

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

Case Number: A72/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 9/5/2023

In the matter between:

SESHEGO LOUIS MOAGI

Appellant

and

THE ROAD ACCIDENT FUND

Respondent

JUDGMENT

MOKOSE J

[1] The appellant (plaintiff in the court *a quo*) appeals the whole judgment and order of the court *a quo* which was delivered on 23 November 2018. The appeal is with leave of the court and is not opposed by the respondent.

[2] When the trial commenced, the merits and the general damages had been settled between the parties leaving the loss of future income and/or earning capacity to be adjudicated by the court *a quo*.

[3] The background facts are briefly that the plaintiff had claimed damages from the defendant (respondent in the appeal) as a result of an accident which had taken place in February 2012 where the plaintiff was a passenger in a vehicle which

collided with another. As a result of the accident, the plaintiff suffered 57% Whole Body Impairment and, had suffered a fractured pelvis, dislocated right shoulder, shortening of the right leg and head injuries.

[4] At the time of the accident, the plaintiff worked as a builder and had already obtained a National Diploma in Policing in 2010. Only subsequent to the accident, was he able to secure a position as an administrative clerk within the South African Police Service ("SAPS") and continues to be employed in this capacity to date.

[5] The only issue at this time was whether the plaintiff had a pre-existing condition which should have impacted on the contingency deduction to be applied to the calculation for the pre-morbid future loss of income/income capacity. On this end the plaintiff and a Ms Malapane gave viva voce evidence to confirm that the plaintiff did not suffer from a pre-existing condition. In light of the fact that the defendant had failed to file any expert witness report and in light of the fact that the defendant admitted the viva voce evidence presented by the two witnesses, the court accepted this fact.

[6] In respect of the past loss of damages, the court a quo applied a 5% pre-morbid contingency deduction and 0% post morbid deduction which amounted to a loss in the sum of R340 864,00 for past loss of earnings.

[7] In respect of future loss of earnings the court a quo applied a 40% pre-morbid contingency deduction and a 15% post-morbid contingency deduction thereby finding that there had been no loss of income occasioned by the plaintiff.

[8] The appellant filed an appeal against the whole judgment and order of the court a quo and specifically submits that:

(i) the court erred in finding that the question of loss of future income is a question of the loss of earning capacity;

(ii) the court erred in disputing the plaintiff's pre-morbid career path and finding that it was left to speculate as to why the plaintiff had not yet joined the SAPS prior to

the accident having already obtained his National Diploma in Policing in 2010, two years prior;

(iii) the court erred in failing to have the Industrial Psychologist an opportunity to address it on its findings and postulation concerning the uncontested evidence of the plaintiff's pre-morbid career postulation;

(iv) the court erred in finding that a 40% contingency deduction should be applied to the plaintiff's pre-morbid future loss of income in view of the fact that the plaintiff's Industrial Psychologist had not made mention of a higher contingency deduction to be applied;

(v) the court erred in finding that a normal contingency deduction of 15% should be applied to the plaintiff's post-morbid loss of income or earning capacity on the basis that the plaintiff is a government employee who receives certain benefits.

[9] The findings of court *a quo* must be considered against the factual findings that the plaintiff had no pre-existing conditions, that he is currently employed and that his post-accident income exceeds his pre-accident income. The court *a quo* deemed it necessary to re-visit the actuarial calculation as it may have had an impact on the contingency spread for the above reasons. The court *a quo* referred to the *locus classicus* being the matter of *Southern Insurance Association Ltd v Bailey N.O.*¹ where the court acknowledged that 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. It was held that the court can only make an estimate which is often a very rough one of the present value of the loss.

[10] A trial judge, in assessing compensation has a large discretion to award what he considers just and equitable. He may be guided by but not tied down by inexorable actuarial calculations.² In the event of the court being presented with conflicting evidence from actuaries, it is not bound to accept any evidence in its entirety. It can

¹ 1984 (1) SA 98 (A)

² Legal Insurance Company v Botes 1963 (1) SA 608 (A) at 641 F-G

take any evidence and from the probabilities be assisted by them to arrive at a finding between the two extremes.

[11] An expert witness is required to lay a factual basis for his conclusion and explain his reasoning to the court which must satisfy itself as to the correctness of the witness's reasoning. An expert witness's opinion must be capable of being reconciled with all other evidence before the court.

[12] In the present matter, the court a quo accepted the actuarial report and more specifically the calculations as the basis for calculating the loss of past and future income occasioned by the plaintiff. We were informed that the plaintiff's future income, had the accident not occurred, was calculated as an amount of R5 903 241,00. The plaintiff's future income, post the accident, now amounts to R4 250 248,00 showing a direct loss suffered by the plaintiff as R1 652 993,00. Counsel for the plaintiff submits that it was not merely a question of loss of earning capacity that had to be considered by the court but also the direct loss as indicated above. We agree with this assertion as the basis for this conclusion is explained adequately by the expert witness and supported by evidence before the court.

[13] We also note that no credibility findings were made by the court in respect of any of the witness' reports including that of the Industrial Psychologist. However, it is noted that the court a quo failed to consider that report without offering any reasons for this. We agree that the court a quo merely speculated as to the possible reasons the plaintiff did not join the SAPS earlier as there was no evidence to this effect.

[14] A court of appeal may interfere with the trial court's assessment of appropriate contingency deductions where there has been an irregularity or misdirection, where the court is of the opinion that no sound basis exists for the award made by the trial court and where there is substantial variation and a striking disparity between the award made by the trial court and that which the appeal court should make.³

³ Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at para (8]

[15] In the judgment of the court *a quo*, the court noted the comments of the actuary that in the case of a government employee it should be kept in mind that it is unlikely that the employer will reduce the income of an employee that is injured or disabled. Other benefits such as generous ill- health retirement benefits and other benefits earned while in the service are unlikely to be affected. It came to a conclusion that a normal contingency deduction of 15% would suffice. However, in his submissions before this court, Counsel for the plaintiff contends that a contingency deduction of 20% should be considered as fair in the circumstances.

[16] In its judgment, the court *a quo* further held that the plaintiff's career prospects and earning potential had been "detrimentally affected by the accident" but we note that this fact had been disregarded by the court in the determination of the contingency. This is in contradiction with the Industrial Psychologist's recommendation who indicated that the plaintiff's career prospects and earning capacity had been negatively affected as a result of the accident and its *sequelae*. The court *a quo* also disregarded that should the plaintiff lose his employment with the SAPS, given his specific qualification, he would be in a much more vulnerable position due to his physical impairments and psychological issues.

[17] We agree with Counsel for the plaintiff that the risk of additional earnings losses should be acknowledged by applying a higher-than-normal post-morbid contingency deduction.

[18] For the reasons stated above and in view of the principles set out in the Guedes matter (*supra*) we are of the view there was an irregularity or misdirection on the part of the court *a quo*: The court *a quo* ignored the undisputed evidence of the expert witnesses and speculated the reasons for the plaintiff's employment history. There was also no sound basis for the award made by the court *a quo* especially the exceptionally high contingency deduction of 40% on the post-morbid scenario. Because there was a striking disparity and substantial variation between the award granted by the court *a quo* and the award the trial should have made, the appeal is upheld.

[19] Accordingly, the following order is granted:

- (i) the appeal is upheld with costs;
- (ii) the order of the court *a quo* is set aside and replaced with the following:

"The draft order marked "A" is made an Order of Court."

MOKOSE J
Judge of the High Court of South Africa
I agree and it is so ordered

BASSON J
Judge of the High Court of South Africa

I agree and it is so ordered

NOKO AJ
Acting Judge of the High Court Of South Africa

Matter heard: 1 March 2023

Judgment handed down: 9 May 2023

Appearances:

For the Appellant: Adv G Lubbe

For Respondent: No Appearance

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

On this the 9th day of May 2023 before the Honourable Justice Basson, Justice Mokose and Justice Noko, AJ.

APPEAL CASE NO: A72/19
COURT A QUO CASE NO: 43682/2015

In the matter between:

SESHEGO LOUIS MOAGI

APPELANT / PLAINTIFF

and

ROAD ACCIDENT FUND

RESPONDENT/DEFENDANT

COURT ORDER

AFTER CONSIDERING THE PAPERS AND HEARING COUNSEL FOR THE APPELANT, THE COURT MAKES THE FOLLOWING ORDER:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside insofar as loss of earnings is concerned and in its stead is substituted as follows insofar as prayer 2 is concerned:
 - 2.1 The pre-morbid contingency to be deducted for future income is 20%;
 - 2.2 The post-morbid contingency to be deducted for future income is 35%;