

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 84770/2014

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

DATE: 28/02/2024

In the matter between:

PHINDILE LUCY MASEKO

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT LEAVE TO APPEAL

Leso AJ,

1. The plaintiff brought leave to appeal the order and the judgment delivered on 25 October 2023 the reasons for which were provided 17 January 2024. The application is brought in terms of Section 16(1)(a)(i) read with Section 17(1)(a)(i) or (ii) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") and in terms of Rule 49(1)(b) of the Uniform Rules of the Court.
2. SUMMARISED GROUNDS FOR LEAVE ARE APPEAL

- I. that the court rejected the plaintiff's claim for past loss of earnings because the plaintiff was not employed and had no salary at the time of the accident;
- II. That the court erred in changing the undisputed evidence for future income in applying 15% contingencies on the pre-accident future income only as a percentage in arriving at the amount of R 309 855.00 in compensation for future loss of earnings.
- III. The Court found that the projections are based on inconsistent information because the postulations are based on the undisputed evidence by De Vlamingh
- IV. The court erred in finding that Pre-and post-accident income is the same failing to consider undisputed evidence by De Vlamingh that the plaintiff will suffer 10-year delay post-accident in reaching her career ceiling which will result in actual future loss as calculated by the Actuary.
- V. That the court should have applied a moderately higher post-accident contingency deduction to the future income as calculated by Potgieter in arriving at a fair and reasonable amount for compensation for future loss of earnings.
- VI. The court erred in finding that no proof of the plaintiff's qualifications was provided.

BRIEF SUMMARY OF SUBMISSIONS

3. According to the plaintiff's counsel in recent years there has been a tendency for the defendant to argue that no claim of past loss exists for unemployed injured individuals and the postulated post-accident future income should be considered the same as pre-accident future income without laying basis thereof. The approach of the courts in entertaining those submissions was incorrect and flawed. This judgment and the legal principles created will have a serious impact on all future litigation.

APPLICABLE LAW AND DISCUSSION

4. The application is based on Section 16(1)(a)(i) read with section 17(1)(a)(i) or (ii) of the Superior Courts Act 10 of 2013 Section 17(1) of the Superior Courts Act. Before the amendment the law on appeal provided that leave to appeal may only be granted if the judge or judges concerned think that there is a compelling reason why the appeal should be heard, such as conflicting judgments on the matter, the decision will have a practical effect or result. The test then, was simply whether leave to appeal should be granted was that another court **may** come to a different conclusion, now the bar has been set higher and the test to grant leave to appeal is whether another court **would** come to a different conclusion and whether the appeal would have a reasonable prospect of success.
5. The plaintiff relied on section 17(1)(a)(i) of the Superior Court Act which provides as follows:
'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
(a) (i) *the appeal would have a reasonable prospect of success; or*
(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
(b) *the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
(c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'*
6. The standard of whether there are any reasonable prospects of success in an appeal is still maintained. If the court finds that the alleged misdirection can be said to be sufficiently weighing to justify a conclusion that if leave is granted the applicant has prospects of success, then the application must

succeed. The applicant relied on the authority of *Smith v S(475/10) [2011] ZASCA 15* 'issue to be decided is whether the appellant has a reasonable success on appeal and not the merits of the appeal'. On the first ground of leave to appeal, I am of the view that the applicant has a reasonable prospect of success on appeal and that another court will arrive at a different conclusion as I had found that according to the evidence before me, in 2014 when the accident occurred, the plaintiff was unemployed. I could not accept the plaintiff's counsel's argument that the plaintiff suffered past loss of income because pre-accident the plaintiff was unemployed and had no salary or income.

7. During the trial the court raised the issue of information contained in the report compared to the information from the school which indicated that the applicant was volunteering at the school for six years earning R1000 while the other reports indicated that the applicant earned a salary R2000. At the time the counsel for the applicant insisted that the applicant was employed however during the application for leave to appeal the counsel admitted that the plaintiff was a volunteer and concluded by arguing that the inconsistent amounts could be cured by application of contingencies. Having said the above, I find that another court may find that past loss of earnings should not have been rejected in totality.
8. On the second ground, the counsel referred to the authority of *Dippenaar v Shield Insurance Co Ltd 1979(2) SA 90(A)* that the assessment and quantification of damages is trite and involves a comparison between the difference between the plaintiff estate but for and having regard to the accident. I find that the applicant will succeed before the different court as because the principle is that the defendant must make good the difference between the value she would have had if the accident had not occurred. The postulation by Vlammingh is that pre-accident.
9. The applicant has prospects of success in the recalculation of loss of earnings because the calculation might change after consideration of past loss and calculation of future loss of earnings. According to counsel the calculations

provided for actual loss were different from the calculation of the court where I had found that the plaintiff's claim in the amount of R 1 177 584.00 had no basis or simply put, was not justified because of a lack of collateral information on the reports and the inconsistent information regarding the employment history of the plaintiff. I accept the expert report that the plaintiff will struggle in the workplace due to back injuries which might get worse. Consequently, I found that the appropriate award for loss of earning capacity would be an amount of R 309 855 after applying a 15% contingency on the amount of R2 065 704.

10. According to the plaintiff, the above calculation was based on misdirection by the court because the evidence and calculation by the Actuary, which calculations were based on the postulations of Vlamingh were admitted into evidence. I do not agree with the applicant's counsel that once evidence is admitted the court cannot interrogate and criticize the evidence, which was the case in this matter however I am of the view that another court would find differently on this issue.
11. I do not accept that the plaintiff is entitled to the amount claimed currently because he is not entitled to impose the contingencies to be applicable on the calculations as the counsel submitted because the application of the contingencies is the prerogative of the court, in consideration of the postulations by the experts. I however find that another Court may arrive at a different conclusion about the finding that the qualifications were not submitted however the absence or presence of the qualification was not the only consideration for the court to arrive at its decision with regard to contingencies applicable.

I NOW MAKE THE FOLLOWING ORDER:

ORDER

1. Leave to appeal to the full Court of this division is granted.

2. Costs of this application are costs in the appeal.

JT LESO
Acting Judge of the High Court

Delivered: the reasons for the judgment were prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives, by email and by uploading it to the electronic file of this matter on Caselines.

Date of Hearing: 28 February 2024

Date of Order: 28 February 2024

FOR THE PLAINTIFF

Adv APJ Bouwer

Durell@sdjinc.co.za