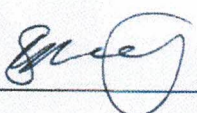


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 42022/2017

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	YES / NO.
(2) OF INTEREST TO OTHER JUDGES:	YES / NO.
(3) REVISED.	
DATE	
SIGNATURE	

TEBOGO PRECIOUS TSHOANE

APPLICANT / PLAINTIFF

and

THE ROAD ACCIDENT FUND

RESPONDENT / DEFENDANT

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

1.

- 1.1 The plaintiff, a 34 (thirty-four) year old woman, instituted against the defendant for damages arising from a motor vehicle accident that occurred on 25 December 2015.
- 1.2 Judgment was handed down on the 21st of January 2021 against the defendant for an amount of R1,198,650.00 (one million one hundred and ninety-eight thousand six hundred and fifty rand only) in respect of the plaintiff's claim in respect of loss of earnings.

- 1.3 On the 18th of February 2021, the plaintiff filed an application for leave to appeal.
- 1.4 The application has not been launched within 15 (fifteen) days from the date of judgment and there is no application for condonation by the Plaintiff.
- 1.5 I requested the Plaintiff's counsel to indicate why there was no condonation application and the response from the bar was that the plaintiff struggled to obtain a copy of the transcript of the proceedings.
- 1.6 The failure on the part of the plaintiff to apply for condonation is fatal to the plaintiff's application for leave to appeal.
- 1.7 I shall nevertheless proceed to deal with the merits of the matter.

TEST TO BE APPLIED IN DECIDING AN APPLICATION FOR LEAVE TO APPEAL:

2.

- 2.1 In terms of section 17 of the Superior Courts Act 10 of 2013:

"17. Leave to appeal

- (1) *Leave to appeal may only be given where the judge or judges concerned are of the opinion that —*

(a)(i) the appeal would have a reasonable prospect of success."

- 2.2 This criterion, which over many years had been adopted in regard to the question of leave to appeal, has now obtained statutory force.

- 2.3 To this must be added the consideration that in this subsection the word 'would' is used in determining the conclusion to which the judge or judges must come before leave to appeal can be granted.
- 2.4 In *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen*¹ the Land Claims Court held (in an *obiter dictum* ²) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.
- 2.5 In *Notshokovu v S* ³ it was held ⁴ that an appellant faces a higher and stringent threshold, in terms of the Act (i.e. this subsection), compared to the provisions of the repealed Supreme Court Act 59 of 1959.
- 2.6 The defendant's sole basis for the application for leave to appeal is that the appeal would have a reasonable prospect of success.

THE PLAINTIFF'S PLEADED CASE:

3.

- 3.1 In terms of the plaintiff's particulars of claim the plaintiff sought judgment against the defendant in the amount of R2,000,000.00 (two million rand) which amount is made up as follows:

3.1.1	Past hospital expenses (estimate)	R 50,000.00
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¹ Unreported, LCC case no LCC14R/2014 dated 3 November 2014, cited with approval by the full court in *The Acting National Director of Public Prosecution v Democratic Alliance* (unreported, GP case no 19577/09 dated 24 June 2016) at para 25 and also cited with approval in *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* (unreported, GP case no 3234/15 dated 28 March 2017) at para [5].

² On the distinction between *ratio decidendi* and *obiter dicta*, see *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 316–17; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) at 871H–872B; *True Motives 84 (Pty) Ltd v Mahdi* 2009 (4) SA 153 (SCA) at 168A–F and 186C–188D; *Hardenberg v Nedbank Ltd* 2015 (3) SA 470 (WCC) at 477A–I; *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA) at 97B–98B.

³ Unreported, SCA case no 157/15 dated 7 September 2016.

⁴ At para 2.

3.1.2	Future medical expenses	Undertaking
3.1.3	Future loss of income and earnings	R1,250,000.00
3.1.4	General damages, pain and suffering	R 700,000.00
	Total:	R2,000,000.00

- 3.2 The plaintiff did not claim any amount from the Road Accident Fund in respect of past loss of earnings.
- 3.3 Shortly before the trial date and more specifically on Friday, 26 June 2020, the plaintiff gave notice of her intention to amend her particulars of claim. In terms of the notice of intention to amend, the defendant was given until 13h00 on Monday, 29 June 2020 (less than 1 (one) business day later) to object to the proposed amendment failing which the plaintiff's amendment would be effected.
- 3.4 No indication is given that this notice was in fact served on the defendant at all. This purported notice of intention to amend was further defective in that it failed to comply with the Uniform Rules of court.
- 3.5 If the plaintiff could not give the requisite 10 (ten) days' notice of her intention to amend her particulars of claim, due to the fact that there was not sufficient time prior to the actual trial date, then it was incumbent on the plaintiff to provide a notice of the plaintiff's intention to amend her particulars of claim on the day of trial and to move the amendment before me. Not only did the plaintiff deliver a defective notice of intention to amend, the plaintiff failed to

move the amendment before me and also failed to deliver the amended pages.

- 3.6 It is trite law that the actual amendment of the pleading takes place only when the amendment is effected within the stipulated time in accordance with Rule Sub-Rule (7).⁵
- 3.7 Given the fact that the judgment awarded in this matter was just shy of the loss of earnings claimed in the amount of R1,250,000.00 (one million two hundred and fifty thousand rand), it is difficult to see how another court would come to a different conclusion. The amount argued on behalf of the plaintiff in respect of loss of earnings was in excess of R3,000,000.00 (three million rand). This was simply not in accordance with the pleaded case of the plaintiff and simply not the case that the Defendant had to meet (even though there was no appearance for the Defendant on the day of trial).
- 3.8 The failure on the part of the plaintiff's legal representatives to ensure that the award that the plaintiff sought was in line with the pleaded case is similarly fatal to the plaintiff's application for leave to appeal.

LOSS OF EARNINGS CLAIM ADVANCED BY THE PLAINTIFF:

4.

- 4.1 The plaintiff's claim for past and future loss of earnings has been fully set out in the report of the plaintiff's Industrial Psychologist namely, Ben Moodie.

⁵ Van Heerden v Van Heerden 1977 (3) SA 455 (W) at 457 G – 458 A; Fiat SA (Pty) Ltd v Bill Troskie Motors 1985 (1) SA 355 (O) at 358 C.

- 4.2 According to this report, the plaintiff started a catering business called Previc Trading and Projects CC in 2014. The plaintiff supplied food at the local taxi rank in Pankop and prepared food for the taxi association meetings. The plaintiff set up a stand at the taxi rank and made use of portable gas stoves to prepare meals. The plaintiff also applied for tenders at the local municipality.
- 4.3 The plaintiff worked at the taxi rank from Monday to Friday. All the information contained in the report of Mr Moodie regarding the plaintiff's earnings, what her expenses are, what the gross profit was were all based on what the plaintiff verbally conveyed to Mr Moodie.
- 4.4 According to the report of Mr Moodie (based on information conveyed to him by the plaintiff):
- 4.4.1 The plaintiff earned a gross profit of R32,597.00 per month.
- 4.4.2 When a tender was awarded, she would earn approximately a gross profit of R8,000.00 per tender.
- 4.4.3 The plaintiff's monthly expenses were R21,830.00 per month.
- 4.4.4 The plaintiff earned a gross income per annum of R529,570.00 and after deductions she made an average profit of R17,300.00 per month (R207,610.00 per annum).
- 4.5 According to Mr Moodie, her business could have grown by at least 20% per annum over a period of 5 years. This would have resulted in doubling her personal income (i.e. R415,220.00 per annum / R34,601.66 per month) by December 2020.

- 4.6 Post-morbidly the plaintiff struggled with her business.
- 4.7 According to Mr Moodie following her treatment and the appointment of an assistant, the plaintiff could earn the same earnings as postulated pre-morbidly.
- 4.8 An actuarial calculation was obtained based on the postulations of Mr Moodie. In accordance with the actuarial calculation, the plaintiff's uninjured earnings (had the accident not occurred) as at 2016, before tax, was an amount of R207,610.00 per year and this amount was allowed to increase to an amount of R415,220.00 per year in December 2020.

Post-Morbidly:

- 4.9 The only earnings that were taken into account post-morbidly are the earnings that appear in the limited bank statements that were provided to the Plaintiff's experts. These bank statements relate to Previc Trading and are not the Plaintiff's own personal bank statements. The actuary in his calculation assumed that the income reflected in the bank statements of Previc Trading was also the income of the Plaintiff personally. The actuary further assumed that this was the only income that the Plaintiff had earned post-morbidly.
- 4.10 The post-morbid income of Previc Trading (according to the limited bank statements provided) that was used for purposes of calculating the Plaintiff's loss of income is set out below:
- 4.10.1 March 2017 – R30,900.00 per year;
- 4.10.2 March 2018 – profit of R32,321.00 per year;

- 4.10.3 March 2019 – average profit of R35.00 per month (R315.00 in total);
- 4.10.4 Date of calculation (25 June 2020) – no earnings;
- 4.11 The future post-morbid earnings postulated in the actuarial report are set out below:
- 4.11.1 Mid-September 2020 – R3,000.00 to R4,000.00 per month;
- 4.11.2 September 2021 – profit of R207,610.00 per year (2016 terms) less the cost of an assistant at R78,000.00 per year, straight line; to
- 4.11.3 September 2026 – profit of R415,220.00 per year (2016 terms) less the cost of an assistant at R99,832.00 per year.
- 4.12 Provision was made for retirement at 65 (sixty-five) years of age.
- 4.13 The following contingencies have been applied in the aforesaid actuarial calculation:
- | | | |
|--------|-------------------------|-----|
| 4.13.1 | Past loss (uninjured) | 5% |
| 4.13.2 | Past loss (injured) | 0% |
| 4.13.3 | Future loss (uninjured) | 15% |
| 4.13.4 | Future loss (injured) | 25% |
- 4.14 After the application of the aforementioned contingencies, the following loss was calculated (after the application of the CAP):
- | | | |
|--------|------------------------|---------------|
| 4.14.1 | Past loss of earnings: | R1,039,200.00 |
|--------|------------------------|---------------|

4.14.2 Future loss of earnings: R2,387,100.00

Total loss of earnings: R3,426,300.00

4.15 The aforementioned calculation is premised on the following assumptions:

- 4.15.1 That the plaintiff earned the amounts as claimed in the report of Mr Moodie (as verbally conveyed to Mr Moodie by the plaintiff);
- 4.15.2 That the business had the expenses as set out in the report of Mr Moodie (as verbally conveyed to Mr Moodie by the plaintiff);
- 4.15.3 That the business had the gross profit as set out in the report of Mr Moodie (as verbally conveyed to Mr Moodie by the plaintiff);
- 4.15.4 That the plaintiff's gross profit of the business namely Previc Trading and Projects (Pty) Ltd could be regarded as the plaintiff's own personal income;
- 4.15.5 That the business which primarily involved selling food at a local taxi rank would have increased by 20% per year;
- 4.15.6 That post-morbidly the Plaintiff was off work for at least a year;
- 4.15.7 That post-morbidly the plaintiff was unable to earn anything until March 2017;
- 4.15.8 That post-morbidly the Plaintiff only earned the limited income as set out in the bank statements of Previc Trading.
- 4.15.9 That even with the help of the assistant the plaintiff could only earn negligible earnings for a period of 5 (five) years post-accident;

- 4.15.10 That the plaintiff would have reached exactly the same earnings as pre-morbidly (albeit with a delay) with the use of an assistant.
- 4.16 None of the aforementioned assumptions were in fact borne out by the evidence at all.
- 4.17 According to the report of Mr Moodie *"there is no proof regarding Mrs Tshoane's earnings pre-accident"* (paragraph 6.2 of Mr Moodie's report).
- 4.18 According to Mr Zeeman:
- "In order to calculate a loss of income claim, it has to be determined what can reasonably be expected the likely income of the plaintiff would have been but for the accident, and what it has been and will likely be having regard to the accident.*
- The absence of independently verifiable information regarding the plaintiff's past and future loss of earnings, make the attainment of the above stated objectives impossible."* (at paragraph 5.1 of Mr Zeeman's report).
- 4.19 Mr Moodie premised the elaborate breakdown of the business's monthly income, expenses and gross profit entirely on the say-so of the plaintiff. The main issue was accordingly whether the say-so of the plaintiff was reliable.
- 4.20 When the plaintiff was asked about the business's monthly income, monthly expenses and monthly gross profit, her answers in each respect differed from that contained in the report of Mr Moodie.
- 4.21 When the plaintiff was asked by me what her monthly gross profit was, she indicated that she was not sure and that she does not know.

- 4.22 Because the plaintiff's answers pertaining to the income, expenses and gross profit differed significantly from the information contained in the report of Mr Moodie (and the ultimate actuarial calculation) this seriously affected the reliability of the actuarial calculation as it was not supported by the oral evidence of the plaintiff.
- 4.23 Because of the differences aforesaid and the ultimate lack of reliable proof of earnings, I enquired whether a generic postulation ought to be advanced in terms of which the income of other traders in a similar field could be considered. This suggestion did not find favour with Mr Moodie.
- 4.24 To compound the difficulty for the plaintiff, she failed to discover or present any evidence with regard to the business's (or her own) bank statements prior to the accident nor did she provide the financial statements of the business that would have been able to demonstrate the income of the business prior to the accident. It stands to reason that if she made as much money as was suggested in the report of Mr Moodie, that this money would have been banked.
- 4.25 In the result, I was left with only the say-so of the plaintiff whose version during her evidence was different from the figures mentioned in the report of Mr Moodie.
- 4.26 Moreover, the bold postulation by Mr Moodie that the business would have grown by 20% per year, lacked any factual or evidentiary basis. There was simply no evidence that the plaintiff's business grew at all.

- 4.27 According to most of the medico-legal reports the plaintiff only returned to work, more than a year later. This was also at variance with her evidence. She testified that she returned to work several months after the accident. Significantly for purposes of quantifying the plaintiff's post-morbid earnings only amounts that appeared in the limited bank statements of Previc Trading were taken into account.
- 4.28 Accordingly, I could not and did not rely on the actuarial calculation that I was presented with as there were no reliable evidence to underpin it. As set out in the judgment, I adopted to quantify the plaintiff's past loss of earnings by adopting a robust approach and awarding a lump sum amount in the amount of R200,000.00.
- 4.29 As there was no factual evidence that the plaintiff's business had grown pre-morbidly at all, I could not and did not rely on the bold conclusion by Mr Moodie that the plaintiff's business would have grown by 20% per year. In the result the only future loss of earnings component that remained was the costs of an assistant.
- 4.30 Insofar as the application for leave to appeal relates to my failure to accept the actuarial calculation I am of the view that there are no reasonable prospects that another court would come to a different conclusion as the evidence was at variance with the assumptions made in the actuarial calculation in every material respect.
- 4.31 In the matter of Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 89 (A) it was emphasised that a mathematical calculation depends on the soundness of the assumptions made therein and this in turn rests on the

evidence. The court further emphasised that a court is entitled, should it consider such a course appropriate, to award a globular amount in respect of loss of earning capacity.

4.32 The plaintiff further alleges that I erred by descending into the arena. I can only assume that this refers to the clarification that I sought at the conclusion of the plaintiff's evidence. At the conclusion of the plaintiff's evidence, the plaintiff had failed to present any evidence as to who the members where of Previc Trading. It was incumbent on the plaintiff to demonstrate through her evidence that she suffered a personal loss of income as a result of the accident and its *sequelae*. My questions in clarification actually assisted the plaintiff, as the plaintiff failed to present this evidence during her examination in chief. Accordingly this ground is completely without merit.

4.33 With regard to the costs of an assistant, counsel for the plaintiff during the hearing of the application for leave to appeal argued that I erred by applying a 50% contingency deduction. He further argued that there should have been no contingency deduction, in fact according to him, a positive contingency had to be added to the quantified claim of an assistant in the amount of R1,997,300.00. No authority has been quoted by counsel for the plaintiff for this proposition. Moreover, the approach suggested by counsel for the plaintiff is at variance with the evidence:

4.33.1 The evidence of the plaintiff was that she needed an assistant pre-accident. This assistant helped her with the carrying of heavy pots and cleaning etc. According to the available medico-legal reports,

the plaintiff was still symptomatic from another accident and the current accident exacerbated her previous symptoms;

- 4.33.2 The plaintiff employed an assistant on a fulltime basis to assist her at the taxi rank. She paid this assistant an amount of R1,000.00 per month;
- 4.33.3 The fact that the plaintiff already had an assistant pre-accident was not taken into account by Mr Moodie at all;
- 4.33.4 The costs of an assistant that was actuarially calculated commenced with a monthly earning of R2,500.00 which amount was allowed to grow with inflation;
- 4.33.5 The purpose of the assistant recommended by Mr Moodie was not to completely replace the plaintiff. The plaintiff would get the benefit of an assistant who would help her with the heavier tasks but the plaintiff would still be present and would still be able to perform sedentary or lighter duties;
- 4.33.6 The assistant recommended by Mr Moodie, who would be paid a fulltime salary, could be used not only for the heavy carrying of pots, cleaning, etc. but as well as other lighter duty tasks that the plaintiff could do herself;
- 4.33.7 It stands to reason that the plaintiff will receive an additional benefit from having a fulltime assistant and as such and given the fact that the plaintiff already needed an assistant pre-accident, a higher contingency deduction was justified.

4.34 In the premises I am of the view that there are no reasonable prospects that another court would come to a different conclusion.

4.35 In the premises the application for leave to appeal is dismissed.

SIGNED AT PRETORIA ON THIS 6th DAY OF APRIL 2021.

MARITZ AJ

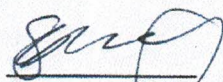
Counsel for Plaintiff: Adv. Phathutshedzo Tshavhungwe

On behalf of the Defendant: Unrepresented

4.34 In the premises I am of the view that there are no reasonable prospects that another court would come to a different conclusion.

4.35 In the premises the application for leave to appeal is dismissed.

SIGNED AT PRETORIA ON THIS 6th DAY OF APRIL 2021.

A handwritten signature in black ink, appearing to be 'Maritz', written over a horizontal line.

MARITZ AJ

Counsel for Plaintiff: Adv. Phathutshedzo Tshavhungwe

On behalf of the Defendant: Unrepresented