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

Case no. 3410/15

Dates heard: 10-11/5/17

Date delivered: 1/6/17

Not reportable

In the matter between:

JOHANNES ESAU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

PLASKET, J:

[1] On 26 July 2011, the plaintiff, Mr Johannes Esau, was a passenger in a vehicle when a collision occurred on the N2 Freeway in Port Elizabeth that involved that vehicle and 14 other vehicles. As a result of the collision, Mr Esau was seriously injured.

[2] In the proceedings he instituted against the defendant, the Road Accident Fund (the RAF), it admitted the negligence of one Van Rensburg in causing the collision. It also admitted and settled the general damages suffered by Mr Esau. It tendered an undertaking for his future medical expenses. The only issues left

unresolved were the RAF's liability for Mr Esau's past and future loss of earnings. He claimed an amount of R1 954 500 in respect of these heads of damage.

[3] The parties reached a wide range of agreements. Two are relevant for present purposes. First, it was agreed that as a result of the injuries suffered by Mr Esau, he has been rendered permanently unemployable in the open labour market. Secondly, they agreed that he has been 'the recipient of a State disability grant, for which he has been paid the total amount of R41 985.16, calculated to the end of May 2017, which amount the parties further agree is to be deducted from the Plaintiff's claim for loss of earnings'. During the course of the trial, another agreement was reached to the effect that Premium Construction, Mr Esau's employer at the time, paid him R10 896.95 after the collision, which is to be deducted from the award in respect of past loss of earnings.

[4] Two witnesses, Dr Karen Piro, an industrial psychologist, and Mr Esau, were called to testify in support of the plaintiff's case. No witnesses were called by the RAF.

[5] I shall deal first with the evidence of Mr Esau. He was an excellent witness whose honesty was evident. Indeed, Mr Frost for the RAF pointed out that at times his honesty tended to work against his own interest. No criticism of any sort was levelled against him, and nor could it have been.

[6] Mr Esau was born on [...] 1966 on a farm in the Willowmore district. He was one of 11 children born to his parents. He left school with a standard 7 qualification. The reason for leaving was economic: all of the children wanted an education but he had to leave school in order to work to make that possible.

[7] He first worked as a farm labourer. He worked on two farms in the Willowmore district. He then left the district and moved to Port Elizabeth to look for work. He found employment at a firm that manufactured rope. He worked there for seven years as a fork-lift driver.

[8] Having then been retrenched, he was unemployed for a while. He and his wife-to-be moved to Bedford, her home town. There he found employment. He was employed by a man by the name of Gerald who was a sub-contractor in a project to build RDP houses. This appears to have been in the mid-1990's because Mr Esau said that he and his wife married in Bedford in 1996.

[9] Although he started to work for Gerald as a general labourer, he learnt on the job and acquired skills in plastering and bricklaying. He spent five years in Bedford working for Gerald.

[10] When the RDP houses were built, he moved back to Port Elizabeth, along with Gerald. He continued to work for Gerald as a bricklayer. Gerald sub-contracted to a firm called Keogh Construction. Mr Esau left Gerald's employ to form a partnership with his brother-in-law, Mr Reuben Myburgh. They engaged in sub-contracting in the building industry. They worked for about three years as sub-contractors for Mr Marcus Koen and Mr Juan Hattingh building townhouses. They employed general labourers to work for them. Mr Esau and Mr Myburgh appear to have done the bricklaying work. They were paid on the completion of each unit.

[11] Once the work for Mr Koen and Mr Hattingh ended, Mr Esau was unemployed for a few months. He then engaged in casual small-scale building work for the next year and a half.

[12] Then, Mr Esau heard that a firm called Premium Construction was in need of the services of a bricklayer. He approached a foreman by the name of Omar and was employed as a bricklayer. This was in mid-January 2011 at the end of the builders' break.

[13] Premium Construction was involved in the building of townhouses in various parts of Port Elizabeth. He worked five days a week from 08h00 to 17h00, in the absence of inclement weather and other vagaries that plague the building industry. He also worked overtime on Saturdays when necessary. When he worked on a Saturday he would, as a rule, work for six hours. He worked overtime as much as two Saturdays per month.

[14] His hourly rate of pay at Premium Construction was R36.89 per hour. He was paid fortnightly. If he worked a full week and no overtime, his pay was R1 475.60.

[15] For the first five months at Premium Construction he was paid in cash every fortnight. Then he was asked to open a bank account, which he did. Payments thereafter were paid into that account. There is nothing to indicate that Mr Esau was employed in a temporary capacity. The probabilities are in favour of him being a permanent employee.

[16] Mr Esau testified that transport to and from work cost him nothing: he walked from his home in Malabar to a point where a Premium Construction vehicle picked him up along with his colleagues and took them to the building site. At the end of the working day they were dropped off at the same place and walked home.

[17] It appears from a pay slip issued to Mr Esau by Premium Construction that deductions were made for holiday pay as well as unemployment insurance. The evidence of Dr Piro was that an employee in Mr Esau's position would, after 18 months, have become a member of a provident or pension fund to make provision for retirement.

[18] She described Mr Esau as a skilled bricklayer who earned a wage at the top end of the semi-skilled scale. This was so only because he had learnt his trade on the job and did not have 'trade papers' – a formal qualification. She described his rate of pay as good compared to the norms of the construction industry.

[19] As far as his probable career path is concerned, she testified that Mr Esau was 44 years old at the time of the accident. She described him as being a strong, strapping man when she first met him. As he had worked for some 25 years in the construction industry, it was probable that he would have remained in that industry until retirement at the age of 65 years, and that he would have continued throughout to work as a bricklayer. Her evidence accords with Mr Esau's evidence that he would have worked as a bricklayer until 65 years for two reasons: first, he enjoyed the work and secondly, he had to work as a result of economic necessity.

[20] Dr Piro was of the view that it is likely that Mr Esau's salary would have escalated by eight percent per year. She based this on the trend in the industry of increases varying between eight and ten percent per year for the years 2013 to 2016 and her belief that similar increases were likely in the future.

[21] Dr Piro's further assumptions were that Mr Esau earned R1 475.60 per week at a rate of pay of R36.89 per hour for a 40 hour work week; that he would have been eligible for retirement benefits to which his employer would contribute a portion; and that he would be entitled to an annual bonus of 20 working days.

[22] In *Southern Insurance Association Ltd v Bailey NO*¹ Nicholas JA dealt with how to approach the problem of quantifying a claim for this type of loss. He said:

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

It has open to it two possible approaches.

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

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

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.'

[23] The second method referred to by Nicholas JA is a more rational way of determining damages because 'while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing

¹ *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A), 113G-114A.

more than a blind guess'.² Where actuarial calculations are relied upon, the judge still retains a discretion in the quantification of damages. In *Legal Insurance Company Ltd v Botes*³ Holmes JA stated:

'In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.'

[25] For the most part, the assumptions drawn from the evidence of Dr Piro and then used for the actuarial calculations appear to me to be reasonable. It was argued by Mr Frost that it was probable that Mr Esau would usually earn less than R1 475,60 per week and that he would only be paid for 48 weeks and not 52 weeks because of the builders' break. While it is so that Mr Esau said that inclement weather and other factors interfered with a bricklayer's ability to work a full 40 hour week, he also said that he worked overtime for as much as two Saturdays a month of six hours each. Secondly, it appears from his salary slip that a deduction was made so that he could be paid for the builder's break.

[26] In the circumstances, I am satisfied that the amount of R 1 475,60 per week is a reasonable figure to use in order to calculate Mr Esau's loss of earnings. It is based on the best evidence available: even if the end result has something of a give and take aspect to it, I am satisfied that it is fair and reasonable. The contingency deductions I shall make will take account of the uncertainties that Mr Frost has raised. I am also satisfied that the evidence establishes a proper basis for escalating Mr Esau's earnings at eight percent per year.

[27] That brings me to the contingency deductions that must be made. Mr Paterson, who appeared for Mr Esau, proposed a deduction of ten percent to the past loss of earnings and of 20 percent to the future loss of earnings. Mr Frost, on the other hand, argued for higher percentages: 30 percent in respect of past loss of earnings and 50 percent in respect of future loss of earnings.

² *Southern Insurance Association Ltd v Bailey NO* (note 1), 114D-E. See too *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W), 920.

³ *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A), 614F-G.

[28] I was referred by Mr Paterson to three judgments to serve as a guide to the contingency deductions to be made. In the first, *Bamfo v RAF*,⁴ the plaintiff was, like Mr Esau, a self-taught bricklayer who had worked for a number of years in various jobs in the construction industry. He was also of a similar age to Mr Esau and the court was also confronted with a paucity of information as to earnings in the past. Contingency deductions of five and 15 percent were applied.

[29] In *Mullins v Road Accident Fund*⁵ the plaintiff was a self-employed and self-taught painter and crede-stone skimmer. He appears to have been somewhat younger than Mr Esau and his employment history was not as solid. As with Mr Esau, much of his work involved working for sub-contractors and his income tended to vary. There was also, as in this case, a dearth of records concerning the plaintiff's earnings. A 20 percent contingency deduction was made for both past and future loss of earnings.

[30] Finally, in *Sofute v RAF*,⁶ the plaintiff was a lot younger than Mr Esau. He had worked as a general labourer. His employment history was far shorter than Mr Esau's and his future prospects far more uncertain. Contingency deductions of 20 percent in respect of past loss of earnings and 20 percent for future loss of earnings were made.

[31] In my view, Mr Esau's position is fairly similar to the position of the plaintiff in *Bamfo*'s case. While I can see no reason not to be guided by Griffith's J's decision on the contingency deductions of five and 15 percent, slightly higher contingency deductions are justified in this case to cater for some of the uncertainties I have outlined – and the 'give and take' aspects that I have referred to. I shall make a ten percent deduction in respect of past loss of earnings and a 20 percent deduction in respect of future loss of earnings, in accordance with Mr Paterson's submissions.

[32] Finally, it was argued that the disability grant that Mr Esau currently receives must be deducted from the award for his future loss of earnings. No evidence was

⁴ *Bamfo v RAF* [2011] JOL 27932 (E).

⁵ *Mullins v Road Accident Fund* ECP 4 August 2016 (case no. 3650/14) unreported.

⁶ *Sofute v RAF* [2008] JOL 21745 (Ck).

placed before me to the effect that Mr Esau would continue to be eligible for a disability grant after he has been compensated by the RAF. In those circumstances, I am not in a position to conclude that the disability grant should be deducted.

[33] I accept the actuarial calculations based on the base-line salary of R1 475.60 per week and its escalation at eight percent per year. The amount established on this basis for past loss of earnings is thus R584 200. From that figure a total of R52 882 must be deducted in respect of Mr Esau's disability grant that has been paid to him and the post-accident salary that Premium Construction paid him. That leaves a total of R531 318 from which a ten percent deduction must be made. That, in turn, results in a past loss of earnings of R478 187. The gross figure for Mr Esau's future loss of earnings is R1 370 300. From this must be deducted a 20 percent contingency deduction, leaving a sum of R1 096 240. The total amount after deductions is R1 574 427.

[34] In the result, I make the following order.

(a) The defendant is directed to pay to the plaintiff R1 574 427 as damages for past and future loss of earnings.

(b) The defendant is directed to pay the plaintiff's costs, including the costs of expert witnesses in respect of whom expert notices had been filed.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: Mr N Pateron instructed by Jaco Hattingh Attorneys, Port Elizabeth

For the defendant: Mr A Frost instructed by Joubert Galpin Searle Inc, Port Elizabeth