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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 306/2016

C C

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Coram: **Chetty J**

Heard: **11 – 15 & 20 June 2018**

Delivered: **28 June 2018**

JUDGMENT

Chetty J:

[1] Consequent upon a multi-vehicle pile-up during March 2010, the plaintiff instituted a delictual action against the defendant in which he claimed damages

under various heads, of relevance extant the pleadings, and the only remaining justiciable claim, loss of past and future income, formulated in the amended particulars as follows: -

- "12. 12.1 From the date of the accident until the end of November 2016 Plaintiff lost earnings in the sum of R5, 645.00;
- 12.2 Plaintiff was retrenched at the end of November 2016;
- 12.3 In the uninjured state Plaintiff would have worked from mid-2017 and earned R619, 037.00 per annum;
- 12.4 In the injured state Plaintiff has become unemployable on the open labour market, and has not worked since his retrenchment;
- 12.5 Plaintiff's claim for further past loss of earnings, after applying the CAP, is in the sum of R250, 091.00;
- 12.6 Plaintiff's total claim for past loss of earnings and/or loss of earning capacity is accordingly in the sum of R255, 736.00.
13. 13.1 Plaintiff became retrenched in November 2016;
- 13.2 In the uninjured state Plaintiff would have been able to work from about mid-2017 and he would have been capable of earning R619, 037.00 per annum;
- 13.3 Plaintiff's income would thereafter have increased with CPI plus 1½% per annum until a retirement age 65;
- 13.4 In the injured state Plaintiff has become unemployable on the open labour market;

13.5 Plaintiff's claim for future loss of earnings and/or loss of earning capacity has been calculated by Mr Loots, Actuary, to be in the sum of R1, 225 556.00, after applying the CAP."
(Emphasis supplied)

[2] It will be gleaned from the foregoing that the plaintiff's alleged retrenchment is integral to the claim for loss of earning capacity. Furthermore, in his trial particulars, the plaintiff, responding to the pertinent question – **"on what basis it is (*sic*) alleged the plaintiff will suffer loss of earning and which of the injuries gave rise thereto,"** averred – **"6(9) Plaintiff suffers impairment due to the pain and discomfort in his cervical spine, lumbar spine and both knees. Plaintiff also experiences a feeling of numbness in both his hands and down his legs."** It is apposite therefore to emphasize that the claim for past and future loss is predicated upon the plaintiff's incapacity to work.

[3] Under the *lex Aquilia*, a plaintiff in an action for damages based on negligence is entitled to be compensated to the extent that his patrimony has been diminished in consequence of such negligence. The loss or impairment of the capacity to earn money is an element of *Aquilian* damages provided it has, as a matter of fact, led to a diminution of such earning capacity. The defendant disputes the validity of this head of damages and the resolution of the impasse perforce compels an analysis and evaluation of the testimony adduced. As a precursor thereto, it is apposite to commence with an exposition of the collision itself.

[4] The multi-vehicle pile-up occurred on 13 March 2010 on the verge abutting the shoulder of the M19 betwixt Port Elizabeth and Uitenhage. The plaintiff had proceeded thence to render assistance to his sister whose car had broken down. He parked his vehicle behind that of his sibling on the verge adjacent to the trafficable surface of the road, alighted and proceeded to the front of her vehicle. Whilst standing there, presumably peering into its engine compartment, he was flung backwards by the sudden forward motion of the vehicle and landed some distance away on the trafficable surface of the road. It is common cause that another vehicle had careered into the rear of his own vehicle, propelled it forwards into that of his sister which in turn then crashed into him. He was ferried to the Greenacres hospital by ambulance and, on admission to the emergency unit, examined and treated by Dr *Wickens (Wickens)*. Clinical examination revealed that he had sustained a fractured nose, lacerations to the nose bridge and right eye, lateral aspect and facial abrasions. The treatment plan administered, according to the hospital notes, comprised the following –

- “- Tramal 75mg intravenous injection given for analgesia. Antitetanus injection given
- Xrays taken: Nasal bone fracture noted.
- Lacerations to face sutured under local anaesthetic.
- Referral to Dr Schemmer (ENT Specialist) for follow up care of nasal injury
- Prescription given for analgesics.”

[5] The plaintiff was discharged the same day, and after a three week convalescence at home returned to work at the General Motors assembly plant (GMSA). He had commenced employment there in 2002 initially as a maintenance electrician and had progressed to the position of artisan/artisan foreman. On resumption, the plaintiff was delegated to perform sedentary work for the first month and thereafter returned to the factory floor where he continued working in his erstwhile capacity.

[6] It is common cause that during 2016, policy considerations, precipitated by the economic meltdown and the end of the production life of the Chevy Spark range, engendered GMSA to offer voluntary severance packages (VSP) and voluntary retirement packages (VRP), to its entire workforce. I interpolate to state that the distinction between the two packages is purely age related, the VRP applicable only to persons over the age of 55. It is not in issue that the plaintiff, then aged 56, completed and submitted a written application for a VRP, approximately six years post collision. The *pro forma* application explicitly obligated GMSA to provide the plaintiff with details of the proposed benefits and one must assume, given the plaintiff's voluntary acquiescence to be considered for the VRP, that it's sweep appealed to him.

[7] In his testimony before me however, the plaintiff sought to underplay the attractiveness of the VRP, ascribed his request for the VRP to the imminent complete closure of GMSA's South African operations and steadfastly maintained that eschewment of the package was not in his best interests. His evidence hereanent

is, upon a conspectus of the pertinent testimony adduced, clearly contrived. It is not in issue that the public announcement that GMSA would cease its South African operations first surfaced in 2017. The evidence firmly established that, given the longevity of his employment and his track record, the plaintiff could not, in 2016, have laboured under any misapprehension that the factory would close and retrenchment, an inevitable consequence. The plaintiff was in fact constrained under cross-examination to concede that his application to be considered for a VRP was unrelated to GMSA's subsequent disinvestment from the Republic of South Africa and, cognisant of this dilemma, sought refuge in his bodily, mental and psychological incapacitation which he alleged deleteriously impacted on his work capacity. As corroborative witnesses, Dr *Stigant (Stigant)*, Dr *Nobre (Nobre)* and his immediate superior at GMSA, Mr *Mac (Mac)*, were called to vouchsafe the plaintiff's alleged work related regression and future unemployability. The fundamental difficulty in accepting this evidence is its omission from the plaintiff's narrative. Whilst he alluded to certain difficulties in aspects of his daily work related chores, it was never his case that the decision to solicit the VRP was actuated by his inability to perform optimally. I have no doubt that during the initial period of his reintegration into the work environment he may have struggled, but the weight of the evidence establishes its transience.

[8] *Mac's* account of the plaintiff's retrogression is in direct conflict not only with the testimony of his own higher ranking colleagues, Mr *Theodorus Ignatius Vermaak (Vermaak)* and Mr *Angus Clark (Clark)*, but with the plaintiff's verbal accounts to both occupational therapists, Messrs *Ansie Van Zyl (Van Zyl)* and *Nicolette Hugo (Hugo)*. Whilst I accept that in the chain of command, *Mac* was the plaintiff's immediate

superior, remissiveness of the magnitude as alluded to by him would, on the probabilities, not have remained undetected in the six years the plaintiff continued in his employment given the precision related nature of work on the robotic production line.

[9] *Hugo* interviewed the plaintiff on 25 October 2017 and in her testimony alluded to appendix 3 of her report where, under the rubric, "**Job description and difficulties experienced**", she recorded the plaintiff's response as: -

"He reports that this however did not affect his productivity. He reports that whilst he was slightly slower with typing he was able to submit his reports of (sic) time. He reports that he implemented reasonable postural breaks as required."

[10] *Van Zyl* had consulted with the plaintiff whilst he was still employed at GMSA and, whilst she alluded to the plaintiff's physical deficits in her reports, she nonetheless concluded that "**Mr C. is suited to his current position with some improvement in symptoms expected with the suggested treatment.**"

[11] Both *Vermaak* and *Clark* expounded upon the range and scope of the plaintiff's tasks and lavished praise not only on his work ethic but the exemplary manner in which he executed them. *Vermaak* described him as a "**robot boffin**", one indispensable to the smooth running of the production line. Whilst both he and

Clark adverted to a regressive period post-accident, it is clear that it was of short duration and that the plaintiff thereafter continued to perform his tasks optimally. The standard of his work was such that, upon being appraised that the plaintiff had opted to avail himself of the VRP, *Clark* had an audience with him and implored him to reconsider, but to no avail. Although the plaintiff denied having met with *Clark* hereanent, I accept *Clark's* evidence that notwithstanding his exhortation, the plaintiff remained steadfast in his resolve to retire.

[12] It is apparent from the reports of *Stigant*, *Nobre* and *Pretorius* that they were in fact inveigled into believing that the plaintiff had been retrenched. *Clark's* evidence however dispels any notion that the VRP was tantamount to a retrenchment. He emphasized that at the time the plaintiff availed himself of the VRP, there was no inkling whatsoever of GMSA's proposed disinvestment and the announcement in 2017 took all and sundry by surprise. He iterated that notwithstanding the company's subsequent departure, its workforce, save for those who had solicited either of the packages, would have been absorbed into the new Isuzu Motors fold and, had the plaintiff not taken the VRP, he would have remained in employment until his retirement at age 65. Under those circumstances, can it properly be contended that the plaintiff's impairment led to a diminution of his earning capacity? The answer is self-evident – the plaintiff elected to cease his employment and it scarcely behoves him to now, given the economic realities, to complain about the difficulty in securing alternative work.

[13] The notion that the injuries sustained in the collision resulted in an impairment of his work ability and, concomitantly, a diminution of his earning capacity, first surfaced in 2018 in the report of the clinical psychologist, *Stigant*. When he interviewed the plaintiff almost eight (8) years had elapsed from the time of the collision. By then the plaintiff had, as he correctly noted in his report, been on pension for almost fifteen months. Following upon his consultation with the plaintiff, and, armed with the reports of *inter alia* *Oelofse, Aslam, Wickens, Hugo* and the radiological records, he made the diagnosis that –

“At this point it is necessary to mention that the above syndrome of symptoms, negative behaviours, changeable moods and emotional lability, social isolation, slowness of performance, lack of drive and ambition, concentration and memory dysfunctions, flashbacks and ruminating thoughts about the incident are typical sequelae of a TBI and/or a PTSD.”

And concluded,

“From the Clinical Interviews and Observations, Psychometric Assessment and Notes in the Documentation it is clear that the MVA resulted, *inter alia*, in a traumatic brain injury (TBI) and PTSD that has compromised the claimant’s cognitive functioning and quality of life, as indicated. The sequelae of pathology with regard to cognitive and personality functioning, including the PTSD symptoms, as set out in 1-9 above and the assessment results, as recorded, all are clear evidence thereof. The markers, as mentioned above,

that indicate a TBI and PTSD are present in varying degrees in all of claimant's cognitive and personality dysfunctions."

[14] Fortified by the plaintiff's narrative concerning his functionality he opined that

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"Accordingly, claimant's quality of life negatively has been compromised, especially with regard to his employment prospects, due to the TBI sequelae. In my opinion it is certain that claimant will not be able to continue to perform at his premorbid levels, given his mentioned slowed responses and other cognitive dysfunctions. It is clear that claimant now is a vulnerable employee, with regard to attempting a new form of employment where he needs to learn new procedures and routines."

[15] *Stigant's* opinion was assiduously lapped up by Dr *Nobre*, who concluded her report with the congruous deduction that —

". . . the injuries which Mr C. sustained in the accident had a significant impact on his career. Had it not been for the accident he would ultimately have been able to continue working as Foreman or return to working as Self-employed Electrician until normal retirement age of 65 years. As a result of his injuries, he is now limited in the work he is able to perform. Since being

retrenched at the end of 2016 he has remained unemployed. It is probable that he will remain unemployable until retirement age."

[16] *Stigant's* conclusion that the plaintiff suffered a traumatic brain injury is, notwithstanding his protestation to the contrary, derived entirely from *Oelofse's* RAF4 assessment report where, under the rubric, "**Head Injury**" he recorded that – "***This patient sustained a traumatic brain injury (TBI)***" In his testimony before me however, *Oelofse* neither alluded thereto nor was he questioned thereanent. Dr *Aslam* disputed that the plaintiff had suffered a TBI and provided a compelling explanation in refutation. The factual scenario conveyed to *Stigant* and which indubitably impacted upon both his and *Nobre's* opinions is in direct conflict with the testimony of *Vermaak*, *Clark* and *Hugo* concerning the plaintiff's functionality on the factory floor. I accept their evidence that save for the initial period after his return to work, the plaintiff performed his tasks with such aplomb that he was prevailed upon by *Clark* to reconsider his decision to apply for the VRP. Their testimony dispels any notion that the injuries sustained in the collision deleteriously impacted upon the plaintiff's employment. The plaintiff has, in my view, failed to discharge the onus that he has suffered a diminution in the value of his patrimony and the claim for loss of earning capacity thus falls to be dismissed. Consequently, the quantification of his loss is rendered wholly unnecessary.

[17] The dismissal of the plaintiff's claim for loss of earning capacity has costs ramifications. As adumbrated hereinbefore the trial was confined to the issue

pertaining to the plaintiff's loss of earning capacity. During the Rule 37 conference held on 9 May 2018 the defendant was requested to indicate whether it intended furnishing the plaintiff with an undertaking as envisaged in s 17(4)(A) of the Road Accident Fund Act¹. The minute records that the defendant undertook to revert thereanent. On 21 May 2018 it served a notice of offer of settlement in terms of Rule 34(1) and 34(5) on the plaintiff's attorney in respect of the plaintiff's claim for future medical expenses in which it provided the relevant undertaking. Although the plaintiff's claim for past medical expenses remained unresolved no evidence was however adduced thereanent during the trial. Prior to argument on 20 June 2018, a document, incorporating *inter alia*, an agreement on the quantum of this head of damage in the sum of R4 578.09, was handed up from the bar. The settlement of this claim can have no effect whatsoever on the plaintiff's liability for costs given the defendant's substantial success in warding off the claim for loss of earning capacity.

[18] In the result therefore, the following orders will issue-

- 1. The plaintiff's claim for loss of earning capacity is dismissed.**
- 2. The plaintiff is liable for the defendant's costs of trial during the period 11 to 15 June 2018 and 20 June 2018.**
- 3. The defendant is liable for the plaintiff's pre-trial costs up until 21 May 2018.**
- 4. The defendant is ordered to provide the plaintiff with an undertaking in terms of sec 17(4)(a) of the *Road Accident Fund Act*, 56 of 1996, for the**

¹ Act No, 56 of 1996

costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to the plaintiff or supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the motor vehicle collision on 13 March 2010, after such costs have been incurred and upon proof thereof.

5. The defendant is ordered to pay the plaintiff the sum of R4 578.09 in respect of past medical expenses.

D. CHETTY

JUDGE OF THE HIGH COURT

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