

**FORM A**  
**FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION**  
**JUDGMENT**

**PARTIES:**

Case Number:           **1864/2008**  
High Court:           **Port Elizabeth**  
DATE HEARD:           **20 & 21 October 2009**  
DATE DELIVERED:       **29 October 2009**

JUDGE(S):               **D. Chetty**

**LEGAL REPRESENTATIVES –**

*Appearances:*

- |    |                       |                      |
|----|-----------------------|----------------------|
| 1. | for the Plaintiff(s): | <b>Adv D Niekerk</b> |
| 2. | for the Defendant(s): | <b>Adv A Frost</b>   |

*Instructing attorneys:*

- |    |                  |                       |                                        |
|----|------------------|-----------------------|----------------------------------------|
| 2. | Plaintiff(s):    | <b>Mr Jock Walter</b> | <b>of Jock Walter</b>                  |
|    | <b>Attorneys</b> |                       |                                        |
| 3. | Defendant:       | <b>Mr Armoed</b>      | <b>of Boqwana Loon &amp; Connellan</b> |

**CASE INFORMATION -**

*Nature of proceedings:*       **Action for Damages**

***Topic:***

***Key Words:***           Motor vehicle accident – Damages – Loss of earnings – Experts  
relying on plaintiff's contentions – Plaintiff's evidence not  
supporting claim for loss of earnings – Claim dismissed –  
General damages – award making provision for claim for past  
loss of earnings

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

**Case No: 1864/2008**

In the matter between:

**DENIS ROBERTSON**

**Plaintiff**

And

**ROAD ACCIDENT FUND**

**Defendant**

Coram: **Chetty, J**

Dates Heard: **20 and 21 October 2009**

Date Delivered: **29 October 2009**

Summary                      Motor vehicle accident – Damages – Loss of earnings – Experts  
relying on plaintiff's contentions – Plaintiff's evidence not  
supporting claim for loss of earnings – Claim dismissed –  
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loss of earnings

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## JUDGMENT

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### **CHETTY, J**

[1]     This is an action for damages for personal injury suffered by the plaintiff in a motor vehicle collision which occurred on 14 February 2007 on the N2 freeway in Port Elizabeth. The defendant conceded the merits of the action and the trial was accordingly confined to determining only the issues relating to the

quantification of general damages, loss of earnings and loss of future earning capacity. Agreement had been reached in respect of past medical expenses in the amount of R35 421. 87 and the defendant has tendered an undertaking pursuant to the provisions of section 17 (4) (a) of the **Road Accident Fund Act**<sup>1</sup>. Appropriate orders hereanent will be incorporated in the order which I propose to make at the conclusion of this judgment.

[2] The plaintiff was born on 20 September 1951 and is currently 58 years of age. He is married and the father of 2 adult children both of whom are in fixed employment. He describes himself as the sole proprietor of a decorative sandblasting enterprise styled Group Design 2 (GD2) which he jointly purchased with his wife during 2002 for R110 000.00 and which he operates from premises situate on his smallholding in Theescombe, Port Elizabeth where he resides with his spouse and mother-in-law. In addition to the aforementioned business the plaintiff alluded to a further business conducted on the smallholding, to wit, an exotic animal breeding enterprise from which he alleges he likewise generated an income.

[3] Thus, in his amended particulars of claim, damages categorized as loss of earnings and for loss of earning capacity is claimed in an amount of R2 223 400.00, the relevant allegations being -

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<sup>1</sup> Act No. 56 of 1996

- "8.3.1        *The Plaintiff was at the time of the collision self-employed, running a decorative sandblasting business, from which he earned a net profit of R20 000.00 per month.*
- 8.3.2        *The plaintiff was for a period of 4 months unable to work, and although his wife and employees continued to work as much as possible, he suffered a direct loss of profit in the estimated amount of R10 000.00 per month, i.e. a total of R40 000.00.*
- 8.3.3        *He furthermore earned an additional amount of R30 000.00 per annum profit from the breeding and selling of exotic animals, which he is no longer able to earn.*
- 8.3.4        *His future business growth estimated at 8% to 15% per annum in real terms will no longer be achievable, and his business is now declining by 10% per annum, and will continue to do so.*
- 8.3.5        *As he is no longer able to drive, he has had to employ a driver at a salary of R3 465.00 per month.*
- 8.3.6        *He has therefore suffered a loss of income and/or income earning capacity in the sum of R2 223 400.00 as set out in the actuarial report of Alex Munro dated 16 October 2009."*

[4] In so far as general damages is concerned the plaintiff seeks an amount of R220 000.00. Whilst the defendant has accepted that the plaintiff is entitled to an award for general damages, albeit not in the amount sought, the claim for past loss of earnings and for future earning capacity was strenuously resisted, defendant's counsel's only concession being that if I felt constrained to make

some award thereanent, the appropriate course would rather be to increase the award for general damages to make allowance therefore.<sup>2</sup>

[5] The plaintiff's claim in respect of loss of earnings was calculated by the actuary Mr. *Alex Munro* on information derived from Dr *H.J Van Daalen* (*Van Daalen*), an industrial psychologist whose services were enlisted, according to him, "*to assess the claimant's (plaintiff's) future prospects in the employment field and also to confirm to what degree this may have been curtailed, to further make a prediction on the positions he is possibly able to fill together with the income he is able to earn*".

[6] The factual material contained in *Van Daalen's* reports was in turn sourced from the plaintiff and, as adumbrated to by *Van Daalen* under cross-examination, from certain financial statements furnished to him by Mr. *C.D Scholtz* (*Scholtz*), an accounting graduate, of CDW Bookkeeping Services who masqueraded as the plaintiff's accountant. These financial statements formed part of exhibit "B" and were introduced in evidence to demonstrate a decline in GD2's turnover post collision. These income statements afford no corroboration whatsoever for the plaintiff's assertion that GD2's turnover steadily decreased post collision. It is obvious from *Scholtz's* own testimony that in order to minimize GD2's income tax liability he manipulated the financial statements and he was constrained to concede as much under cross-examination by Mr. *Frost*. It is

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<sup>2</sup> Counsel's submission is not res nova as I shall in due course elaborate upon.

abundantly clear that dubious methods were employed in the preparation of these financial statements. Furthermore, *Scholtz* relied solely on figures faxed to him on a two monthly basis from the plaintiff which allegedly constituted VAT returns. The source documents were never seen by him and, it is patently clear that *Scholtz* fiddled the books. Both exhibit “B” and the entire body not only of his evidence but that of the plaintiff concerning these financial statements falls to be rejected.

[7] The foregoing circumstances raise serious concerns whether, not only GD2 but moreover the exotic animal breeding enterprise, suffered the losses contended for. In so far as the latter enterprise is concerned it is important to note that in the original particulars of claim the plaintiff’s loss of earnings was limited to the sandblasting business. Those particulars were filed of record in September 2008, more than eighteen months after the collision and although no adverse inference can *per se* be drawn from its omission, the failure to incorporate them earlier assumes an altogether different dimension upon a holistic appraisal of the evidence tendered on behalf of the plaintiff.

[8] The plaintiff alleged that he purchased the smallholding with the objective of breeding exotic animals and developing the property into a touch farm and events venue. He described himself as passionate about animals and photographs of the property which were introduced into evidence as exhibit “C” bears testimony to its suitability for the purposes envisaged. The plaintiff

described how he built various cages and enclosures where he bred chinchillas, parrots, peacocks and fowls and a dam in which he bred tilapias. He testified that prior to the collision he sold - approximately six thousand tilapias at prices ranging from R1 to R1.50; initially approximately six male chinchillas a year which increased as his herd multiplied to the extent where he would sell females and pairs; between 6 to 8 parrots for between R100.00 to R200.00 each per year; and day old chicks which generated an income of approximately R2000.00 every 3 weeks. Although he adverted to the fact that he sold eggs as well he was unable to give any indication what his profit margins were and further alleged that a small nursery business on the property generated an income of approximately R500.00 monthly. As corroborative evidence that the collision had adversely affected his capacity to generate an income from these activities the plaintiff referred to the contrast between the upper and lower sets of photographs in exhibit "C" which he alleged unequivocally demonstrated a decline in the smallholding's once pristine condition.

[9] The contrast on certain of the photographs is quite glaring and certainly attests to a general decline in the number of animals kept but in other photographs there does not appear to be any decline in the overall standard of the smallholding itself. Whilst certain of the cages appear dilapidated, I am far from persuaded that the plaintiff has succeeded in establishing that he suffered any loss of earnings from this particular business enterprise. The main difficulty is that the plaintiff kept no records whatsoever relating to the alleged business. His

evidence concerning this business is unsatisfactory and in certain respects in conflict with the report of *Van Daalen* in which no mention is made of the profits generated from the sale of the day old chicks and plants in the nursery. Furthermore, in contradistinction to what he reported to *Van Daalen*, he made no mention during his testimony that he bred pheasants and quails and the profit margins are moreover irreconcilable. In the light of the foregoing paucity and contradictory nature of the evidence I am unable to find that the plaintiff has established that he has suffered a loss of earnings from this enterprise as alleged. The major component of the claim relating to loss of earnings of course relates to the sandblasting business. In this regard too the evidence adduced is wholly inadequate to show, on a preponderance of probabilities, that the plaintiff has suffered a loss of earnings as alleged.

[10] As adverted to hereinbefore, *Van Daalen's* reports constituted the basis upon which the actuarial calculations were made. During the trial however I directed that he meet with the defendant's expert witness Mr. *Hannes Swart* (*Swart*) in an attempt to reach consensus. A joint minute emanated therefrom in which they *inter alia* agreed that the financial extent of the plaintiff's loss could not be quantified by them and demurely suggested that it be left to the court to make the calculation, if any. It is of importance to note that as regards the claim for loss of earnings, they reached consensus that –

*"The experts agree that subsequent to the accident there had been a drop in turnover and this could partially be due to his immobility*

*and psychological sequelae. We both agree that this is difficult to quantify precisely i.e. which proportion is due to economic decline or the sequelae stated. HvD is of the opinion that a decline in building activities normally lags behind the recession in normal activities by 12 to 18 months due to contracts still being completed.”*

[11] In Swart’s report, he opined that *“I have no doubt that the claimant is quite able to continue with his business or business in the same fashion as he had before the accident. I am not at all convinced that his ankle injury would have caused any of these business to cease existence or even deteriorate significantly. I am finally of the opinion that the Claimant can continue with his business until the said retirement age of 65 to 70 years – if not even beyond that. I cannot agree to the suggestion that the Claimant is in need of a permanent driver at the expense of the Defendant.”*

[12] Although Swart was not called to testify and his report not admitted by the plaintiff, during cross-examination Van Daalen agreed with this conclusion of Swart. Whilst I have the utmost sympathy for the plaintiff’s plight his evidence is unconvincing. The initial impression created during his evidence in chief was that the entire sandblasting business depended upon his personal involvement. He referred to his active participation in the entire process ranging from design, measurement, artwork and installation. It later transpired however that one of his employees, one Junior, whom he described as his artist and right hand man, performed most of the work together with the other employees and that the position has remained unchanged save that their workload has increased by

reason of his inability to traverse uneven terrain and to climb ladders and mount scaffolding. On the evidence however the plaintiff's inability to do so has not had a deleterious effect on the business' profit margins and whilst it is so that his injury has to an extent compromised his ability to drive a manual vehicle, this will no doubt be offset by the conversion of his vehicle to automatic. As adumbrated earlier I am unable to find that the plaintiff has proved that he suffered a loss of earnings as claimed.

### **General Damages**

[13] After the collision and being freed from his vehicle the plaintiff unsuccessfully tried to walk. Following his admission to Greenacres hospital radiographic examination revealed a fracture of the left calcaneus. Dr. *Mackenzie* opined that comminuted joint depression type calcaneus fractures are notoriously difficult to manage and that it is seldom possible to fully restore the congruity of the subtalar joint and in particular the articular facet of the calcaneus. Although he recommended future surgical intervention in the form of a subtalar arthrodesis, he was constrained to concede that this may not be necessary. The discomfort associated with the injury however is and remains real. Following his discharge from hospital the plaintiff was confined to a wheelchair for two months whereafter he used crutches for three months before being able to walk unassisted. His outdoor activities have severely been curtailed and this has no doubt contributed to his current depressed state. Counsel have referred me to

various authorities dealing with awards in matters of similar ilk. These have proved useful in determining the award which I propose to make. Plaintiff's counsel submitted that a fair award would be one in the region of R220 000.00 whilst counsel for the defendant submitted that an amount of R150 000.00 would constitute a fair award.

[14] In the course of this judgment I have emphasized that the plaintiff has failed to discharge the onus to prove that he suffered a loss of earnings in the amount claimed. The experts were in agreement that the drop in the plaintiff's turnover could partially be due to his immobility and psychological sequelae. They were unable to place a monetary value on the loss of earnings occasioned thereby. It would be wholly inappropriate for me to attempt to do so but there can in principle appear to be no impediment to award a lump sum incorporating the claim for future loss of earning capacity. This much was recognised by Burne J in **Roberts N.O v Northern Assurance Co Ltd**<sup>3</sup> where the learned judge stated –

*"I proceed now to deal with several matters that require attention before the quantum of damages can be fixed. The first is whether the approach, suggested by Mr Broome, of endeavouring to assess loss of future earnings separately from the balance of the claim for general damages, is an appropriate approach. I have no doubt but that I am not compelled to sub-divide the claim for general damages into various compartments and to put a separate money value on each compartment. I conceive it to be clear that a Court is free, should it consider such a course desirable, to award one lump sum for all aspects of general damages. This was accepted by both*

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<sup>3</sup> 1964 (4) SA 531 (D) at 536H-537B

*counsel. In this connection, it is not without significance that in his declaration the plaintiff simply claimed a lump sum, and I did not interpret Mr Broome's suggestion that I should deal with the claim in two compartments as being any derogation from or modification of the claim as presented in the declaration.*

*The conclusion to which I have come is that I should award one lump sum to cover all aspects of the claim for general damages. I consider it wholly inappropriate, in the circumstances of the present case, to endeavour to put a separate money value on the claim for loss of future earnings along the lines suggested by Mr. Broome."*

In all the circumstances I consider that an award of R200 000.00 would be appropriate. In the result the following order will issue –

3. **Defendant is ordered to pay the plaintiff the sum of R235 421.87 which sum is made up as follows –**

|     |                       |             |
|-----|-----------------------|-------------|
| 1.1 | past medical expenses | R 35 421.87 |
| 1.2 | general damages       | R200 000.00 |

4. **Defendant, by agreement, is ordered to furnish the plaintiff with an undertaking in terms of section 17 (4) of the Road Accident Fund Act 56 of 1996 to cover all future medical expenses, including, as agreed upon, the conversion of the plaintiff's vehicle to automatic.**
5. **Defendant is ordered to pay the plaintiff's costs of suit which shall include the qualifying expenses of the plaintiff's expert**

witnesses, to wit, Dr B.L Mackenzie, Dr. H.J Van Daalen, Ansie Van Zyl, Alex Munro and Mark Eaton.

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**D. CHETTY**  
**JUDGE OF THE HIGH COURT**

Obo the Plaintiff: Adv D. Niekerk  
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