



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/ NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 3742/2016

In the matter between:

LORENZO BEVAN NELSON

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

CORAM: NAIDOO J

HEARD ON: 4 NOVEMBER 2022

DELIVERED ON: 5 MAY 2023

JUDGMENT

- [1] The plaintiff, Lorenzo Bevan Nelson (the plaintiff), issued summons against the defendant, the Road Accident Fund (RAF) for damages arising out of injuries suffered by him, in a motor vehicle accident which occurred on 19 December 2012 at the crossing of the Dewetsdorp Road and the N6 motorway to East London, in the Free State Province. The plaintiff was a passenger in one of the two motor vehicles involved in the collision. RAF had previously conceded merits and negligence at 100%. By the time the matter came before me for the hearing of the trial in respect of quantum, most heads of damages had become settled, namely, general damages (which were settled on the morning of the first day of trial on 18 October 2022), past and future medical expenses and hospital expenses. The only issue for this court to adjudicate was the past and future loss of earnings and specifically the percentage of contingency deductions to be applied to loss of earnings. Adv (Ms) K Petersen represented the plaintiff and Ms K Mkhwanazi represented RAF.
- [2] The plaintiff, who lives with his parents at the premises of the Grootvlei Prison (where his father works), sat for his matric examination in 2012. Having failed the examination, the plaintiff repeated matric in 2013 and obtained his Senior Certificate. The accident happened during the school holidays in 2012, after he wrote his matric examination, so he had not lost any time at school. The plaintiff was 18 years old at the time and had never been employed prior to the accident. The injuries he suffered are recorded as fracture dislocation of the right hip, multiple abrasions to both arms and mild head injury.

- [3] As indicated, at the commencement of the hearing of this matter, and as a result of most of the damages having been settled, the court was required to adjudicate the issue of past and future loss of earnings.
- [4] The plaintiff was examined and interviewed by various medical experts, from 2013, including a follow-up assessment in September 2021 by an industrial psychologist. I will deal only with those experts whose reports and/or opinions have a bearing on the issues to be adjudicated by this court. The following is gleaned from the medico-legal reports filed, and is accepted to be common cause as no issue has been taken with same:
- 4.1 The plaintiff suffered restriction on his ability to participate in vigorous activity and sports after the accident;
 - 4.2 He did not meet the academic requirements to study for physiotherapy, which he intended to; this is unrelated to the accident
 - 4.3 It was assumed that he may have qualified as a fitness trainer and entered the job market as such, at age 24 years, but for the accident;
 - 4.4 His ability to enter the job market was not negatively impacted by the accident although his job opportunities would be narrower;
 - 4.5 He suffered no psychological or neurological deficit as a result of the accident
 - 4.6 His cognitive functions were not impacted by the accident;
 - 4.7 the plaintiff suffered multiple scarring to his forearms
- [5] The plaintiff engaged a number of medical experts, who each

prepared reports in respect of their findings. I will deal briefly with opinions and/or conclusions of these experts. The orthopaedic surgeon engaged by the plaintiff, Dr FP Du Plessis, asserted in 2013, that he was unable to comment on the plaintiff's future employability, as that would be determined by the healing or otherwise of the right hip. He postulated that there was a 25% possibility of complications occurring which would impact on future employability. Another Orthopaedic surgeon, Dr Ziervogel, said in April 2019, almost seven years after the accident, that *"the patient should be able to do the work of a salesman until normal retirement age. He is however handicapped as far as his sporting activities are concerned."*

- [6] The neurosurgeon, Dr Wilkinson, who assessed the plaintiff in November 2014, indicated that the plaintiff functioned at a relatively high cognitive and intellectual level and diagnosed the head injury as a mild concussion without permanent impairment, which did not contribute to the calculation of the whole person impairment. He further indicated that the plaintiff has the mental and cognitive ability to achieve the career goal of a physiotherapist, but doubted if his injuries would enable him to sustain such a job to normal retirement age.

Ms Milne, the occupational therapist took account of some of the medico-legal reports I have mentioned, and assessed the plaintiff in April 2015. She conducted tests to assess his upper and lower body capabilities, and found that with regard to the upper extremities, he could function within a normal range, whereas he was limited with regard to the lower extremities, as a result of his injuries. She too made conclusions with regard to physiotherapy as

a career goal for the plaintiff. She asserted that the plaintiff has the physical strength but not the endurance to perform the duties of a physiotherapist, as it might be too much of a physical strain. She opined that he should rather focus on areas such as hydrotherapy or lecturing of students

- [7] Ms S Van Jaarsveld, the industrial psychologist, took account of all the medico-legal reports filed, and quoted relevant extracts from each report to support her conclusions regarding the plaintiff's capabilities and future employability. She evaluated the plaintiff on three occasions, initially on 25 March 2015, and thereafter on 5 June 2019 and 29 September 2021. Ms Van Jaarsveld gave a detailed exposition of the plaintiff's background, educational history, cognitive functioning, socio-economic circumstances and future employment prospects. She was of the view that after he obtained his matric qualification, one would have to assume a probable career path that the plaintiff would have followed, had the accident not occurred, in order to link the qualification to a career level. Based on the plaintiff's pre-accident academic performance, she estimated that his intellectual functioning would have been in the average range, which is in keeping with the opinion of the neurosurgeon, Dr Wilkinson, that the plaintiff's concentration, memory, insight and reasoning are normal.
- [8] Ms Van Jaarsveld was of the opinion, that had the accident not occurred, the plaintiff would have undergone formal training at a tertiary institution and would have obtained a Bachelor's degree or equivalent qualification. She worked on the assumption that he would have entered the open labour market at age 24 years as a

fitness trainer and would have been employed in the fitness industry until he retired at 65 years. Ms Van Jaarsveld obtained collateral information from the manager of a local fitness centre regarding the earning capacity of a fitness trainer, and asserted that it is extremely difficult to set an average salary/package for a fitness trainer, due to a number of variable factors which determine the earning capacity of a fitness trainer.

[9] Ms Van Jaarsveld opined that someone with a Grade 12 certificate and a post school qualification would in all probability enter the labour market on a salary equivalent to the median of Paterson level B3, which in this case is R275 000.00 per annum. Progression to the next level would probably occur every three to five years, and the plaintiff in that situation would have reached his plateau at the median of Paterson level C3, being R582 000.00. With regard to the plaintiff's post-accident income potential, Ms Van Jaarsveld indicated that he started his university studies in 2015, having registered for a Bachelor's degree in Humanities but discontinued studies because of pain and discomfort. From 2016 to the end of 2017, he worked at different jobs on a part-time basis until he secured permanent employment in 2019, as a salesperson. He held this position until January 2021, when the company closed its offices and he was retrenched. He has been unemployed since February 2021.

[10] From an industrial psychological perspective, Ms Van Jaarsveld opines that the plaintiff's injuries could negatively affect his ability to secure and maintain employment and would also negatively affect his work performance, and hence his career advancement

opportunities. She points out that in calculating a monetary compensation for the plaintiff's claim, it should be borne in mind that the accident had no impact on his entry into the open labour market. Due to his discontinuing his tertiary studies as a result of accident-related pain and discomfort, he would enter the labour market at a lower income level, with earnings equivalent to the median of a semi-skilled worker in the non-corporate sector. She is of the view that he should be compensated for the difference between what he would have earned, which I mentioned earlier, and what he would earn as a semi-skilled worker.

- [11] The plaintiff also engaged Mr W Loots, an actuary. After receiving instructions from the plaintiff's attorneys and based on Ms Van Jaarsveld's report, he undertook a detailed exposition of the pre-accident and post-accident scenarios in respect of earnings, setting out the methodology he employed and the various factors that he took into consideration in arriving at the results contained in the report. He calculated the loss of earnings, applying a pre-accident contingency deduction of 5%/20% and a post-accident contingency deduction of 5%/35%, as instructed by the plaintiff's attorneys. His calculations yielded an amount of Six Million Four Hundred and Six Thousand Three Hundred and Twenty Six Rand (R6 406 326.00) in respect of loss of earnings, adding that the calculations are based on information, instructions and assumptions provided to him.
- [12] RAF engaged four experts, Dr M Matjane, a Neuro-Psychiarist, Dr TS Bogatsu, an Orthopaedic Surgeon, Ms S Moagi, an Occupational Therapist and Mr H Solanki, an actuary. I pause to

mention that RAF accepted the expert reports filed by the plaintiff, and consequently those witnesses were not called by the plaintiff. RAF indicated on the first day scheduled for trial that they are not in agreement with the calculations, and particularly the contingency deductions, of Mr Loots, the plaintiff's actuary. Dr Matjane, interviewed and assessed the plaintiff on 21 February 2017, just over four years after the accident. He appears to have been provided with only the RAF1 form and the plaintiff's hospital records for the purposes of his evaluation. He therefore, had no recourse to the reports of the plaintiff's experts. Dr Matjane outlined briefly the plaintiff's injuries, the medical, family, educational and occupational history obtained mostly from the plaintiff. His assessment of the plaintiff focused on impact of his injuries from a neurological and psychiatric point of view. Dr Matjane, in considering the plaintiff's injuries was of the view that maximum medical improvement had been reached and further deterioration or improvement in his condition was not anticipated. Similarly, with the cognitive assessment, the plaintiff performed well and did not indicate any cognitive deficiencies or challenges. His view was that the head injury suffered by the plaintiff is a mild, transient, traumatic brain injury, which is without neuropsychiatric sequelae. He was also of the view that the plaintiff did not suffer serious permanent disfigurement, that his injuries did not affect his life expectancy and did not negatively impact on his competitiveness in the open labour market. He defers to the relevant experts in respect of these aspects.

- [13] Dr Bogatsu assessed the plaintiff on 5 March 2018, approximately a year after Dr Matjane. He noted the plaintiff's personal details,

injuries and treatment history. It seems that Dr Bogatsu only had recourse to the RAF 4 form, which he in fact completed. The RAF 1 form and the plaintiff's hospital records were not made available to him, nor were the reports of the plaintiff's experts. He therefore, obtained the details of the accident, the plaintiff's injuries and treatment from the plaintiff. Dr Bogatsu's clinical examination of the plaintiff revealed that the eyes, ears, throat, chest and abdomen were normal. The head, neck and cranial nerves were normal and full range of cervical spine movements, without pain was observed. The upper limbs were normal, save for multiple scarring on both upper limbs. Full range of painless movements were observed at both shoulders, elbows, wrists and hands. The examination of the back revealed that the thoracolumbar spine movements were such that the plaintiff was able to painlessly touch his toes with extended arms. The extension was assessed to be in the range 0 to $\pm 20^\circ$.

- [14] With regard to Right lateral flexion in respect of the examination of the back, Dr Bogatsu notes that in an erect position, the plaintiff was able to painlessly touch his right calf with an extended right arm. A similar reach was noted on the left, with his pelvis being square and stable. The lower limbs were observed to be clinically normal with full range of movements noted at the hips, knees, ankles and feet of both legs. His gait was normal, and perusal of a radiology report compiled the same day (5 March 2018) indicated that the lumbar spine and right hip were normal. Dr Bogatsu deferred to the opinions of the relevant experts in respect of non-orthopaedic injuries, for example a plastic surgeon in respect of the scarring. From the information available to him and his examination of the plaintiff, he concluded that the plaintiff

sustained minor orthopaedic injuries in the accident which resulted in chronic mechanical pains. He also opined that the plaintiff was not incapacitated by orthopaedic related injuries nor have his general health and longevity been adversely affected by the accident. It was also his opinion that the plaintiff's injuries have not resulted in any significant losses with regard to his mental, employment and earning capacities, nor his amenities, independence and enjoyment of life.

- [15] Ms Moagi, the Occupational Therapist engaged by RAF, also assessed the plaintiff on 5 March 2018. She had recourse to the reports of Drs Matjane, Bogatsu and Bohme (the radiologist). She recorded a detailed personal, medical and treatment history, the plaintiff's injuries and accident details. She also subjected the plaintiff to a number of tests to assess his physical capacity in relation to occupational performance. In summary, she found the neck, back and upper limbs functioning normally. The left lower limb was also normal, while the right lower limb was weaker. The plaintiff also reported pain in the right hip. The plaintiff complained of pain and discomfort in the right hip throughout the various tests and exercises, as a result of which, Ms Moagi found that his sitting endurance was functional, but that he had a slightly reduced standing endurance and reduced walking endurance, walking speed and mobility. His hand function, balance and senses were functional. She concluded that that his physical capacity could occasionally meet the requirements of work which called for working below knee/hip level in a squatting or crouching position. His physical capacity would meet the requirements for work that fell within the category of sedentary, light to low range medium

work. He would not be able to meet the requirements of full range medium, heavy to very heavy type work.

[16] The occupational therapists, Ms Milne and Ms Moagi compiled a joint minute in which they agreed on a number of aspects, which included:

- 16.1 occupational therapy sessions to educate the plaintiff on such matters as joint protection techniques, use of assistive devices, correct posture during performance of tasks, methods of task approach and task execution, etc
- 16.2 interventions by various medical and healthcare professionals to assist the plaintiff improve his physical capacity and quality of life, such as a biokineticist to explore other sports activities, physiotherapist to improve strength and stability and an orthotist to assist with devices to correct difference in leg length.

I pause to mention that it was common cause that the actuary engaged by RAF, Mr Solanki, based his calculations on certain inputs from an Industrial Psychologist, Ms Kheswa, seemingly also engaged by RAF. The latter, however, failed to file Ms Kheswa's report. It appeared to be common cause that no reliance can be placed on Mr Solanki's report, hence I make no mention of it. Furthermore, Mr Solanki's report was compiled in June 2019, and is out of date. The Plaintiff amended his summons in the interim, so no reliance could be placed on Mr Solanki's report

[17] As indicated, the issues between the parties appear to be RAF's disagreement that the plaintiff suffered past loss of earnings and its disagreement with the percentage of the contingency deductions

applied to the loss of earnings. It is trite that the percentage of the contingency deduction is in the discretion of the court, which discretion must be exercised judiciously, taking into account all relevant factors. The parties made their submissions in respect of their respective cases, both orally and in their written Heads of Argument. I do not deal with these submissions for the reasons set out below.

[18] It is trite that the plaintiff bears the onus to prove on a balance of probabilities that the injuries he sustained have reduced his earning capacity, which will result in actual loss. [See *Rudman v Road Accident Fund* 2003(2) SA 234 (SCA); *Road Accident Fund v Kerridge* 2019(2) SA 233 (SCA)]. The court in *Kerridge* said at para 25 “Indeed, a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income...” Put differently, there must be proof that the disability gives rise to patrimonial loss. The latter of course is dependent on the nature of the work that the plaintiff had done prior to the accident or would probably have done had the accident, giving rise to the disability, not occurred.

[19] In the present matter, RAF accepted the reports of the experts filed by the plaintiff. RAF itself filed expert reports. The only report that the court was asked to disregard was that of the actuary engaged by RAF, Mr Solanki, for reasons I have set out earlier. Therefore, in the absence of other evidence, such as *viva voce* evidence, this court must have recourse to the various expert reports and general circumstances of this matter in order to make an order which is just

and equitable. In reading the various reports, several concerns arose. The first concern was the age of the various expert reports filed by the plaintiff. With the exception of Ms Van Jaarsveld, the Industrial Psychologist and Mr Loots, the actuary, who filed updated reports in 2021, just over a year before the trial of this matter was scheduled to commence, all the other reports were compiled between three and nine years prior to the hearing of this matter. RAF's expert reports are dated 2017 and 2018. There was no indication of what the current condition of the plaintiff is, whether he has recovered fully from his injuries, and if not, to what extent his injuries have impacted upon his employability, and whether he is currently employed or not.

- [20] The plaintiff's academic qualifications (or lack thereof) played a central role in the information contained in Ms Van Jaarsveld's report, which formed the basis of the actuarial calculations done by Mr Loots, in respect of loss of earning capacity and earnings. Some discrepancies which were noted in the information relayed to different experts at different times bear mentioning. The plaintiff told Dr Wilkinson in November 2014 that he spent 2013 as a recovery year, whereas he told Ms Van Jaarsveld in March 2015 that he failed matric and repeated matric in 2013. With regard to his tertiary studies, he told Dr Wilkinson that he had registered for a Bachelor of Social Science (B.Soc), with Sociology and English as his main subjects. He indicated that he was doing extremely well in his studies and achieving very good marks. He informed Ms Van Jaarsveld in March 2015 that he was studying Human Movement Science at university, whereas he told Ms Milne, the

Occupational Therapist a few weeks later that he was in his second year of study in physiotherapy.

- [21] Ms Van Jaarsveld's comment in her report in March 2015, in response to the information that the plaintiff had considered studying Physiotherapy, was that it was unlikely as he had not met the admission requirements for Physiotherapy. There is no information or evidence to indicate what became of his studies in B.Soc, for example, whether he completed the course or not. He did mention to Ms Moagi that he has a certificate in Sociology and English, based on which, she opined that sociology would be more suitable as a career path, as it fell into the category of light work. Ms Van Jaarsveld was informed that he abandoned his tertiary studies because of pain and discomfort, whereas Ms Moagi was informed in 2018 that he stopped studying because his doctor advised him that he should not study Physiotherapy as he was unable to lift heavy objects.
- [20] The plaintiff was able to find employment after the accident in a variety of fields (fibre optic installer, student liaison officer and a salesperson in the mobile telephone industry). Since his retrenchment in January 2021, he is alleged to be unemployed. No reason for this is given, and in my view, it appears doubtful that his unemployment is related to his injuries. The medical reports since 2013 show that there has been an improvement in the plaintiff's physical condition. Compare for example, Dr Du Plessis's report in 2013, with that of Dr Bogatsu in 2018 as well as that of Dr Ziervogel in 2019. The complete lack of information or evidence of the plaintiff's physical health and capacity since 2019, places this

court in the position that it cannot properly consider whether the plaintiff's injuries have negatively impacted his earning capacity or earnings. It would have been expected of the plaintiff to give oral evidence regarding his present health condition, employment status and earning capacity. Many of the court's concerns may well have been addressed had he done so.

- [21] In my view the reports of the various experts indicate that their findings and recommendations are based largely on the probabilities and an anticipation of what the plaintiff's future condition may be. Ms van Jaarsveld herself expressed the view that one has to work on the assumption that the plaintiff would have completed a tertiary qualification, for the purposes of the actuarial calculation. The circumstances and facts as I have articulated make it difficult to make the assumptions that Ms Van Jaarsveld advocates as the circumstances surrounding the plaintiff's post-accident academic performance and history are nebulous, to say the least. It is unclear what career path the plaintiff had intended to pursue and what the real reasons were for the abandonment of his studies. It is trite and well established in our law that courts need to be mindful of the current situation of the plaintiff and exercise a measure of common sense and judicious discretion in avoiding an award that would amount to a windfall to which the plaintiff would not be entitled. The purpose of a claim such as this is to compensate the plaintiff for loss that he has suffered or will suffer and not to make an order that amounts to largesse. The plaintiff, however, must first discharge the onus on him to prove the loss.

[22] With regard to this claim, the plaintiff has not placed the court in a position to grant the order he seeks. Courts are loathe to non-suit a litigant, and while this court has the option of dismissing the plaintiff's claim for loss of earnings on the basis that the plaintiff has not discharged the onus on him, the court is not inclined to visit that hardship upon the plaintiff. My view is that an order for absolution from the instance gives the plaintiff an opportunity to return to court with better evidence, if same is available. RAF has furnished the plaintiff with the statutory undertaking in respect of future medical expenses and has already paid to the plaintiff's attorneys the amount of R46 879.96 in respect of past medical expenses. The parties had settled the claim for general damages in the amount of Six Hundred Thousand Rand (R600 000.00), and Ms Petersen had indicated in Chambers that the latter should be made an order of court. I see no impediment in doing so. With regard to costs, and considering the manner in which this litigation was conducted, I am of the view that each party should pay its own costs.

[23] In the circumstances, I make the following orders:

23.1 The defendant's offer of R600 000.00, accepted by the plaintiff, in settlement of the plaintiff's claim in respect of general damages, is made an order of court;

23.2 Absolution from the Instance is granted in respect of the plaintiff's claim for loss of earnings;

23.2 Each party shall pay his/its own costs.

S NAIDOO, J

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