

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

Case no: 128/2018

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

WP M

Plaintiff/Applicant

and

THE ROAD ACCIDENT FUND

Defendant/Respondent

(CLAIM NO: 560/12522085/1075/0 & LINK NO: 4127045)

CORAM: OPPERMAN, J

HEARD ON: 21 October 2022

DELIVERED ON: 7 November 2022. The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 7 November 2022. The date and time for hand-down is deemed to be 7 November 2022 at 15h00

JUDGMENT BY: OPPERMAN, J

SUMMARY: Leave to Appeal - failure of the Plaintiff to prove *nexus* between the *quantum* claimed and the injury for a claim of past and future loss of income

JUDGMENT

[1] There is not a Court that will grant a man the amount R4 621 300.00 for a loss of income that he caused by resigning carelessly to start a business with his son. The business failed and he now wants for the Road Accident Fund to foot the bill.

[2] The assessment of an application for leave to appeal lies in the words of the Supreme Court of Appeal that was spoken recently in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021 at paragraph [10]:

If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a Court of appeal could reasonably arrive at a conclusion different to that of the trial Court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist. (Accentuation added)

[3] The atmosphere of this case reminded of the words of the Constitutional Court in *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar)*

intervening as Amicus Curiae); *S v O'Connell and others* 2007 (2) SACR 28 (CC) that defined the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal. Although having heard the evidence and having made a ruling; the judge is called upon to consider whether another Court may reach a different conclusion. This requires a careful analysis of both the facts and the law that have supported the judgement *a quo* and a consideration of the possibility that another Court may differ either in relation to the facts or the law or both. This is a task that has been carried out by High Court Judges for many years and it is a judicial task of some delicacy and expertise. It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court. (Accentuation added)

[4] The peculiarity of this case is that the Plaintiff caused his own loss of income by resigning from his job. There is a lack of evidence on the causal link between the injuries and the loss; the resignation caused the loss not the injuries. There must be a nexus between the injury and the loss and the *quantum* of the loss.

[5] Contingencies shall only be applied and considered if the causal link between the injuries and the loss was proved; when the incident and loss was proven to be causally connected. The injuries were not the cause of the alleged effect of R4 621 300.00. Contingencies shall not be used to fix a broken case.

[6] Crucial is what the primary issue in this case is not about. It is not about the Plaintiff's duty, or not, to mitigate his losses. That said; claimants may not be reckless with their fate and circumstances and expect that the Road Accident Fund must remedy the situation.

[7] Courts must apply the same diligence when adjudicating matters wherein the Road Accident Fund is a party as in other cases; the fact that the coffers may be deep does not permit that sympathy for the Plaintiff must cause warped law and dubious

justice. The parties, the expert witnesses and all involved must show due honour and integrity to the administration of justice when they prepare and present their case.

[8] At the time of the accident and for two years afterwards, the Plaintiff was gainfully employed by the Department of Public Works as a Construction Project Manager. He was on middle management level (MMS).

[9] The Plaintiff, on his admission during *viva voce* evidence, resigned thoughtlessly and impulsively in 2017, two years after the incident; after 30 years of service. He realised his mistake and endeavoured to retrack the resignation but could not. He could not supply a reason to the Court as to why he was not allowed to retract his resignation.

[10] His income, hereafter, dropped significantly from R586 392.00 per year in December 2015 and an estimated R687 171.00 per year in April 2017 to about R3000.00 to R4000.00 per month in 2017 and he ended up unemployed in 2019 and until the time of the trial in 2022.

[11] The Industrial Psychologist conceded, also during *viva voce* evidence, that the Plaintiff should have considered negotiations with his employer for sedentary sympathetic duties or ill-health retirement and should not have resigned as he had given his circumstances.

[12] There is not any evidence on record that the Plaintiff was forced to resign due to his injuries.

[13] On top of all else is the fact that the Orthopaedic Surgeon indicated the Plaintiff had pre-existing spondylosis of his **cervical spine and only 50% of his symptoms can be attributed to the accident**. He had an unspecified lumbar spine injury prior to the accident, **he has a history of backpain, spondylosis and underwent a previous L4 – S1 fusion**. Conservative treatment was prescribed for this injury. Treatment for the shoulder injury should focus on long-term rehabilitation to regain as much function as

possible. From the x-rays, it is apparent that the Plaintiff also had Osteoarthritis of his right knee which was not injured in the accident, he already had degeneration in his left knee prior to the accident and therefore **50% of his symptoms relating to his knee is apportioned to the accident.** This was not included in the calculations of the actuaries. The Industrial Psychologist or legal representatives did not give them any instructions on this vital aspect.

[14] The statement by Counsel for the Plaintiff in their Heads of Argument on the merits that the plaintiff was pain-free before the incident is not correct.¹ It did apparently increase but not to the extent that he could not do sedentary work.

[15] The restoration of what is just must be ordered; nothing more and nothing less should be ordered by a Court for effective justice to prevail. Parties must come to Court on trial with the best evidence. This is the constitutional decree to serve the administration of justice and give credence to the Rule of Law.

[16] I regress to allude to the curious fact that Counsel for the Road Accident Fund, after a vehement opposition of the case for the Plaintiff during the trial, was now instructed to abide to the ruling of the Court on the application for leave to appeal. A Notice to Abide was filed on 18 October 2022.

[17] It was concluded *a quo* that:

CONCLUSION

[84] The Plaintiff in this case did not prove the facts on which he wants for the mathematics to be done. The case may therefore be concluded with a dismissal of the claim.

[85] The second option is to order absolution from the instance with costs and with leave to the Plaintiff to proceed afresh on his claim on the same papers duly amplified.

¹ Paragraphs 6.2 and 6.3 of the Heads of Argument.

[86] The other option is a recalculation of the loss by the actuaries. The problem is that there are many unproven scenarios that might be speculated on. The outcome may still be in dispute between the parties afterwards. It is not known if the Plaintiff would have been placed on sedentary and more sympathetic duties or ill-health pension and what the effect on the Plaintiff's salary would have been. Only the employer can attest to that.

[87] The reason for resignation by the Plaintiff is also still speculation. Evidence as to his mental and emotional condition might alleviate the elusiveness, vagueness and ambiguity surrounding the issue.

[88] The aspect of the fact that only 50% of the *sequelae* of the injuries was due to the collision as indicated by the Orthopaedic Surgeon, also taints a just and effective finding by the Court.

[89] The Plaintiff will receive constant medical treatment on the account of the Road Accident Fund and his health will be contained if he co-operates. If he was able to run a business with his son for two years, he will be able to employ somebody to help him in accordance with his future plans expressed to the experts. This causes a third scenario to be regarded.

[90] I cannot comply with Draft Order B of the Plaintiff to: "Upon receipt of the actuarial calculation the parties are to approach Court to make the actuarial calculation of the Plaintiff's claim for past and future loss of earning capacity an order of Court." There might still exist a dispute on the *quantum* to be adjudicated due to the fact that the basis on which the calculation must be made is in shambles.

[91] The Plaintiff must adduce evidence that the injuries sustained during the collision caused him to resign and discontinue his business. The effect of his

pre-accident physical condition on the loss of past and future income must be specified and calculated.

[92] The parties will have to pay their own costs. The issues of the case have only been realised when this case started on trial and both parties could have contributed to a more effective trial.

[93] ORDER

1. Absolution from the instance is ordered.
2. Leave is granted for the Plaintiff to proceed on his claim on the same papers duly amplified should he be so inclined.
3. Each party to pay their own costs.
4. The Plaintiff's claim for past medical and hospital expenses is postponed to the pre-trial roll of 24 October 2022: 14h15.

[18] The issue of costs in the application for leave to appeal is also not straightforward. In order to assist the Applicant/Plaintiff to obtain a date for the hearing of the application for leave to appeal as expeditiously as possible, the Registrar, after receipt of the application on 3 October 2022, emailed all the parties with the suggested date. The most suitable date came to be the 14th of October 2022.

[19] The date was never confirmed because on 12 October 2022 all the parties were notified that Counsel for the Road Accident Fund had, up to that date, not received instructions on the application. In the meanwhile, the attorneys for the Applicant/Plaintiff went forth, without confirmation and instruction of the Registrar, to set the matter down for hearing on the 14th of October 2022 by way of a formal "Notice of Set Down: Plaintiff's Application for Leave to Appeal" on the 10th of October 2022. The matter was subsequently only confirmed by the Registrar and all the parties to be on the roll for 12h00 on 21 October 2022.

[20] Counsel for the Applicant/Plaintiff in argument during the hearing demanded the costs for the 14th of October 2022. Contrary to the conduct of his instructing attorneys; he explained to the Court that an application for leave to appeal is not enrolled by way of a formal Notice of Set Down. It is clear that he did not know of the erroneous Notice of Set Down and the correspondence between the attorneys and the Registrar. The demand for costs for the 14th of October 2022 will therefore not be entertained.

[21] To conclude; the Applicant in this matter did not convince on proper grounds that they have prospects of success on appeal.

[22] **ORDER**

The application for leave to appeal is dismissed with costs.

M OPPERMAN, J

APPEARANCES

On behalf of the Applicant/Plaintiff

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