

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 3650/2014

In the matter between:

JONATHAN WAYNE MULLINS

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BESHE J:

[1] On the 23 March 2013, a motor vehicle with registration letters and numbers F[.....] collided with the plaintiff **Mr Jonathan Wayne Mullins**, who was a pedestrian at Stanford Road, Port Elizabeth. Plaintiff is suing the defendant for damages he suffered as a result of the collision.

[2] By agreement between the parties, the merits of plaintiff's claim were settled on the basis that the plaintiff is entitled to 80% of his damages. It was agreed that the defendant will furnish the plaintiff with an undertaking in terms of *Section 17 (4) (a) of the Road Accident Fund Act No. 56 of 1996*, to pay to the plaintiff 80% of the costs of future accommodation in a hospital or nursing home, or treatment of, or rendering of a service to, or supplying of goods to the plaintiff, as a result of injuries sustained by him in the motor vehicle collision in

question, and the sequelae thereof, after the costs have been incurred and upon proof thereof.

[3] The plaintiff's claim for general damages was settled between the parties in the sum of R650 000.00 minus the 20% apportionment.

[4] The only issue that remained between the parties was the quantum of the plaintiff's claim for loss of earnings and earning capacity. Plaintiff's claim in this regard is for an amount of R3 754 100.00. It appears to be common cause that plaintiff is unemployable following injuries sustained as a result of the collision in question.

[5] The plaintiff was self-employed before the collision. He could not produce any record of his earnings in the form of salary slips from which the loss of future earnings and earning capacity can be assessed. In a bid to place evidence from which an assessment of what his earnings would have been, evidence was adduced in support of plaintiff's claim from:

- the plaintiff himself;
- **Doctor Peter Whitehead**, an Industrial Psychologist who had prepared a report in this regard;
- **Ms Ansie Van Zyl**, an Occupational Therapist who likewise had compiled a report as well as a supplementary report.
- Also placed before me were two actuarial reports compiled by Munro Consulting Actuaries.

[6] No evidence was adduced on behalf of the defendant.

[7] Plaintiff testified that he dropped out of school whilst doing Grade 11. However even before dropping out of school, he would assist his neighbour **Mr Webber** who was involved in construction work. Having dropped out of school, he held jobs as a factory worker repairing furniture. Then at another factory as a machine operator. In-between the jobs he held at three different factories, he would be engaged in doing construction work, painting and doing crede-stone skimming. He explained skimming to be an exercise where one would level the surface of the wall and ceiling after a builder had done his / her part. He testified that there were not many skimmers. He together with one **Mr Deon Jacobs** would work for a subcontractor or for themselves – (self-employed). He testified that sometimes he would enter into agreements with his employers or contractors which would be signed before a police officer. He however did not produce any of those agreements.

[8] Plaintiff testified that the day before the collision he was working as a painter with **Mr Jacobs** for a company by the name Starwanda. The last named company was building “RDP” houses on behalf of the municipality. Together with **Jacobs**, they would be paid R1000.00 per house which they would then divide between themselves. They earned between R10 000.00 and R12 000.00 per fortnight. In respect of other jobs, he would charge R35.00 per square metre for painting and R45.00 per square metre for skimming. Although he did not always have jobs to do, his income varied from R10 000.00 to R25 000.00 per month. He however did not have a bank account. He attributed this to not having an identity document, which in turn he attributed to an attempt to avoid detection by the police for old cases.

[9] It also transpired that for a period of eighteen (18) months, he drew a disability grant from the Department of Social Development. This was after the collision. He received a total of R23 760.00.

[10] It also transpired that plaintiff did not have any formal training or qualification as a painter or skimmer. He only received on-site training. It emerged that having left school in 1994, for approximately three (3) years thereafter, he was involved with gangs and drugs.

[11] **Mr Mullins** testified that he did not have a house of his own. He stayed at his mother's place. He moved out of his mother's house for a short period and moved in with a girlfriend. He did not own a vehicle. He gave his age as being thirty eight (38) years old.

[12] **Doctor Whitehead** took the court through his report. The salient parts of the report are the following:

Plaintiff gave him details of a number of concerns he worked for, the nature of work he did for those concerns as well as how much he earned working for those concerns.

[13] **Doctor Whitehead** reported that given the uncertainty of plaintiff's earnings as a skimmer, he contacted some construction businesses in the Eastern Cape as well as in the Western Cape for collateral information in this regard. He also consulted some of the construction companies plaintiff alleged he had worked for.

[14] One such contractor was **Mr Tait** for whom plaintiff worked for a period of one (1) week after the collision earning R250.00 per day. He did paint work. It would appear that plaintiff stopped working for **Mr Tait** after the latter learnt that he suffered injuries as a result of the motor vehicle accident in question. He also could not keep up with the work.

[15] As regards other individuals / concerns plaintiff indicated he had worked for, **Mr Whitehead** could not reach them. The one that he was able to contact was a representative of Starwanda, but they were not willing to provide any information relating to the plaintiff.

[16] Having examined all the permutations based on information obtained from the plaintiff as well as collateral information **Doctor Whitehead** concluded that plaintiff's pre-morbid earnings would have been approximately R138 000.00 per annum. He would probably have worked 8 to 10 months a year. He also testified that had it not been for the collision in question, plaintiff would in all probability have worked until he reached the retirement age which is usually at age sixty five (65).

[17] Munro Consulting Actuaries compiled two (2) reports one at the behest of plaintiff's attorneys and the other at defendant's request. Both reports are based on **Doctor Peter Whitehead** and **Amorei Van Der Westhuizen's** report of the 11 November 2015 to which I referred to earlier. The first report (one requested on behalf of plaintiff) was compiled on the 16 November 2015. The latter report (at behest of defendant) is dated 2 February 2016. As indicated it is based on **Doctor Whitehead et al** report as well as on Munro Consulting Actuaries earlier report of the 16 November 2015.

[18] The first actuarial report is premised on the assumption that plaintiff earned R15 338.00 per month for nine (9) months a year consisting of the following components of work:

Skimmer earning R15 338.00 per month.

Painter earning R1 500.00 per month less expenses of R1 750.00 per month.

An assumption that plaintiff's income would have increased by 9% per year until retirement at age sixty five (65).

[19] This report puts plaintiff's total loss of income at R3 754 100.00.

[20] For purposes of the second actuarial report, the actuary was instructed to assume that the plaintiff was a semi-skilled worker earning R56 000.00 per year at the time of the collision. That his income would have increased by 9% per year until his retirement at age sixty five (65). This report placed plaintiff's total loss of income at R1 610 000.00.

[21] This dichotomy of instructions from the respective attorneys underpins the essence of the dispute between the parties in this regard. This is brought about mainly as a result of the unavailability of any records pertaining to plaintiff's earnings. Documents such as pay slips, agreements, bank statements, quotations and the like which would have given a clear indication regarding plaintiff's earning and landed credence and reliance to his say-so.

[22] To a large extent the court only has the say-so of the plaintiff as to what he earned prior to the collision. He is the only source of information in this regard.

This is so because even the expert reports compiled were largely compiled on the basis of the information provided by him.

[23] It is trite that, as stated in *Bridgman NO v Road Accident Fund*¹ that:

“In order to claim compensation for patrimonial loss, plaintiff must discharge the onus of proving, on a balance of probabilities, that such loss occurred. That does not mean the plaintiff is required to prove the loss with a mathematical precision – however – the plaintiff is required to place before the court all the evidence reasonably available to enable the court to qualify the damages and make an appropriate award in his favour. There is merit in *Mr Dane’s* contentions in this regard. In order to claim compensation for patrimonial loss, a plaintiff must discharge the *onus* of proving, on a balance of probabilities, that such loss has indeed occurred. That does not necessarily mean that the plaintiff is required to prove the loss with mathematical precision — however, the plaintiff is required to place before the Court all the evidence reasonably available to enable the Court to quantify the damages and to make an appropriate award in his favour. As was pointed out by Berman J in *Aaron’s Whale Rock Trust v Murray & Roberts Ltd and Another* 1992 (1) SA652 (C) at 655I-656E;

“The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss. That this is so appears from the well-known passage from the judgment of Stratford J in *Hersman v Shapiro & Co* 1926 TPD 367 at 379, quoted with approval by Diemont JA in *Eso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 970E, viz:

‘Monetary damage having being suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.’”

There must of course be sufficient evidence before the Court for it to be in a position to make a proper assessment of damages, for

“... it is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of loss could have been made”,

per Rose Innes AJ in *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118E. See also *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 630.

“Thus where evidence is available to a plaintiff to place before the Court to assist it in quantifying damages, and this is not produced, so that it is impossible for the Court to

¹ Quantum of Damages 2007 (5) Case No. 5622/98 B4-1 at 23.

do so, or there is no, or quite insufficient evidence which can be produced by an unfortunate plaintiff, he must fail...”

[24] As regards what balance of probability entails, the following was stated in *Ocean Accident and Guarantee Corp. Ltd v Koch 1963 (4) SA 147 at 159 B-C* “... That seems to me to present no difficulty, since the degree of proof required is a court of law is not “absolute science: but merely (this being a civil case) a balance of probability; see *West Rand Estates Ltd v New Zealand Insurance Co. Ltd. 1925 AD 245 at page 263*. As to balancing of probabilities, I agree with the remarks of *Selke J* in *Govern v Skidmore 1952 (1) SA 732 (N) at page 734* namely:

“... ... in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys, in his work on *Evidence 3rd ed, paragraph 32*, by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion may not be a reasonable one.”

[25] During cross-examination by *Mr Paterson* for the defendant, the following unfolded regarding particulars of work done by the plaintiff mostly prior the collision:

He worked for one **Rickey** skimming and painting for about one month.

Leon – skimming for a couple of days.

Supa-kwik – painting.

Golden Fountain – skimming ceiling.

Jacqui – skimming.

Tertia – skimming and painting.

After the collision worked for **Mr Tait** – painting and earned R250.00 per day, painting.

[26] In his evidence in chief, he stated that at the time of the collision he had been working for Starwanda, painting “RDP” houses earning R500.00 per house.

[27] Apparent from plaintiff’s as well as **Doctor Whitehead’s** evidence, skimming pays more than a painting job. **Whitehead’s** report and subsequently the actuarial report were premised on plaintiff having done predominantly skimming work. This is however not supported by plaintiff’s own evidence. He appears to have done painting and skimming work interchangeably if not more painting than skimming. Even the occupational therapist **Ms Ansie Van Zyl** in her report, at page 10 thereof, where she lists jobs undertaken by the plaintiff, there is no mention of skimming. Only painting jobs are listed.

[28] On the evidence before me, being plaintiff’s own evidence, figures used for compiling the relevant expert reports cannot be accurate. They clearly do not paint the true position of what type of work was predominantly done by the plaintiff.

[29] There is no evidence to gainsay plaintiff’s evidence that he was self-employed at the time of the collision. Even though defendant disputes the base figures upon which the expert reports regarding the quantum of loss of income and earning capacity, no evidence was placed before me by defendant to suggest how much plaintiff actually earned. Be that as it may, plaintiff’s own

evidence does not show that his jobs comprised mostly / predominantly of skimming work.

[30] In his evidence, **Doctor Whitehead** stated that plaintiff's earnings can be compared to earnings for semi-skilled individuals working in the informal labour market. The instructions given to the actuary by defendant's attorneys were based on the premise that plaintiff was a semi-skilled worker. The figures for semi-skilled workers are set out in the *Quantum Yearbook 2016 by Dr Robert J Koch*. In my view a figure slightly higher than the one given by the actuaries in their latter report will be appropriate. Slightly higher to provide for the undisputed fact that plaintiff did some skimming and such work is more specialized than painting and earns him more than painting jobs.

[31] **Mr Niekerk** for the plaintiff urged me not to deduct the amount of R23 000.00 received by the plaintiff during a six month period comprising of a disability grant received from the Department of Social Development. This was a period after the collision. Reliance for this submission was placed on ***Dikeledi Alice Modibedi obo Ishmael M Modibedi v The Road Accident Fund unreported Case No 45626/13. Gauteng Division Pretoria 18/11/2015.***

[32] The abovementioned matter was concerned with the question whether a disability grant can be a basis for calculation of plaintiff's loss of support / earning. The plaintiff in this matter was claiming for loss of support against the Road Accident Fund in her personal capacity as well as on behalf of her minor child following the death of her husband and father of the minor child in a motor vehicle collision. At the time of his demise, the deceased was receiving a disability grant.

[33] In dismissing the claim, the court in **Modibedi** declared that a disability grant is not an income for purposes of suing for loss of support. [Emphasis provided]

[34] I am inclined to agree with **Mr Paterson** that the **Modibedi** matter is distinguishable from the present matter. This matter is not concerned with a claim for loss of support (in respect of a dependant) but a claim for loss of earnings by the person who received the disability grant (the plaintiff in this case). According to the *Social Assistance Act no 13 of 2004 (Section 9)*, a person is eligible for a disability grant if he or she

(a)

(b) *Is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.*

[35] It is not clear why plaintiff only received the disability grant for only six months. In my view, it will be appropriate to deduct the amount received by way of a disability grant from the award for loss of earnings and earning capacity especially in view of the fact that it was received as a result of the disability arising from collision in question. The grant may not have been equal or close to what plaintiff earned in his uninjured state. The difference will be supplemented / compensated for by the award to be made in this matter.

[36] The next aspect to be dealt with is the degree of the contingency to be applied. It is trite that contingencies cover a wide range of considerations which may vary from case to case, such as taxation, early death, saved travel costs etc.

There are no fixed rules as regards general contingencies. See *Koch – The Quantum Yearbook 2011 at 104*. An allowance is also made in this regard for unforeseen contingencies for errors in the estimation of future earnings and other hazards of life – including whether conditions that may have an effect on a person's capacity or ability to work. **Mr Niekerk** argued for a combined contingency allowance of 15%. On the other hand **Mr Paterson** submitted that 40% allowance being 10% for past loss of earnings and 30% for future loss of earnings. He argued that the construction industry is a difficult one. That plaintiff was at the lower level in this industry relying on small jobs and subcontracts not being an established big company / corporation. I am not persuaded that the circumstances of this matter required that a higher contingency allowance should be made even though plaintiff did not submit any records to back or support his evidence of how much he earned. Not even copies of agreements he alleged would be signed before a police officer. That "uncertainty" has been factored into the consideration of the award to be made. In my view, the appropriate deduction to be made for contingency in respect of loss of income should be 20%.

[37] Accordingly the following order will issue:

- 1. The Defendant shall pay to the Plaintiff the sum of R520 000.00 in respect of general damages (being R650 000.00 less 20%).**
- 2. The Defendant shall pay to the Plaintiff the sum of R1 800 000.00 less 20% in respect of loss of earnings and earning capacity.**
- 3. Interest shall accrue on the aforesaid amount at the rate of 9% per annum from fourteen (14) days after the date of this order to date of payment.**

4. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, to pay to the Plaintiff 80% of the costs of future accommodation in a hospital or nursing home, or the treatment of, or the rendering of a service to, or the supplying of goods to the Plaintiff, as a result of the injuries sustained by him in the motor vehicle collision which occurred on 23 March 2013 in the district of Port Elizabeth, and the sequelae thereof, after the costs have been incurred and upon proof thereof.

5. The Defendant shall pay the Plaintiff's taxed party and party costs, such costs to include:

5.1 The costs of the photographs;

5.2 The reasonable and necessary qualifying expenses of the following expert witnesses, if any:

(a) Dr P A Olivier;

(b) Dr F Rank;

(c) Ansie van Zyl;

(d) Dr Peter Whitehead;

(e) Ian Meyer; and

(f) Alex Munro.

6. The Defendant shall be liable for interest on the taxed costs at the legal rate of 9% per annum from 14 days after *allocator* to date of payment.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff : Adv: Niekerk

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Date Heard : 8 and 9 February 2016

Date Reserved : 9 February 2016

Date Delivered : 4 August 2016