- and post-collision. I will deal with those later.

22. The plaintiff submitted an actuarial calculation, which calculation was informed by the expert opinions.

23. This Honourable Court is not bound by any actuarial calculation and may make any award in respect of the plaintiff's loss, as it deems fit.

24. Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.[2]

[2] *see: Southern Insurance Association v Baily NO 1984 (1) SA 98 (A)*.

25. It has open to it two possible approaches:

    25.1. one is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown;

    25.2. the other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

26. Having regard to what is stated herein, the court is not adopting the method of actuarial computation.

27. I have considered the report prepared by the industrial psychologist. According to that report, it is postulated that the plaintiff would have followed a career path, pre-accident, which would have secured him an income equivalent on the B4/C1 Patterson scales to the age of 45. Thereafter, the plaintiff would have earned on the Patterson scales D1/D2. The jump between Patterson B4/C1 to Patterson D1/D2 is an increase in come from R328 000.00 per annum to R1 100 000.00 per annum. This would have resulted when the plaintiff decided to pursue a career in IT.

28. Now that the collision has occurred, the industrial psychologist is of the view that the plaintiff will not be able to reach the levels D1/D2 and will only have the

potential to earn an equivalent amount of R328 000.00 per annum (that is equivalent to Patterson B4/C1). In effect, the possibility of the plaintiff being employed in the IT field is now being totally excluded. There is insufficient evidence to support this conclusion by the Industrial Psychologist.

29. I am not convinced, on the evidence before me, that the plaintiff will not be able to reach his pre-accident earnings. He is a well-qualified entrepreneur with experience in his field. He is the managing director of his own business, and he will be able to manage his pain and discomfort as and when they arise at his own time. Accordingly, his employment would not be imperiled because of the injuries and *sequelae* thereof. There is insufficient evidence to show that the plaintiff will be disqualified in pursuing employment in the IT field. The occupational therapist did not, form a physical perspective, rule out this possibility. Neither did the neuropsychologist.

30. Significantly, however, is the fact that the neuropsychologist refers to "*some*" deficits that he now suffers from, and the occupational therapist is of the view that, from a physical perspective, the plaintiff would be able to manage his business endeavors in almost every aspect.

31. I am satisfied that, because of the collision, the plaintiff suffered a past loss of earnings. The plaintiff was unable to work for 5 months before he returned to his business. It is reported by the industrial psychologist that the plaintiff earned profit of R96 000,00 per annum at the time of the collision. That equals R8000,00 per month. The plaintiff then likely suffered a past loss of income of R32000,00.

32. As I am not bound to make an award as calculated, with reference to the aforesaid authorities, I exercise my discretion to instead grant a globular amount in respect of the plaintiff's future loss of earnings which I deem appropriate. To this end, an amount of R2 000 000.00 is awarded in respect of the plaintiff's possible future losses. I considered, amongst others, the injuries, and sequelae thereof and the paucity of evidence to support a case that the plaintiff will not be able to pursue a career, like his uninjured position. I also considered the negative effects of the sequelae of the injuries. Those may result in the plaintiff suffering some loss of earning capacity and/or loss of productivity.

33. The total amount which the court awards, as damages for the plaintiff's past and future loss of earnings, is accordingly R2 032 000,00.

34. The evidence further established that the plaintiff would require future treatment and the plaintiff ought to be furnished with a certificate in terms of Section 17 of the Road Accident Fund Act to cater for the plaintiff's future hospital and medical treatment for accident-related injuries.

35. The plaintiff's counsel referred me to a proposed draft order, which was filed onto CaseLines at 030-5.

36. In paragraph 13 of the proposed draft order, it is recorded that "*there is a valid contingency fee agreement*". This is with reference to the contingency fee agreement which was uploaded onto CaseLines at 029.

37. I had regard to the contingency fee agreement, and, in my view, this is not a valid agreement as provided for by the Contingency Fees Act, 66 of 1997. I say so for the following reasons:

    37.1. Section 3 of that Act sets out the terms that should be contained in a valid agreement.

    37.2. Section 3(3)(c) requires that the attorney and the client agree on what will be considered success or partial success.

38. However, the agreement so disclosed to me do not state what is meant by *success* or *partial success* and *premature termination*. Those areas of the agreement are left in blank.

39. Having regard to the nature of a contingency fee agreement it is required from our courts to ensure that there is strict oversight regarding compliance with the Contingency Fees Act. As the contingency fee agreement in this matter does not fully comply with the provisions of Section 3 of the Act, I cannot find that it is a valid agreement.

40. In the circumstances, I make an order in terms of the order attached hereto marked **Annexure "X"**.

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JM KILIAN

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

APPEARANCES

Counsel for the Plaintiff	: Adv MC Phathela
Instructed by	: Makwarela Attorneys
Counsel for the Defendant	: No Appearance
Date of hearing	: 23 March 2023
Date of Judgment	: 24 March 2023