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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No: 2549/2018

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

IG M

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Coram: Opperman, J

Heard: 25 February 2022, 10 May 2022 & 2 August 2022

Delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 29 September 2022. The date and time for hand-down is deemed to be 29 September 2022 at 15h00

Summary: *Quantum* - past and future loss of income - “sympathetic” employment

JUDGMENT

[1] *Quantum* of past and future loss of income lies before court for adjudication.

[2] Plaintiff claims an amount of R7 289 454.00¹ for past and future loss of earnings. If awarded; the monies will be administered in a Trust on behalf of the plaintiff.

[3] The defendant opposed the claim on the basis that the pre – morbid contingency deductions of 5%/10% and post – morbid 5%/0% deductions are inappropriate. They focused their argument on:

- a) The pre – morbid contingency deduction on future earnings,
- b) Plaintiff’s future post – morbid earnings (the “sympathetic employment”), and
- c) The post – morbid contingency deductions on future earnings.²

[4] The claim of the plaintiff on Notice of Motion was as follows:

Past medical expenses	R6 135.73
Future medical treatment	Undertaking
Past and future loss of income	R9 000 000.00
General damages	R1 500 000.00

[5] Every aspect of the case was in dispute until the parties settled on the 25th of February 2022. The settlement was made an order of the court. The crux thereof is that:

1. The defendant is liable to compensate the plaintiff for 100% (Hundred Percent) of his proven or agreed damages.
2. The defendant shall pay the plaintiff the sum of R1 000 000.00 (One Million Rand), in respect of General Damages.

¹ Paragraph 10 of the Heads of Argument of the plaintiff dated 12 May 2022.

² Paragraph 6 of the Heads of Argument of the defendant.

3. The awards to the plaintiff shall be protected by means of it being entrusted to a Trust to be formed for the benefit of the plaintiff.

4. The defendant is ordered to furnish the Trustee appointed in respect of IG M (the patient) an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the patient in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the patient arising out of injuries sustained by him in a motor vehicle collision on 26 April 2016 in terms of which Undertaking the defendant will be obliged to compensate the Trustee in respect of the said costs after the costs have been incurred by either the patient or by the Trustee or by any party on behalf of the patient and on proof thereof. The defendant is ordered to pay the reasonable travelling costs and accommodation for the patient and his caretaker to and from the location where he is to receive treatment covered under the Undertaking. A case manager may be appointed, as per the discretion of the trustee of which the cost of such appointment (if necessary) is covered under the Section 17(4)(a) - Undertaking.

5. The issues of merits and *quantum* are separated in terms of Rule 33(4) and that the issue of *quantum* (Loss of Income and Past Medical Expenses) was postponed to 10, 11 & 13 May 2022.

[6] The claim of R9 000 000.00 for past and future loss of income was amended to R7 289 454.00 after the calculations were amended on instruction by the plaintiff to the actuaries.

[7] The plaintiff also abandoned his claim for past medical expenses.³

[8] The week before the trial was to commence on 10 May 2022 the defendant apparently maintained that there was not to be any settlement. All the plaintiff's

³ Paragraph 1.2 of the Heads of Argument of the plaintiff dated 12 May 2022.

experts were reserved and requested to clear their diaries and to attend court and to prepare to give *viva voce* testimony in court. The trial was to last for three days.

[9] Moments before the trial was to start counsel for the defendant indicated that she received instructions to admit the plaintiff's expert reports by mere submission thereof to the court.

[10] Counsel for the defendant conceded that the only matter that was at issue was the contingencies applied by the Actuary and the calculation as to the influence of the CAP thereon. The fact that the plaintiff was still sympathetically employed was also a factor that counsel for the defendant wanted to be phased into the calculations.

[11] I regress to refer to the experts' evidence that lies before the court for the plaintiff and unopposed and undisputedly so. They are:

1. L. Grootboom (Clinical Psychologist).
2. Dr D.K. Mutyaba (Neurosurgeon).
3. L van Zyl (Occupational Therapist).
4. Dr L van der Merwe (Ophthalmologist).
5. B Moodie (Industrial Psychologist) dated 01 July 2020 and updated on 5 May 2022.
6. J Sauer (Actuary) dated 07 July 2020⁴ in respect of Loss of Income and his addendum reports dated 10 May 2022.

[12] The defendant elected not to adduce or submit any evidence to gainsay that of the plaintiff; they closed their case forthwith.

[13] This is the case for the plaintiff on the facts that caused him to be sympathetically employed. B Moodie, the Industrial Psychologist, supplied the court

⁴ Expert Notices Bundel, Volume 3 (Dated 27 July 2022) at pages 243 to 252 and at pages 271 to 283.

with a comprehensive and well corroborated report referring to the other experts' findings and updated to May 2022.⁵

1. The plaintiff was born in 1986 and 29 years old at the time of the incident on 26 April 2016.
2. He enjoyed good general health before the incident.
3. On the day of the incident the plaintiff was a passenger involved in a motor vehicle accident. He was unconscious after the collision. He was transferred to the Bongani Hospital by ambulance. His Glasgow Coma Scale upon arrival was 9/15. On the same day he was transferred to the Pelenomi Hospital where he stayed for three months, until the 31st of July 2016. He was then transferred back to Bongani Hospital for a further four months, until November 2016. His Glasgow Coma Scale had by this time improved to 13/15.
4. The plaintiff's injuries were severe:
 - i. Laceration on the left eyelid;
 - ii. Deep laceration forehead;
 - iii. Dilated right pupil;
 - iv. Severe traumatic brain injury with severe neuro cognitive and neuropsychological deficits in addition to the physical effects such as headaches and visual problems;
 - v. Epidural hematoma;
 - vi. Subdural collection;
 - vii. Scar tissue both eyes;
 - viii. Severe central retinal damage of the right eye;
 - ix. Severe reduced to no vision in the right eye, the right eye deteriorated to blind;
 - x. Attention deficit, concentration deficit, cognitive deficits, verbal and learning impairments, significant depressive features, anxiety and post-traumatic stress disorder symptoms, behavioural changes and adjustment difficulties. He has lost his sense of smell and taste and have weekly nosebleeds. He experiences confusion at times and lability of emotions.

⁵ Expert Notices Bundel, Volume 1 (Dated 12 May 2022) at pages 126 to 173 and Volume 3 (Dated 27 July 2022) at pages 253 to 262.

5. His career and education evolved as follows:
- i. He obtained grade 12 after he repeated grade 9;
 - ii. Post school he obtained Electrical Studies N1, Electrical Studies N2, Engineering Studies N3, Engineering Studies N4 and Engineering Studies N5. He commenced with his studies in Engineering N6 but the examination on the certificate was in May 2016 shortly after the accident. In 2018 he completed the Chamber of Mines Certificate in Radiation.
 - iii. He was employed at Joel Mine from 2008 to 2009 until his contract ended, in 2010 at Marais Spruit Mine until the mine closed down, 2013 to 2016 he was employed as a general worker underground until the accident. He was immediately demoted to a position above ground as a store assistant when he returned to work. He experienced a significant decrease in salary and benefits. According to the HR form the plaintiff suffered a total loss of earnings of R20 143.32 for the six months absent from work for his recovery.
 - iv. Imperative is that even if the accident did not happen there would not have been any promotional possibilities for him and he would have remained a general worker underground. He did however have benefits such as overtime, housing allowance, medical allowance, pension allowance and a performance bonus.
 - v. His current (2022) supervisor reported that he is forgetful; instructions must be repeated. He is accommodated in his present position by providing him with assistance when he struggles with a task and by repeating instructions. He suffered loss of overtime payments and a decrease in salary.
 - vi. The Occupational Therapist reported that the plaintiff will never be well matched to his previous work demands. He is, as a matter of fact, not entirely well suited for his current position.⁶
 - vii. The experts opined that should the plaintiff continue to be employed where work demands exceeded his maximum capacity, the cognitive or neuropsychological decline expected could evolve into post-

traumatic epilepsy, dementia or Alzheimer's disease. Early retirement is expected.⁷

viii.B Moodie reported in May 2022 that notwithstanding noting that the plaintiff remained employed in the same work capacity to date, he maintains the opinion in his initial report. This is further supported by the letter from TWC Mining (Pty) Ltd dated 4 May 2022 wherein it was stated that the continuous employment of the plaintiff at the company is out of sympathy. Furthermore, does Moodie express the opinion that the plaintiff is not being accommodated permanently due to the probability of restructuring of management staff or for any other reason. He can for all practical reasons be rendered as unemployable in the open labour market due to the fact that it is highly unlikely for the next employer to want to have someone on the payroll that is not functioning independently.

[14] Plaintiff's counsel's argument is solidly based on the facts, opinions, postulations and calculations by the experts. Defendant's counsel was perturbed by the fact that, according to her, the plaintiff is in reality permanently employed in sympathetic capacity and that the actuarial calculations must be based on his continued employment. Her argument is that the best predictor of future behaviour/success, is past behaviour/success. There is, according to her, no indication that he would have progressed with his career as was opined by the experts. It is her opinion and not that of an expert.

8.1.6 Plaintiff's postulated career progression by his Industrial Psychologist (in 2019 and in 2022) is based on the presumption that the economy and employers will prosper and thrive. It disregards what is deemed to be a third world war, and it makes no mention of the effect of the COVID-virus on employers, employees and employment possibilities. The COVID-virus alone, is a reminder that wholly unpredictable events can supervene, causing delays in career progression.

[15] The argument of counsel for the defendant is frustrated by the fact that they have not submitted any expert evidence or any evidence at all on the issues she

⁷ Expert Notices Bundle, Volume 3 (Dated 27 July 2022) at page 226 paragraph 11.6.

raised. On her word from the bar, it remains pure and mere speculation. The court shall not take cognisance thereof for the mere vagueness, generalness and unsubstantiated nature thereof. The unyielding, unambiguous and factually corroborated evidence of the Industrial Psychologist remained that the continued employment of the plaintiff in his current environment and faced with the real fears of the deterioration of his *sequelae* is on unstable foundations.

[16] It is trite that it is vital that the evidence pinioned by an expert is solid. "Solid" supposes veracity of the facts of the particular case, expertise on the issue and an opinion that makes legal sense based on the facts combined with the expertise. Neither the Industrial Psychologist that instructed the Actuary, nor the Actuary can be faulted on their postulations and calculations.

[17] In *Southern Insurance Association v Baily* NO 1984 (1) SA 98 (A) that was supported in *Adv Johan Malherbe Kilian N.O Plaintiff in his capacity as Curator Ad Litem to Jansen Van Rensburg: Andre Abraham Petrus Le Grange v Road Accident Fund, The High Court of South Africa (Gauteng Division, Pretoria)* Case No. 34116/2016 Judgement 15/9/2016 Gauteng Division, Pretoria it was held that:

[1] 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 estimates, which is often a very rough estimate, of the present value of 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.

[2] It is manifest that either approach involves guesswork to a greater or lesser extent. When it comes to scanning the uncertain future, the Court is

virtually pondering the imponderable, but must do the best it can, on the material available even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss.

[6] I must however emphasise that because of the speculative nature of the enquiry, when parties elect to approach the court on a stated case and lump sum of money is claimed, as in the present case, R6 653 636.00 from the public coffers, it is incumbent on the parties to place before the court sufficient evidence in the form of admissions and other admitted format.

[18] The case of *National Justice Compania Naviera S.A v Prudential Assurance Co Ltd* 1993 (2) Lloyds Reports 68-81 set out the duty and role of an expert.

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In the case of where an expert witness who has prepared a report could not assert that the report

contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

[19] In *Schneider NO & Others v AA & Another* 2010 (5) 203 WCC Davis, J stated at paragraph 211J-212B:

In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusions of the expert, using his or her expertise, are in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as far as possible. An expert should not be a hired gun who dispenses his or her expertise for the purpose of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.

[20] In *RAF v Zulu* [2011] ZASCA 223 the court dealt with the approach to expert evidence that has to be adopted by the courts. The court reaffirmed the principles set out in *Michael v Linksfield Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) that:

[14] What is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.

[21] The common theme is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts that caused the expert opinions in this case are vital. It was supplied by the plaintiff and corroborated by experts and surrounding evidence. It is logic and sound.

[22] The just and equitable calculation on the *quantum* for the loss of past and future income of the plaintiff is to be found at pages 279 to 283 of the Expert Notices, Volume 3 and dated 10 May 2022 to be R7 241 045.00.

[23] Counsel⁸ for both parties were vocal and piercing on their sentiments regarding costs and the manner in which the case was conducted. It was to the extent that there was even a dispute over the definition of the word “counsel”.

[24] I share the frustrations of both counsel for the plaintiff and the defendant that are in fact frustrated by the same bureaucratic system. I will weigh in and conclude on the discontent by stating that the constitutional piety and virtue of litigation; or access to court and justice, is a precious commodity.

[25] Cases of this nature must be subjected and opened to settlement negotiations and dispute resolution much earlier than at the door of the trial court. This abhorrent practise has implanted and rooted itself into the justice system at an alarming and disgusting cost to the administration of justice and the depletion of the coffers of the fiscus. It has become a tributary money-spinning atrocity that must be stopped.

[16] Organs of state are not free to litigate as they please. The Constitution has subordinated them to what Cameron J, in *Van Niekerk v Pretoria City Council*, called ‘a new regimen of openness and fair dealing with the public’. The very purpose of their existence is to further the public interest and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust.

[17] It is expected of organs of state that they behave honourably – that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind is able to. That places the defendant in a position of great responsibility: its control of the purse-strings

⁸ Synonyms for counsel: advocate, attorney, attorney-at-law, counselor (or counsellor), counselor-at-law, lawyer, legal eagle at <https://www.merriam-webster.com/thesaurus/counsel> on 23 September 2022.

places it in a position of immense power in relation to the victims of road accidents, many of whom, it is well-known, are poor and 'lacking in protective and assertive armour'.⁹

[26] ORDER

In light of the above the following order is made:

1. The defendant shall pay the plaintiff the sum of R7 241 045.00 (Seven two four one zero four five million rand) for his total past and future loss of earnings.
2. The payment shall be dealt with *mutatis mutandis* by the plaintiff's attorneys as was ordered in the order by this Court dated 25 February 2022; to be protected and administered in a Trust for the benefit of the plaintiff.
3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on High Court scale, inclusive of the cost reserved on 10 May 2022 and for the hearing on 2 August 2022 until date of this order; including but not limited to the costs set out hereunder:

3.1 The reasonable attendance, preparation/qualifying and reservation fees and expenses of the following experts, if any:

3.1.1 Dr L van der Merwe (Ophthalmologist);

3.1.2 Dr DK Mutyaba (Neurosurgeon);

3.1.3 L Grootboom (Clinical Psychologist);

3.1.4 Ms L van Zyl (Occupational Therapists);

3.1.5 Mr Ben Moodie (Industrial Psychologist); and

⁹ *Mlatsheni v Road Accident Fund* (418/2005) [2007] ZAECHC 108; 2009 (2) SA 401 (E) (6 December 2007).

3.1.6 Mr J Sauer (Actuary).

4. Payment of the capital amounts shall be made directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

ACCOUNT HOLDER: VZLR INC.
BRANCH: ABSA BUSINESS BANK HILLCREST
BRANCH CODE: 632005
TYPE OF ACCOUNT: TRUST ACCOUNT
ACCOUNT NUMBER: [...]
Ref: MAT 118200

5. Interest shall accrue at the prevailing statutory rate per annum, on date of this order, compounded in respect of:

5.1 The capital of the claim, calculated at 90 (ninety) days from date of this order;

5.2 the taxed or agreed costs, calculated at 90 (ninety) days from date of taxation, alternatively date of settlement of such costs.

M. OPPERMAN, J

Appearances

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MAT118200/V596

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