




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

13/3/15

CASE NO: 47122/2012

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) DATE DELIVERED: 13/03/15
(4) SIGNATURE: 

In the matter between:

JACOB JOHANNES SPAMMER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] Plaintiff is a 40 year old male Quantity Surveyor (QS). He was the driver of his motor vehicle when it was involved in a collision with another

one on 03 January 2010 along the N1 highway in the direction of Polokwane.

He instituted an action against the defendant to recover damages he suffered as a result of the collision.

[2] When the matter came before me, I was advised by counsel for the both parties that merits were conceded and that the plaintiff would be entitled to recover 100% of his proven damages. Furthermore, I was also advised that there was no claim for past medical expenses and that the defendant has tendered a certificate in terms of section 17(4)(a) of the Road Accident Fund Act with regard to future medical expenses.

[3] The only issue for determination was future loss of income / earning capacity. This amount is indicated as R1 567, 038.00.¹ It is set out and calculated as per the actuarial report of Mr G Whittaker of Algorithm Consultants and Actuaries CC dated 13 January 2014.

[4] It is common cause that the defendant failed to respond to certain pre-trial questions within the agreed time frames. In this regard, counsel for the plaintiff submitted that the contentions of the plaintiff arising from the questions should be deemed to be admitted and that no evidence in respect thereof will have to be adduced by the plaintiff.

¹ Particulars of Claim dated 27 July 2012 in the "Amended Pleadings " bundle.

The minutes of the pre-trial conference held on 15 January 2015.

[5] In paragraph 3.1, the defendant was asked to confirm service of expert notices and expert reports of amongst others, Dr. DA Birrel (Orthopaedic Surgeon), Dr. M Mazabow (Clinical Neuro-Psychologist), addendum to Dr. Birrel's report, Ms P Grove (Occupational Therapist), Mr W Wessels (Industrial Psychologist) and actuarial calculations of Mr. G Whittaker.

The defendant's reply is indicated as "noted and confirmed".

[6] In paragraph 3.2 the defendant was asked whether it admitted "that the factual allegations/findings, opinions and basis/evidence in support of same as contained in the aforementioned expert notices of the Plaintiff filed in terms of Rule 36(9)(b) to date".

The defendant's reply is indicated as "yes".

[7] In paragraph 5.4, the defendant was asked whether it admits "that the plaintiff has, as a result of his injuries, suffered a loss of earning capacity?"

The defendant's reply is indicated as follows: "The defendant undertakes to revert by close of business on Friday, 16 January 2015 at 16h30, failing which same will be deemed to be admitted and no evidence in respect thereof will have to be adduced by the plaintiff"

[8] The same reply as above is indicated to a few other questions such as ;

In paragraph 5.5 where the defendant was asked whether it *admits* "that the Plaintiff's productivity has been negatively affected by the sequelae of his injuries and that it will in future be negatively affected"; and also in paragraph 5.6 where the defendant was asked whether it admits that "*the Plaintiff will suffer a loss of income in the future*".

[9] It was also pointed out by counsel for the plaintiff that the defendant did not revert or dispute "*the calculations and method used to perform same as contained in the report of the actuary filed on behalf of the Plaintiff*", and as such, they should be deemed as admitted.

[10] In response to the failure to revert to questions in the pre-trial minute and the consequences thereof, the defendant's counsel confirmed that it failed to revert on the identified issues and that he did not intend to dispute the assertions . He agreed that the dispute between the parties is on the correct contingencies to be applied for future loss of earning capacity.

[11] Whilst I agree that the defendant is bound by the answers (or lack thereof) that it gave to the plaintiff as reflected in the pre-trial minute, I do not agree that the court can simply accept conclusions that are not supported by facts or logical reasoning. In my view, the plaintiff still has to

prove , based on the available evidence, that he suffered a loss of earning capacity.

EVIDENCE OF THE PLAINTIFF

[12] The plaintiff testified under oath and confirmed that he was involved in a motor collision as indicated above. He identified the remains of his motor vehicle in the trial bundle.

[13] He described how his motor vehicle was hit from the back as he was making a safe return to his lane after overtaking. His motor vehicle rolled about five times. He was taken to Wilgers Hospital. He felt pain on his head and neck as he had hit his head on the roof of the motor vehicle. He also had bruises. He was treated and released the same day. He went back to work two days later.

[14] He went for a check-up at the hospital three days after the collision. The doctor informed him that he had suffered a concussion and that he should stay in bed.

[15] When asked about the difficulties relating to the accident, the plaintiff indicated that his neck was stiff , he was suffering from a headache and that few years after the accident he developed a

backache. He often gets up to walk after working behind a computer for some time.

[16] On his emotional state, the plaintiff testified that he was diagnosed with depression in 2009, before the accident as he was going through a divorce. He was on medication but had stopped . He had to take medication again after the accident as he experienced depression again.

[17] He confirmed that his wife has reported to the experts now that he was prone to aggression and road rage.

[18] On his employment, the plaintiff testified that he is a Candidate QS . He joined the company he is working for on 01 May 2010, after the accident. He has a B.Tech degree in Quantity Surveying that he acquired at the University of Pretoria (now Tshwane University of Technology (TUT)) in 2000.

[19] At the time of the accident he was employed by a company known as VDDB as a QS but he was not registered with the professional body of Quantity Surveyors .

[20] When asked what was outstanding for him to be a registered QS, the plaintiff indicated that he still had to do a five-year internship with a registered company and write some examinations.

[21] On how the accident-related difficulties affect his work, the plaintiff testified that most of his work is done on a computer and part by scrutinizing plans (drawings). He often has to take breaks to lie down due to pain. Working on a computer requires a lot of concentration. He also has to go out in the field (sites) more often, although this is not much of a problem. He also has to study to complete the registration with the professional body. This is done outside working hours.

[20] He testified further that the first duration of his employment history was with a company that was not registered with the professional body of Quantity Surveyors.

He made a decision in 2008 before the accident that he needed to register as a professional QS. He registered as a candidate in 2013. He is trying to study to register, but it is taking a little bit longer.

[21] He testified further that he has never received a warning or negative evaluation on his work performance from his current employer. However, he lamented about the fact that he is not getting where he should be to qualify for an evaluation though. The evaluation would have an effect on whether he is promotable and it is a tool that enables the employer to know what further training he requires.

[22] In conclusion, he confirmed that he would continue to work in the same company as a QS even if he does not make it to register with the

professional body. However, he would not be able to do certain things, such as sign a certificate of a QS. This has to be co-signed by his registered counterpart. He will also not be able to register his own QS company.

[23] **Cross-examination** elicited the following ;

[24] He conceded that the expert reports make no mention of the fact that he sometimes take breaks to lie down to ease the pain. His answer to this was that he was probably not asked.

[25] He was admitted at Denmar Psychiatric Hospital during 2009, before the motor collision. This was after he attempted suicide after a fight with his girlfriend. His family took him there and he stayed for two weeks. He was diagnosed with depression which was treated. He was also diagnosed with Attention Deficiency Disorder, Anxiety and Obsessive Compulsive Disorder. He was given a prescription of Venor for the depression and Concerta for the other conditions. He used the medication for six months and then on a six-monthly cycle. He then stopped and only used it when he needed to.

[26] He visited the psychiatrist after the hospitalization incident. It was explained to him that he needed to use the Concerta for six months.

[27] The Concerta did not have a positive effect on him. He thinks he was misdiagnosed because he never had the problems before.

[28] When asked why he did not register as a candidate QS during 2008 when he first decided he wanted to be one, the plaintiff indicated that he first wanted to be certain if that was what he really wanted to become. This is the reason why he applied for a job at a professional Quantity Surveying firm. The accident occurred in 2010 as he was about to register.

[29] He studied for a Building Science Diploma from 1994 and obtained it in 1996. Upgrading to a B.Tech is an extra year. He registered for this in 2000 and obtained the qualification in 2002. He took a gap year in 2001. This was not due to difficulties with concentration, but rather the fact that he was already working and he was concentrating on his career.

[30] When asked to explain his Psychologist's statement with regard to his pre-morbid difficulties with concentration, the plaintiff indicated that he told the doctor that his parents took him to a doctor for evaluation when he was still at primary school.

[31] He only suffered from Attention Deficit Disorder after his divorce. The suicide attempt was a way of seeking attention. He only attended four sessions with the psychiatrist after he was discharged from hospital, thereafter he never went back but did seek help from his house (family) doctor as and when he needed it.

[32] He was diagnosed with anxiety disorder before the accident , however, the levels have increased since the accident. He did not seek help from a psychiatrist because he was not up to it and in any case, it cannot be treated with medication.

[33] He sought help from his house doctor. He did not feel like taking time off work to attend to this. He learnt to live with it.

[34] In his view, his failure or reluctance to follow up with his psychiatrist or treatment does not worsen his situation. There is always a trigger for his disorders. In 2008 it was the divorce. In 2009 it was a fight and in 2010 it was the accident.

[35] He denied that he was contradicting the medical reports that say that there may be a benefit for him if he take his treatment. In fact he agrees that there would be a benefit, but his work situation does not allow him to take time off for that.

[36] He also agreed that not making followup consultations with his psychiatrist is worsening his condition.

[37] In principle, the plaintiff agrees with the Occupational Therapist that his work is basically sedentary in nature , sitting in front of a computer and site visits and that although he does have certain impediments, he can work until retirement.

[38] He has not written any examination towards registration as a QS as he must first register (enrol), then go through some academic courses that he will attend in the evenings. He also has to submit his logbook to the registration council to approve his enrolment. The information he enters in the logbook relate to work he has been doing.

[39] He has no idea how difficult the examination will be but he works with qualified QS and he knows what to expect.

[40] Although he does not know the difference between the salary of a registered and unregistered QS, he does know that it is quite a substantial leap.

[41] When I asked him how he was doing with the internal courses in the company , he indicated that there were no examinations.

[42] When I asked him whether there has been any negative assessment on his work,the plaintiff indicated that the results are by scoring performance, not written tests. Thereafter they get the results by emails.

[43] There was no re-examination. The pre-trial minute and the expert reports were marked Exhibits 1 and 2 respectively.

EVIDENCE OF THE DEFENDANT

[44] No evidence was tendered on behalf of the defendant.

THE INJURIES

[45] The following expert reports were considered:

Dr. Birrel (Orthopaedic Surgeon)

[46] He examined the plaintiff on 15 October 2012 (almost three years after the accident). His source of information other than the plaintiff was the MMF 1 forms signed by Dr. Saunders as well as notes from the trauma unit of Wilgers Trauma Clinic. A diagnosis of a soft tissue injury was made. Xrays were also taken.

[47] In his opinion, the plaintiff has no loss of life expectancy and has no scars as a result of the accident. He still has posterior neck pain at times and it is increased by sitting at a computer for a long time.

[48] On loss of amenities , hobbies and sport, Dr Birrel indicated that this was "mild" and that he did not believe that the back pain was due to the accident. He opined that the plaintiff should receive "*ergonomic advice from the occupational therapists concerning his work station where he spend long hours at the computer*".

[49] On "present and future work capacity", Dr Birrel indicated that "The patient will not have to retire early as a result of the accident under question. I estimate his loss of work capacity as a result of the accident to be in the order of 4% to 5% but this can be improved, I believe, with conservative treatment by a percentage or so. The patient today was no longer complaining of any right ear hearing problem. He is being treated for depression which apparently was the case prior to the accident"

[49.1] Under medical expenses, Dr Birrel indicated that in his view, the plaintiff "has a 3% to 4% chance of requiring neck surgery as a result of the accident, which would cost now around R150 000, requiring still 8 week's sick leave".

Dr Birrel maintained this view after he had obtained xrays that he commissioned during the assessment.

[50] Dr Birrel concluded his report by noting that "This patient does not reach 30% Whole Person Impairment nor does he qualify as a serious injury under the Narrative Test". He reiterated this stance in the addendum after examining the xrays ordered on the date of the medical examination.

[51] A second examination was conducted on 31 March 2014 and he reported his findings and opinion in an "**Addendum Medico-legal Report**".

[52] He recorded the plaintiff's history since he last saw him and specifically indicated that plaintiff had no surgery, he experienced abdominal pains around August 2013 , Xrays did not reveal any pathology, he had headaches about two to three times a week and that they responded to analgesics. Futhermore, plaintiff had lower back pain that increases in intensity as daily activities increase .

[53] He noted that during examination the plaintiff "*experiences mild discomfort with rotation of the neck to the left. He has mild left sided tenderness*".

[54] Xrays indicated a normal cervical spine and narrowing of the L4/5 disc. This was attributed to degeneration.

[55] He remained with his view that the patient does not qualify as a serious injury under the narrative test. The "*cervical spine is normal and there is no pressure on the nerve roots or the spinal cord in the neck*"

[56] Dr Birrel is of the opinion that since the headaches respond well to simple analgesics, the plaintiff "*would benefit from some conservative therapy, such as from biokineticist, experienced physiotherapist and/or occupational therapist, for example, a possible change in his work station may be indicated*"

[57] His opinion with regard to loss of present and future work capacity remain the same as in the last report, namely, that it *"is in the order of 4% to 5%, noting , for example , that he does spend a lot of time on the computer. This could be improved with conservative therapy...."*

Dr Menachem Mazabow (Registered clinical psychologist)

[58] After performing some assessment tests on 03 December 2013, some of the findings were formulated as follows:

[59] The plaintiff sustained a mild concussion. There is no traumatic brain injury.

[60] The plaintiff does have *"a proness to intermittent lapses of attention"*. This is attributed to his pre-existing attention/concentration difficulty in accordance with the diagnosis made at Denmar clinic before the collision.

[61] On the reported worsening of concentration and his memory since the accident, Dr Mazabow gave the following explanation:

"Given that the concussion sustained in the accident was mild, and thus would not in itself be expected to give rise to a worsening of the premorbid disturbances, this reported aggravation would instead be attributed to the following: Mr Spammer reports that he has experienced

back pain and headaches since the accident in question, and back pain was noted to occur also during the course of this present test-session (after sitting for a long period). Those pain symptoms would be expected to disrupt Mr Spammer's attention /concentration, rendering him more distractable at times when the pain symptoms are more salient"

[62] On the reported "worsening of his depression in the immediate post-accident period" and "episodes of aggressive road rage" , Dr Mazabow found that the "depressive symptoms have apparently improved over the past 18 months, and they are presently within the mild range. However, the episodes of road rage persist".

[63] Finally, Dr Mazabow noted that the plaintiff has not "undergone psychotherapeutic treatment in the post-accident period, although he has continued to take the anti-depressant medication and the Concerta, and he is likely to benefit from a formal course of psychotherapy, aimed at addressing the road rage episodes (which, as reported above, were not present prior to the accident), and aimed also at assisting him to adjust to his residual intermittent pain symptoms (which, as noted above, appear to worsen his already variable attention)".

Petro Grove (Occupational Therapist)

[64] The assessment was done on 09 December 2014.

[65] Based on the information adduced, the Occupational Therapist noted that the plaintiff's *"pre and post-accident job demands are similar and fall into the sedentary category of work with occasional light tasks, i.e. he usually works on laptop in the office but also needs to go on site visits to the mines, which depend on the projects he is involved in at a given stage"*.

[66] It also appears from the report that a colleague of the plaintiff was interviewed and confirmed that the plaintiff had difficulty sitting for long and doing measurements. It was conceded though that it is junior QS that do the measurements and not the plaintiff.

[67] The Occupational Therapist is of the opinion that the plaintiff *"complies with the job demands of a Quantity Surveyor. He should however, benefit from an Occupational Therapy work visit to address the ergonomics of his work station. He ought to take breaks to prevent pain"*

[68] Under the heading *" recommendations"*, the Occupational Therapist indicated that *"Occupational Therapy is indicated to educate Mr Spammer regarding neck/back hygiene and ergonomic principles. He should be assisted in obtaining the recommended assistive devices and taught in the application thereof. A work visit is indicated to address the ergonomics of his work station. Further to this he requires education with*

regards to stress/anxiety management strategies and life skills (e.g. conflict management skills). He also needs advice on constructive leisure time use, taking his presenting physical sequelae and psychosocial functioning into account".

Wessels Wessels of Schoombee, Wessels & Associates (Industrial Psychologists)

[69] A retirement age of 70 is recommended as a basis of quantifying loss of earnings.

[70] The opinion of the Orthopedic Surgeon (4-5% loss of work capacity) as well as the Clinical Psychologist's opinion that the tests did not indicate a traumatic brain injury should be taken into account when assessing the loss of earnings claim.

[71] The Industrial Psychologist concluded by stating that the work of a QS requires productive performance in construction processes and that the physical and emotional difficulties that the plaintiff experiences will have " a direct influence on his productive capacity and ability to work to optimal productive performance and thus influencing his incentive remuneration negatively".

"Disturbance of his productive capacity will also prolong his ability to complete the registration process to the status of Professional Quantity Surveyor and thus his ability to earn more".

[72] Based on the plaintiff's pre-accident psychological disposition, the Industrial Psychologist recommended that *" a slightly higher post-accident contingency deduction be applied"*.

Followup interview: Dr Menachem Mazabow

[73] The assessment was done on 12 January 2015. The plaintiff and his wife reported on current challenges that the former faces, such as frequent headaches, back pain, road rage and concentration difficulties.

[74] Dr Menachen stood by his initial opinion and stated the following *"As was recommended in the initial report, Mr Spammer requires continuing anti-depressant treatment, together with psychotherapeutic intervention (which he has not received as yet), in order to address the worsened depression and ongoing "road rage" and he will likely benefit from a course of such treatment"*.

Algorithm Consultants & Actuaries

[75] The Plaintiff's pre-accident earnings were valued at R797,478 per annum at 01 February 2015, and thereafter inflation increases were made up to retirement age of 70.

[76] The expert opinion of Wessel J. Wessels with regard to the productive nature of Quantity Surveyors and the fact that pain and concentration deficiencies may affect productivity was taken into account. Higher contingencies were applied to off-set pre-existing psychological dispositions.

[77] On the basis for post-accident value of earnings, the actuaries indicated that it is based on the *"same level of income as for the pre-accident scenario until retirement at age 70. For quantification purposes a higher post-accident contingency is applied as set out in paragraph 4.1. Explicit provision has been made for a 3.5% chance of being off work for eight weeks in an assumed 10 years' time for cervical surgery as envisaged by Othopaedic Surgeon Dr D.A Birrel in his report dated 31 March 2014"*.

[78] The results of the calculations were summarized under two scenarios. The value of the income uninjured is R10 438 207 and injured is R10 436 340.

[79] A total net loss of R1 045 221.00 was obtained in Scenario 1 based on a 15% and 25% pre-and post-accident contingency deductions

respectively. In scenario 2 a slightly higher contingency deduction of 30% post-accident was applied and the results yielded a net loss of R1 567 038.

PLAINTIFF'S CAREER PATH

[80] This information was obtained from the reports of Petro Grove (Occupational Therapists) and Wessel J Wessels (Industrial Psychologist). In the former's report the plaintiff is alleged to have held various positions as a Candidate Quantity Surveyor whereas in the latter's report he is referred to as a Quantity Surveyor.

PERIOD	EMPLOYER & POSITION	SALARY	REASON FOR LEAVING
1995-1997	Vilkon Projects --Student site foreman	unknown	-
1997-1999	Fabucon construction -Construction site foreman	Unknown	unknown
1999-2000	Self-employed --import export	Unknown	Not specified
2000-2002	Vilkon Projects --Student Candidate Quantity Surveyor	Unknown	Career opportunity
2002-2004	Accolade Construction --Candidate Quantity Surveyor	Unknown	Career opportunity
2004-2005	Caliber Management --Candidate Quantity Surveyor	Unknown	Not specified
2005-2006	Gilda Projects --Candidate Quantity Surveyor	unknown	Career opportunity

	--Director		
2006-2008	Jomar Services --Candidate Quantity Surveyor --Quantity Surveyor	Unknown	Career opportunity
2008-2010	Van Der Dussen Quantity Surveyors (VDDB) ■ Candidate Quantity Surveyor ■ --Quantity Surveyor	R36 500.00 per months (payslip dated 31/12/2008)	Voluntary retrenchment (April 2010. 3 months after the accident in question)
2010-present	Professional Cost Consultant --Candidate Quantity Surveyor --Quantity Surveyor	R61 267 ,57 per month plus 13 th cheque and variable project bonuses (payslip dated 30/11/2014)	

COUNSEL'S ORAL SUBMISSIONS

[81] The reservations expressed by the medical experts were correctly raised by counsel for the defendant , Mr. Bahlmann during argument. He also argued that plaintiff had pre-existing conditions such as depression, anxiety and attention deficiency disorder and that some of the issues plaintiff raised in court during his testimony were not raised with the experts; for example, that he often has to take breaks to lie down to ease his pain. If this was so, it is serious and he would have mentioned it.

[82] Counsel for the defendant further argued that the fact that plaintiff's condition may improve with treatment means that a high percentage contingency of say for example, 18 % , must be applied.

[83] In her written heads of argument, counsel for the plaintiff, Ms Van Antwerpen argued, amongst other things that the delayed registration as a QS will hamper the plaintiff's career progression. She also re-iterated Wessel J Wessels recommendations with regard to reasons why a slightly higher contingency deduction should be applied, amongst which is Dr Birrel's opinion that the loss of work capacity is between 4-5%, pre-existing psychological dispositions as well as the productive nature of the work of a QS.

[84] With reference to the actuarial calculations, she submitted that 15% in scenario 2 is fair because the plaintiff is still young. She referred me to several authorities on the issue of appropriate contingencies.

[85] On the issue of conservative treatment suggested by the various experts, Ms Van Antwerpen argued that the treatment was not curative as it would not take away the back pain and headache.

Plaintiff will have to take time off work and his productivity will be affected. The defendant must take its victim as it found him. The pre-existing disorders do not make a difference. The 3% differential suggested by defendant's counsel does not take matters any further because the plaintiff has physical pain.

The 15% contingency is fair because it is based on plaintiff's current income, and is not a postulation of a registered QS income.

[86] Both counsel referred me to various paragraphs in the well known case of **Southern Insurance Association LTD V Bailey NO²** to advance their respective stance on the issue of contingencies.

WHETHER PLAINTIFF HAS SUFFERED A LOSS OF EARNING CAPACITY

[87] In the matter of **Prinsloo v Road Accident Fund**³, Chetty J set out the general principles, with reference to old authorities⁴ as follows:

“A person's all-round capacity to earn money consists, inter alia, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date of which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. That loss is, as adumbrated hereinbefore calculated by the actuary on scenarios postulated by Dr Holmes.

² 1984(1) SA 98

³ 2009(5) SA 406 (SE)

⁴ Santam Versekeringsmaatskappy Bpk v Byleveldt 1973(2) SA 146 (A) at 150 B-D

Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A) at 917 B-D

*At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil....."*⁵

[88] I will now proceed to examine whether the plaintiff has lost any earning capacity under two headings; whether the delays in registering as a professional QS were (are) caused by the sequelae of the accident and whether the physical injuries (neck and back pain) have any appreciable effect on his work capacity, and if so, whether there is any diminishing effect on his patrimony.

Ad delays in registering as a professional QS

[89] Although much was made during the plaintiff's oral evidence about his diminished prospects of becoming a registered QS, there is simply no convincing evidence that he was in the process of enrolling with the QS professional council (body) just before he was involved in the collision, neither is there any proof that he is anywhere near enrolment or that the delay thereof has anything to do with the sequelae of the accident.

[90] Plaintiff's professional ambition leaves much to be desired. This is in stark contrast to the plaintiffs in matters such as for example, **Griffiths v Mutual & Federal Insurance Co Ltd**⁶ where the plaintiff was shown to be a

⁵ At p

⁶ 1994(1) SA 535 (A)

hard worker and highly motivated attorney who most likely would have gone to the bar.

[91] On his own version, the plaintiff decided during 2008 that he wanted to register with the professional council as a candidate QS. He does not do so for almost two years until he is involved in the accident and , in my view, conveniently say that he was about to just before the accident happened. When I asked him why it took him long to register, his response was that he wanted to make sure that it is what he wanted to be.

[92] In some interviews with the various experts he refers to himself as a Candidate QS , however, it is common cause that he has not submitted the enrolment form (logbook). There is no evidence before me to show how difficult completing that form is for the court to appreciate that the delay is caused by the sequelae of the accident.

The only reference to the delay being attributed to the sequelae of the accident is in the expert report of the Industrial Psychologist where Wessel J Wessels remarked that "*Disturbance of his productive capacity will also prolong his ability to complete the registration process to the status of Professional Quantity Surveyor and thus his ability to earn more*".

[93] Plaintiff told Prof Fritz that he returned to work after about 4 or 5 days and he worked for the same company for a further five months after

the accident. He was " offered voluntary retrenchment and he thought this would be a way of getting a sum of money and being able to find a new job, which he has succesfully managed to do". He told Dr Mazabow that he left VDDB in April 2010, some 3 months after the accident, because he feared being retrenched. Grove (Occupational Therapist) recorded that plaintiff took retrenchment from the company he was working for before the accident in May 2010 and he has been working for his current employer since May 2010.

[94] All this (what he told the experts) contradicts the plaintiff's evidence⁷ with regard to his reasons for seeking employment at his current employer, a registered QS company.

[95] Counsel for the plaintiff submitted during argument that his claim for loss of earning capacity and the calculations done by the actuary are actually not based on postulated income of a registered QS, but his current position. I have noted that in fact, the alleged delayed registration as a QS is not one of the factors that the Industrial Psychologist recommended to be taken into account.

⁷ Plaintiff testified that he made a decision during 2008 that he wanted to become a registered QS. According to him, he left the company he was working for and joined a registered QS company , his present employer , for this reason.

[96] The plaintiff would not have succeeded to convince me that the delay to register as a professional QS is caused by the sequelae of the accident.

Ad difficulties at work as a result of orthopaedic injuries as well as psychological difficulties

[97] Save for the Industrial Psychologist, in the main, the expert reports are qualified. They were all agreed that the orthopaedic difficulties would improve with conservative treatment and that the psychological difficulties were not only pre-existing, but that the worsened state would also improve by treatment.

[98] It is common cause that the plaintiff has not followed through with his treatment for depression and other pre-existing psychological challenges. In my view, his failure to heed medical advice is indicative of the fact that these difficulties do not have a real effect on his work capacity or productivity, alternatively, that they have been overstated.

[99] There is no evidence from his current employer to support his claim that the orthopaedic injuries are impacting negatively on his work production. It was noted by Dr. Birrel that plaintiff has not taken leave off work. On his own version, the reason he failed to make follow-up with his psychiatrist is because he cannot take time off work. There is no evidence to suggest that his employer refuses to release him.

[100] The problem here is that both the Orthopaedic Surgeon and the Clinical Psychologists downplayed not just the extent of the physical and psychological injuries, but its impact on his work .

[101] In his favour, Dr Birrel , as I have already indicated above, is of the opinion that there may be a 3 to 4% chance of plaintiff requiring neck surgery and 8 week's leave of absence from work.

[102] The question is whether this can or should be used as a basis for a claim of loss of earning capacity. It is common cause that the cost of the surgery will be covered by the undertaking that the defendant has tendered for future medical expenses.

[103] The only remaining issue in this regard would be whether the plaintiff will earn a salary during the 8 week period that Dr Birrel suggests he will take off work to undergo surgery.

There is no evidence before me to suggest he will not. On his own version, he will continue to work as a QS (as an employee) , whether he registers with the professional QS council or not.

[104] According to the Industrial Psychologist, the nature of plaintiff's work requires productivity. The back pain and headaches, as the argument goes, may impact on his productivity, thereby reducing his

chances of promotion. This conclusion does not take into account the opinion of the other experts in this regard.

I quote the recommendations of the Occupational Therapist again for purposes of emphasis:

"Occupational Therapy is indicated to educate Mr Spammer regarding neck/back hygiene and ergonomic principles. He should be assisted in obtaining the recommended assistive devices and taught in the application thereof. A work visit is indicated to address the ergonomics of his work station.

Further to this he requires education with regards to stress/anxiety management strategies and life skills (e.g. conflict management skills). He also needs advice on constructive leisure time use, taking his presenting physical sequelae and psychosocial functioning into account".

[105] As I have already indicated, it is common cause that there has never been any negative evaluation / assessment against the plaintiff. He has been with the current employer since 2010, just a few months after the accident.

[106] I would have expected evidence from his employer that would at the end of the day justify a conclusion that the plaintiff's career prospects have been compromised by the sequelae of the accident.

All that the plaintiff could say during cross examination was that he is not getting where he needs to be to be evaluated because of his orthopaedic injuries and psychological challenges .

I do not know where he needs to be to qualify for evaluation and what this evaluation entails and why the employer does not evaluate him.

[107] The 4% - 5% loss of work capacity that Dr Birrel was prepared to concede in his favour has not been shown to translate into a lessening of the plaintiff's patrimony because there is no evidence to suggest that what he would earn post-morbid has been compromised.

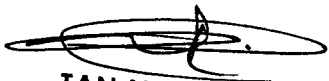
The plaintiff remains on the same position as a QS and there is no evidence to demonstrate that his anxiety about career progression has anything to do with the accident.

[108] Accordingly, the plaintiff's claim for loss of earning capacity fails.

ORDER

[109] I will amend the draft order that was handed in at the conclusion of the oral submissions by deleting paragraph 1 and renumbering the remaining paragraphs in chronological sequence.

[110] The order that i make is in terms of the draft that I have marked "XY" as amended by me.



TAN Makhubele

Acting Judge of the High Court

Date heard: 30 January 2015


Appearances:

Plaintiff: Advocate M Van Antwerpen

Instructed by: Adams & Adams

Defendant: Advocate B. Bahlmann

Instructed by: Maluleke Seriti Makume Matlala Incorporated.

X J 

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

HELD AT PRETORIA ON THIS THE 30TH DAY OF JANUARY 2015 AT COURT 8F
BEFORE THE HONOURABLE JUSTICE MAKHUBELE (J)

In the matter between:

CASE NO: 2012/47122

SPAMER, JJ

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

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:-

15%

1. The Defendant shall pay the sum of

R 1 567 038 -00

(One million Five hundred and sixty Seven thousand and thirty eight rand only)

to the Plaintiff's attorneys, Adams & Adams, in settlement of the Plaintiff's claim, which amount shall be payable by direct transfer into their trust account, details of which are as follows:

delete.



Account holder : Adams & Adams Trust Account
Bank : Nedbank
Branch : Pretoria
Branch code : 198765
Account number : 160 431 8902
Reference : DBS/taa/s11/10

2.1. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 03 January 2010.

3.2 The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include but not limited to the following:-

3.2.1 The fees of Senior - Junior Counsel on the High Court Scale, inclusive of Counsel's full reasonable day fees for 30 January 2015 and the reasonable costs of preparation of Heads of Argument, if any;

3.2.2 The reasonable taxable costs of obtaining all expert, medico-legal and actuarial reports from the Plaintiff's experts which were furnished to the Defendant;

3.2.3 The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts of whom notice has been given, being:-

- 3.3.1 Dr DA Birrell (Orthopaedic surgeon);
- 3.3.2 Prof VU Fritz (Neurologist);
- 3.3.3 Dr M Mazabow (Clinical Neuropsychologist);
- 3.3.4 Dr PJ Viljoen (Ear, Nose and Throat Specialist);
- 3.3.5 Ms P Grove (Occupational Therapist);
- 3.3.6 Mr WJ Wessels (Industrial Psychologist);
- 3.3.7 Mr GA Whittaker (Actuary).

3.2.4 The costs of a consultation between Plaintiff and his attorney to discuss the terms of this order;

~~3.5~~
2.5 The reasonable costs of a consultation between the Plaintiff's counsel, the Plaintiff and his attorney in preparation for the hearing;

~~3.6~~
2.6 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, consultations with his legal representatives and the court proceedings, subject to the discretion of the Taxing Master;

~~3.7~~
2.7 The above costs will also be paid into the aforementioned trust account.

~~3.8~~
2.8 It is recorded that the Plaintiff's attorneys do not act in terms of a contingency fee agreement for services rendered.

4. 3. The following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs:-

~~3.1~~
4.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

~~3.2~~
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;

~~3.3~~
4.3 Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 9 % on the taxed or agreed costs from date of allocatur to date of final payment.

BY ORDER OF THE COURT

DBS/taa/s11/10