



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

CASE NO: 69404/2019

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

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MM LINGENFELDER DATE: 11 AUGUST 2023

In the matter between:

COENRAAD HENDRICK VAN DEN BERG

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

LINGENFELDER AJ

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 11 AUGUST 2023.

BACKGROUND

1. The plaintiff was involved in a motor cycle accident on 19 July 2018. He sustained multiple orthopaedic injuries. He was admitted to hospital until his discharge on 15 August 2018. A court order dated 5 August 2021 declared that the RAF is liable for 100% of the plaintiff's proven or agreed damages, and to issue the plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in respect of future medical and related expenses.
2. The RAF has made an offer in respect of general damages and accordingly the seriousness of the injuries are not in dispute and the plaintiff is entitled to be compensated for general damages.
3. The matter was set down for hearing and the trial proceeded on the quantum of the plaintiff's claim, and more specifically the claims for past medical expenses, general damages and future loss of earnings/earning capacity. The RAF did not appoint any experts to assess the plaintiff and to furnish expert reports, and an application in terms of Rule 38(2) was granted for the plaintiff to proceed to present evidence by means of affidavit of his expert witnesses. The various experts have deposed to confirmatory affidavits regarding the contents of their reports filed.
4. The plaintiff's injuries sustained in the collision are as follows:
 - a) a fracture of the left tibia plateau
 - b) fractures of the right distal radius and ulna
 - c) fracture of the pelvis
 - d) pelvic haematoma
 - e) fracture of the sacrum
 - f) fracture of T5

- g) fracture of the sternum with fractured ribs – he developed a haemothorax and collapsed lung
- h) Compression fracture of L3
- i) Abrasions left thigh.

He underwent 2 surgical procedures, namely an open reduction and internal fixation of the radius and ulna fracture, and a revision and internal fixation of the left tibia and knee.

The plaintiff was an active individual before the accident and had run various marathons. He is no longer able to do so.

THE EXPERT REPORTS

5. Dr Engelbrecht, orthopaedic surgeon

He confirms that the plaintiff suffers from residual symptoms, and that the major symptom is that of pain and instability in the right knee. Provision is made for a knee replacement procedure within the next 5 years.

The fracture of the right radius and ulna presents with a cross-union and mal-union of the fractures of the distal radius and ulna. The right forearm has impairment of function and stiffness, and the hand has poor grip strength and the plaintiff cannot carry or lift heavy objects. The plaintiff requires a repair of the cross union and corrective osteotomies, which procedure should be done in the near future.

The plaintiff also presents with back pain and muscle spasm of the lumbar area. He will require conservative treatment and there is a possibility of surgery to the right shoulder, and to the lumbar spine.

In an addendum report, Dr Engelbrecht states that the plaintiff will in all probability not be able to work until normal retirement age 65, and that early retirement of 1 year should be allowed.

6. **Ms Cummings, occupational therapist**

The plaintiff was a Financial Accountant at the time of the accident, employed by Liberty. He remains in the same position post-accident.

Ms Cummings opines that the requirements of the plaintiff's position are purely sedentary and his work could be regarded as having the demands of sedentary physical work.

Post-accident the plaintiff experiences difficulties in executing his duties and requires intermittent breaks to alleviate his discomfort. He also complains of poor memory and making errors in his work. Testing confirms that he meets the demands of light physical work. Physical assessment revealed reduced tolerance for load handling, certain positions and limitations related to the left lower limb, right upper limb and upper and lower back. He has reduced fine motor coordination of the right arm. Comparing his physical functional capacity to his job demands, the plaintiff does not fully meet the physical demands of his occupation. He is not capable of reaching his pre-morbid speed and will have to work longer hours to meet his deadlines.

Psychological assessment on the Becks Depression Inventory is indicative of a moderate mood disturbance, and symptoms of depression.

Overall, she is of the opinion that provision should be made for early retirement of 3 – 5 years, considering the combination of psychological deficits, physical deficits and proposed orthopaedic treatment.

7. **Ms Jonker, Neuropsychologist**

The plaintiff complains of experiencing headaches on a weekly basis, pain in his right arm and left knee on a daily basis, and pain in his back when sitting for protracted periods. From a cognitive point, he has been experiencing memory problems, is forgetful of tasks and has been misplacing items. The plaintiff's manager confirmed upon enquiry that the plaintiff has been experiencing these difficulties, and that his performance has dropped from above average pre-accident, to average post-accident.

Ms Jonker concludes that the plaintiff has been experiencing moderate symptoms of depression, and she concludes that he has been suffering from severe symptoms of depression and residual symptoms of a posttraumatic stress disorder, for which he should be referred to a psychiatrist.

Neuropsychological assessment revealed areas of test scores below what is expected for his educational and occupational histories and overall his cognitive profile was more depressed than expected. It is postulated that in the absence of a head injury, his neuropsychological presentation is the result of post-accident psychological dysfunction, depressive symptoms, residual post traumatic symptomology and ongoing physical pain and limitations. She states that the plaintiff should be referred to a psychiatrist.

8. T Talmud, Industrial psychologist

The initial report by the industrial psychologist is dated 17 February 2022, and is based on an assessment of the plaintiff on 20 September 2020.

Two addendum reports have been filed, the first addendum dated 15 June 2023, and the second addendum dated 3 July 2023.

In the initial report, a detailed description of the plaintiff's employment duties are set out. It is stated that the plaintiff's employment aspiration before the

accident was to work until age 60, which is the retirement age at Liberty, and then offer his services on contract. Liberty provides a contract work after age 60, especially if you have the expertise. The contract can be for 6 to 12 months, with on average an extended contract for 2 years. One needs to talk to the Manager to find out about the years – there is a person aged 70 who still works at Liberty.

The plaintiff's manager, Mr Luichmaan, was telephonically contacted on 24 March 2021 and described the plaintiff's work on standard. The Divisional Director of Liberty, Ms Natsas, confirmed the plaintiff's reports of difficulties and performance. She confirms that it is possible that one can work on contract past the retirement age of 60, if the person has specialized expertise. Mr Wichmann of Liberty confirmed this information and stated that the retirement policy will have to be obtained from Liberty and that he does not have access thereto.

It is then postulated by the industrial psychologist that but for the accident, the plaintiff would have continued with his employment at Liberty until retirement age 60, and then continue on a contract basis with fluctuating earnings between 60 and 65 years.

Having regard to the accident, the plaintiff has the option of retirement at 55, and will not reach his pre-accident potential, in line with the opinions of the orthopaedic surgeon and occupational therapist. It is accepted that the occupation therapist opined that the plaintiff will retire 3 – 5 years early accepting a retirement age of 65, and that the orthopaedic surgeon is of the opinion that with a retirement age of 60, he will require 1 year early retirement.

The revised addendum report postulates that the plaintiff pre-accident would have followed a similar career path up to date, will receive inflationary increases and then retire at age 60, with fluctuating earnings between age 60 and 70. No factual basis is stated for the change of opinion of the end of the period of contract employment from age 65 to age 70 and the opinion is expressed without any foundation therefor.

9. HEADS OF DAMAGES

9.1. PAST MEDICAL EXPENSES

The plaintiff claims payment of an amount of R617 064.43 incurred for past treatment of the injuries sustained in the collision. The plaintiff was a member of a medical aid at the time, and an affidavit has been filed by the administrator of the medical aid's recover unit, confirming that the amount of R617 064.43 has been paid, and that the invoices and schedules of expenses have been perused and that the treatment was for injuries sustained in the accident. The RAF is ordered to make payment of the amount of R617 064.43 in respect of this head of damages.

9.2. GENERAL DAMAGES

The plaintiff sustained multiple orthopaedic injuries, and remains symptomatic as a result of the injuries sustained. He was hospitalized for a period of approximately 1 month and developed complications in hospital from a fungus infection. After his discharge he was mobilized with crutches. He was off work for a period of 3 months. He will need to undergo surgery in the immediate future for the cross-union of the radius and ulna fracture, and a knee-replacement and

revision procedure are foreseen. There is also a possibility of lumbar spine surgery. The plaintiff is no longer able to engage in marathon running and had to adapt to a more sedentary lifestyle. Neuropsychological assessment reveals severe symptoms of depression and residual symptoms of a post-traumatic stress disorder. Cognitive impairments are identified on testing, probably due to residual post traumatic symptomology and ongoing physical pain and limitations.

An award for general damages as was said by Holmes J (as he then was) in **Pitt v Economic Insurance Company Ltd 1957 (3) SA 284 (D) 287 E–F** 'must be fair to both sides — it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense'. Although there is a modern tendency to increase awards for general damages, the assessment of the quantum of general damages primarily remains within the discretion of the trial court.

In the matter of **RAF v Marunga 2003 (5) SA 164 at 165 B** it was held that:

“in cases in which the question of general damages arose, a trial Court had a wide discretion to award what it considered to be fair and adequate compensation to the injured party.

There was no hard and fast rule of general application requiring a trial Court to consider past awards, although the Court might derive some assistance from the general pattern of previous awards.”

Counsel for the plaintiff referred me to awards made for general damages in various matters where multiple injuries were sustained, and submitted that an award of R900 000.00 to R1 000 000.00 should be made to the plaintiff in respect of general damages. I have had regard to these matters, as well as other matters.

In **Abrahams v Road Accident Fund 2014 (7J2) QOD 1 (ECP)** the plaintiff, a 41 year old male, sustained multiple injuries including a badly comminuted fracture of the femur, fractures of the fibula and patella, fracture of the right malleolus, severe soft tissue injuries of the hand and a mild concussive head injury. He underwent surgery in the form of an open reduction and internal fixation of the femoral fracture, an open reduction of the patella fracture with fixation, an open reduction and internal fixation of the malleolus. Subsequent surgeries for removal of the fixatives at the patella and a revision of the non-union of the fibul malleolar fracture were performed. The right limb was shortened with the need for an assistive device. Osteoarthritis was present in the left knee and there was limitation of range of motion in the right hip, knee and ankle. Pre-existing generalised anxiety disorder was exacerbated. The plaintiff was rendered unemployable. An amount of R500 000.00 was awarded in 2014 for general damages, with a present value of R880 000.00 was made.

In **Vukubi v RAF 2007 (5J2) QOD 188 (E)** an adult male sustained an open fracture of the knee joint, a fracture of the humerus and a fracture of the radius and ulna. Osteoarthritis was foreseen in the knee joint

with a future knee replacement and revision surgery a probability. The fracture of the radius and ulna were treated by open reduction and internal fixation and degenerative changes would cause future pain. The plaintiff walked with an antalgic gait and could no longer participate in sport. An award of R400 000.00 was made in respect of general damages with a present monetary value of R740 000.00.

Having regard to the matters referred to, as well as the matters of Vukubi and Abrahams above, I am satisfied that an award of R850 000.00 for general damages is fair and just.

9.3. LOSS OF EARNINGS

The industrial psychologist's (Ms Talmud) report and addendum reports as confirmed by affidavit, are presented as expert evidence to this court.

It is trite that an expert witness should state the facts or assumptions on which his opinion is based.¹

The approach to the nature of expert evidence is clearly set out in the matter of **Price Waterhouse Coopers Inc and others v National Potato Co-operative Ltd 2015 2 All SA 403 (SCA)**, where the SCA quotes with approval the following statement of the court a quo:

"... 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. Except possibly where it is not controverted, an expert's bald statement of his

¹ *Schneider NO and Another v AA and Another 2010 (5) SA 203 (WCC) at 211E-I.*

opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”²

The legal principles and tools to assess the reliability and credibility of the expert’s opinion is quoted with approval by Wallis JA from the matter of **Widdrington (Estate of) c. Wightman, 2011 QCCS 1788** as follows:

[326] *Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist*

[327] *As long as there is some admissible evidence on which the expert’s testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish.*

[328] An opinion based on facts not in evidence has no value for the Court.....”

The reports of Ms Talmud do not measure up to the above standards with regard to the pre-accident scenario of contract employment until the age of 70, as stated in the revised addendum. This opinion is not based on any facts and there is no reasoning for the opinion held.

There is no substantiation for the increase of retirement age on contract from age 65 as stated in the first addendum, to age 70 in the

² At 440 (97)

revised addendum. This aspect is also not dealt with by the employer in any of the comments regarding contract work. The only reference to continuation of employment on contract after age 60, is the reference above that on average it is 2 years, as confirmed by Ms Natsas. The fact that there is an individual still working at age 70 at Liberty as reported, does not assist the court in accepting that the plaintiff would have been able to secure contract employment to age 70.

In the original report and the first addendum report, Ms Talmud opined that the plaintiff would not have worked beyond the age of 65, being employed on contract basis after the age of 60.

There is no factual basis for changing this opinion to state that the plaintiff would have worked until the age of 70. No collateral information was obtained from the employer whether the plaintiff has the specialized skills required to continue with contract employment, that he would therefore have been eligible for contract employment, and that there is no evidence before the court by the Manager of Liberty regarding the applicable years for contract employment, as is referred to in the report. The remuneration of a contract employee at Liberty is not verified. The opinion of the industrial psychologist regarding the pre-0accident scenario that the plaintiff would have done contract employment up to age 70 is of no value to the Court, as it is not based on factual evidence before the Court.

I am of the view that the plaintiff would not have continued with any contract employment after the age of 65, if he did manage to obtain

such employment after the retirement age of 60. His earnings would have fluctuated as stated by the Industrial Psychologist. The plaintiff is well qualified with a stable employment history and I accept that the probabilities are that he would have been able to generate an income until the so-called “normal” retirement age of 65, even if he did not obtain contract employment at Liberty.

The pre-accident scenario

For quantification purposes, it is accepted that the plaintiff on a pre-accident scenario would have continued with his employment at present remuneration with inflationary increases, until retirement age 60. Thereafter, he could have been eligible to obtain contract employment, which would have terminated at age 65. Notice is taken of the statement that the earnings between age 60 and 65 years would be fluctuating, and this has to be taken into account when applying a contingency deduction to this scenario.

The post-accident scenario

Having regard to the accident, it is important to note that the orthopaedic surgeon is of the view that the plaintiff will not be able to continue with his employment until the retirement age of 60, and that provision should be made for 1 year early retirement.

I therefore direct that a calculation should be obtained on the following basis:

But for the accident – the plaintiff would have continued with employment at his present income as per salary slips until age 60; and thereafter with contract employment on a basic income and

annual bonus until age 65. A contingency deduction of 5% should be applied to the income earned up to age 60; and a contingency deduction of 40% to the income generated up to age 65. The contingency deduction applied to the income earned during 60 to 65, is substantially increased to make provision for the uncertainties surrounding this scenario, and specifically whether contract employment would have been available at Liberty for more than 2 years, the conditions applicable to such employment and the remuneration therefor.

Having regard to the accident – the plaintiff will continue with his employment at his present income subject to inflationary increases up to age 59, accepting the orthopaedic surgeon's opinion that provision should be made for 1-year early retirement accepting a retirement age 60. The plaintiff is at present 54 years of age, and that means that he will have to work for a further 5 years. It is clear that the plaintiff is no longer able to perform his duties as before the accident and that whilst he meets his deadlines and his performance is average, he does so with more pain, effort and longer hours. An increased contingency deduction of 15% should be applied to the post-accident income.

I therefor make the following order:

1. The defendant is ordered to make payment of an amount of in respect of past medical expenses;
2. The defendant is ordered to make payment of an amount of R850 000.00 in respect of general damages;

3. A revised calculation should be uploaded onto caselines according to the directions above for the plaintiff's claim for loss of earnings, after which an award based on the calculation obtained will be made;
4. The defendant is ordered to make payment of the plaintiff's costs.

**M M LINGENFELDER
ACTING JUDGE OF THE HIGH
COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES

PLAINTIFF'S COUNSEL: ADV K STRYDOM

PLAINTIFF'S ATTORNEYS: EHLERS ATTORNEYS