



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

Case number: **26765/2016**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
..... SIGNATURE	2022-06-15 DATE

In the matter between:

PHILISA JACK

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

- [1] The Plaintiff, Mr Philisa Jack, an adult male born on 25th of June 1983 has instituted a claim against the Road Accident Fund, for damages suffered as a result of injuries sustained in a motor vehicle collision which occurred on 08th of August 2015. The matter is not defended as the defendant did not participate in the proceedings.

MERITS

- [2] Liability has been conceded 100% in his favour of the Plaintiff on the basis that the plaintiff was a passenger in a motor vehicle and therefore needed to prove only 1% negligence on the part of the insured driver.

GENERAL DAMAGES

- [4] The Plaintiff has not complied with section 17 read with **Regulation 3(3) (dA)** of the Road Accident Fund Act¹ which requires the Fund to accept or reject a serious injury Assessment report or direct the third party to submit to a further assessment, within 90 days from the date on which the report was declared to the Fund. The Court will therefore not deal with the aspect of General Damages.

PAST AND FUTURE LOSS OF EARNINGS

- [5] Dr LF Oelofse, the Orthopaedic Surgeon, diagnosed the Claimant (Plaintiff) with soft-tissue injury of the lower leg with residual pain and bruises on her left leg. The expert further reports that the injury had an impact on the plaintiff's amenities of life, productively and working ability, however, she will do better following successful treatment.
- [6] According to the Occupational Therapist, the plaintiff does not meet the requirements.
- [7] Ms Jack requested that she returned to her pre-accident work and stated that she now experience back and right leg pain and headaches as a result of the accident in question. She reported that her employer is aware of her condition and she is allowed to take breaks in between.
- [8] The Occupational Therapist concluded by reporting that Ms Jack is sympathetically employed and if it happens that she loses her current job she will struggle to secure another similar job.
- [9] Dr JLF Mureriwa, the Clinical Psychologist, opines that taking all the factors into account the plaintiff had a whole person impairment of 12%

¹ 56 of 1996

[10] The Industrial Psychologists, Mark Day and ben Modise, postulate the following post-morbid scenario:

[10] **POST-ACCIDENT INCOME POTENTIAL:**

- "3.1 The following post-accident occupational scenarios have been postulated based on the outcome of whether Ms Jack's complaints relating to her back are accident-related
- 3.2 Scenario 1: It is determined that her back complaint are accident-related:
- 3.3 In the event that it is determined that Ms Jack's reported complaints with regards to her back are accident-related when considering her reliance on work of a more manual/physical nature due to her findings of Ms Matsape regarding Ms Jack only now being suited to carrying out work of a sedentary to light duty nature, as well as her being disadvantage on the open labour market in terms of her competitiveness and that her occupational choices have been curtailed; it can be concluded that Ms Jack has been left severely occupationally impaired in comparison to that of her pre-accident self – especially when considering that Ms Matsape classified Ms Jack's pre-accident duties as being of a medium-duty nature.
- 3.4 Coupled with this , cognisance would also need to be taken of the combined impact that Ms Jack's psychologist difficulties would have on her drive and motivation to pursue employment. This becomes especially apparent when considering that individuals who struggle with pain and difficulties tend to not only be prone to developing depression – which is problematic when considering her current psychologist difficulties but also tend to be avoidant of posts or tasks in which they believe will result in them experiencing pain.
- 3.5 Therefore in light of the above, it can be concluded that through Ms Jack may have been able to obtain and sustain employment since the accident, it can be concluded that she has in all likelihood done so with pain and difficulty. This is further confirmed in the collateral information obtained from her immediate post-accident employer Ms Dlomo, who noted that after Ms Jack struggled with pain and difficulties while carrying out her duties. The writer further notes that the collateral information from Ms Jack's current supervisor Ms Thembeni regarding her behavioural pattern of being sensitive to minor things as well as being quiet and withdrawn can also be a behaviour indicator of her experience of chronic pain – especially when noting the regular pain and difficulties which she reportedly experiences while carrying out her current duties. What is important to bear in mind here is that individuals who struggle with chronic pain tend to either be easily frustrated and short-tempered or alternative display avoidant behavioural symptoms similar to that of Ms Jack. This reaction often develop as a result of their continued exposure to their chronic pain, and the adverse prolonged impact that this was worn down their resilience and coping mechanisms.

- 3.6 *What concerns the writer when noting the above, is that it would appear that Ms Jack's current experience of pain and difficulties are already of such a nature that she is struggling to carry out her duties even in an environment which is lighter than her pre-accident duties. The problem with this is that she will need to be very selective in terms of the nature of post which she would pursue, hence her choices of career have been curtailed – which gives credence to the findings of Ms Matsape. Furthermore, she will in all likelihood also find herself at a disadvantage against her more physically abled peer's when competing for posts. Therefore though Ms Jack has not been rendered totally unemployed as a result of the accident – as evidenced by her post-accident career history; her loss of working capacity as a result of the accident, and her subsequent inability to be able to access employment of a more physical/manual nature would have a devastating impact on her ability to progress occupationally, and thus earn on par with that of her pre-accident self. Furthermore, due to her decreased competitiveness curtailed occupational choices, it can be concluded that in the event that she was to find herself on the open labour market pursuing employment, regardless of the reason; she will in all likelihood find herself experiencing prolonged periods of unemployment between posts.*
- 3.7 *Therefore, in light of the above, taking cognisance of the available expert opinion regarding the various difficulties which Ms Jack has and will continue to struggle with even after successful treatment; the writer opines that though Ms Jack still retains a residual earning capacity post-accident, she has also suffered a loss of working capacity of between 60% to 70% in terms of her ability to earn on par with her pre-accident self. In order to quantify this loss of working capacity and the impact that this would now have on her future earning potential, the writer notes that 60% to 70% loss of working capacity should be directly converted into a percentage basis and be deducted from her pre-accident earnings potential – the final figure being her post-accident earning potential.*
- 3.8 *Based on the above, it can be concluded after comparing Ms Jack's pre- to that of her post-accident earning potential, that she will now sustain a loss of income as a result of the accident under review. She would therefore need to be compensated for this.*
- 3.9 **Scenario 2: it is determined that her back complaints are not accident related**
- 3.10 *In the event that it is determined that Ms Jack's reported back complaints are not as a result of the accident under review, then it can be concluded that she would have in all likelihood also struggles with this problem regardless of the fact that as per the collateral information from Ms Jack's pre-accident employer Ms Dlomo, indicated that prior to the accident Ms*

Jack was a diligent and hard-working employee, and did not mention her struggling with any difficulties, leads the writer to conclude that she did not struggle with back problems prior to the accident.

3.11 *Hence, though the writer is unable to connect on the nexus of Ms Jack's back problems, what is certain is that these developed post-accident, and if the opinion of Ms Jack is accepted, immediately after the accident. A further factor that also needs to be considered is that even in the event that it is at this injury in isolation and would need to take into account the adverse impact that her accident-related physical and psychological difficulties would have on maintaining as well as exacerbating her experience of pain – as discussed in Scenario 1 above. Therefore, even if Ms Jack's pain and difficulties would have on her overall experience of her pain as well as psychological difficulties.*

3.21 *As a result of the above, and noting the findings of Ms Matsape regarding the combined impact that Ms Jack's accident-related impairments combined with that of the pain and difficulties which she experience in her back would have on her occupational functioning; the writer opines that it is unlikely that she will progress onto earning on par with that of her pre-accident self. Due to being unable to objectively postulate to what degree the accident has compromised Ms Jack's ability to earn on par with that of her pre-accident self, the writer opines that the most appropriate way to compensate her for this loss would be by way of a higher post-accident contingency deduction.*

3.22 *In both scenarios, she would also need to be compensated for any loss of income which she incur as a result of needing to undergo the recommended treatment – deference is given to the relevant experts to comment in this aspect"*

EVALUATION

[11] In order for the plaintiff to succeed in her claim for loss of earnings or earning capacity the plaintiff must prove that she sustained injuries in a motor vehicle accident had that those injuries resulted in her suffering damages. The mere fact that the plaintiff sustained injuries, alone does not automatically qualify her to a compensation for loss of earnings or earnings capacity.

[12] In **Van Heerden v Road Accident Fund**² Strauss AJ said the following:

"In my opinion the learned Judge in the Court aquo has not misdirected himself in his undertaking of these allegation of authorities or in his application of the law to the facts. His judgment correctly emphasizes that where a person's earning

² [2014] ZAGPPHC 958

capacity has been compromised, "that in capacity contribute loss, if such loss diminishes the estate".

- [13] In **Deysel v Road Accident Fund**³ the following was said: "loss of income arise primarily from a loss of earning capacity. In other words, if the plaintiff loses a certain degree of earning capacity this will show in that they will lose actual income in future. This is also true in that when a person loses income due to a damage-causing event such loss is due to a lowered earning capacity arising from the same cause of action. However, the contentions issue in casu is whether one can determine in terms of which form of damages the compensation is being claimed. I do not believe that a person can claim patrimonial damage for loss of earning capacity without proving, through use of the same formula, that this loss of earning capacity would also lead to an actual loss of income."
- [14] In casu the plaintiff proved that she sustained injuries in a motor vehicle accident. Before the accident the plaintiff was employed as a live-in domestic worker for a Ms Dlomo. According to the family she was booked of for a period of one month to recuperate but she was not remunerated for the time she was absent from work. Thereafter she returned to her pre-accident job. She continued to work for her pre-accident employers until December 2019, when she resigned after finding a better paying post at Seven Fast Food. The plaintiff was earning R1 700.00 per month and she was given three meals per day when she resigned. In January 2020 she started working for Seven Fast Food and she earned R1 600.00 per fortnight which equals to R3 200.00 per month.
- [15] According to the plaintiff's current supervisor she did not notice the plaintiff struggling with any physical ailments.

CONCLUSION

- [16] From the reports presented by the Plaintiff, in my view, it is clear that the plaintiff suffered no loss of earning capacity.
- [17] The facts that the plaintiff was not paid a salary when she was absent from work for a month whilst recuperating was neither confirmed nor denied by the plaintiff's previous employer. The probabilities therefore favour the plaintiff in this regard.
- [18] On the future loss of earnings it is clear that the plaintiff's estate was never negatively affected by the accident, nor had the estate of the plaintiff diminished. In fact the plaintiff was able to secure a better paying job after the accident. Given the experts opinion that with treatment the plaintiff should be able to realise her pre-accident potential I am of the view that the plaintiff has not succeeded in proving that as a result of the accident she suffered future loss of earning capacity.

³ (2483) [2011] ZAGPJHC 242(24 June 211) paragraph 15

[19] I therefore agree with the calculation by the Munro Actuaries on the second scenario in respect of the past loss of income.⁴ The plaintiff's claim for future loss of earning capacity should therefore fail.

ORDER

[20] In the result I make the following order:

- (a) The defendant is liable for 100% of the plaintiff's proven damages.
- (b) The defendant shall pay the plaintiff R2 500.00 as compensation for the plaintiff's claim for past loss of earnings.
- (c) The plaintiff's claim for future loss of earnings and earning capacity is dismissed.
- (d) Costs of suit.



KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE
HIGH COURT

Delivered: this judgment was 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 his matter on Caselines. The date for handing down is deemed to be 15 June 2022.

JUDGMENT RESERVED ON : 23 February 2022

FOR THE PLAINTIFF : Advocate Ndamase

⁴ CASELINES Page 033-447 paragraph 5.5 of the report

INSTRUCTED BY : Godi Attorneys
FOR THE DEFENDANT : NO APPEARANCE
DATE OF JUDGMENT : 15 June 2022