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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 49899/17

REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED.
21/1/2020

In the matter between:

R S

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

POTTERILL J

[1] The plaintiff, R S ("S"), is claiming from the defendant, the Road Accident Fund ("RAF") for loss suffered as a result of injuries arising out of or caused by the negligent driving of the insured driver.

[2] RAF accepted 100 % liability for the loss suffered, but the quantum pertaining to loss of income and general damages is in dispute.

Loss of income

[3] S testified that he started his employment with the National Department of Rural Development as Director in May 2008 and did so until 20 10. He was then promoted to Chief Director in 2011 which position he held when the accident occurred on the 18th of May 2016.

[4] S's undisputed evidence was that he had a BSc in Land Surveying as well as an Honours and Masters' Degree in Land Surveying. He was a Board member of the South African Geomatics Council and represented South Africa at the African Union Conference in 2015. He lectured at the University of Natal and still often gave guest lectures at University. He personally wrote the Geomatics Profession Act, Act 19 of 2013 ("the Act") and advised the state law advisor pertaining to this Act. S' s training, expertise, scarce skills and attributes for this high profile job was thus undisputed.

[5] It was also common cause that S enjoyed his job immensely, so much so that he used much of his leisure time to work on job files. Annual leave was a foreign concept to him; in 10 years he had not taken any. leave. The once or twice he indicated he would take leave the Chief Surveyor-General asked him to defer the leave because there were matters that only Mr. S could attend to. It is thus factually unchallenged that he was passionate, as he testified "*religious*" about his job, was driven and had the right attributes for the job.

[6] Before the accident S did not ever smoke or take a drop of liquor. He went to the gym and jogged and partook in volleyball, cricket and was a sprinter. He also assisted in coaching, especially in sprinting.

[7] He had a partner since 20 0 5. A short period after the accident the relationship ended. After the accident he was very easily irritable and often lost his temper. It was difficult for his partner to handle.

[8] He returned to work on the 9th of June 2017 and found an immense amount of work that nobody had attended to and was uncompleted on his desk. Before the accident he was at ease to cope with the amount of work and work related data would come to him naturally. But after the accident he now had to look up the data, his memory failed him and he found the whole situation very distressing. He also for the first time struggled to cope with the amount of work. He worked until retirement and then he received a further contract. This contract was however only for six months and not the normal two years. He suspected that the six months contract was with the purpose for him to finish the work and although the Chief Surveyor-General, who was on suspension at that period, gave him no reasons why the contract was not for the full two years he suspected that it was due to his personality change that rendered him to lose his temper, be argumentative with the personnel and his struggle to cope with the work.

[9] Before the accident he would have secured a two year contract because of the high profile of the job, the scarce skill he possessed and the knowledge, expertise and commitment he had. From 6 7, because of his vast experience in international boundaries, cadastral conveyancing, etc. he would have secured a further three years contract. There was a need for his expertise, for example, the Department of Human Settlements offered him to do surveying on an urgent basis for RDP housing. Surveying needed to be done for title deeds to be handed over to the owners of the property. In the Justice Department there was a dire need for the jurisdiction of the sheriffs to be mapped out which would require intense mapping and consultations. Both these departments contacted him, he went to meetings to secure a contract, but is puzzled as to why he was not contracted. He suspected it was due to the fact that the accident had affected him and it had become known.

[10] He did not engage with his old Department, Human Settlements or the Department of Justice as he did not want to debate the appointment on contract with them as he hoped he might still secure work from them. He admitted that he would have to compete for these contracts, but could submit that he was definitely the most knowledgeable, trained and seen as an expert in this field, rendering him a step above other competitors.

[11] S called Ms. Rossouw, the industrial psychologist, to testify. Her expertise and training was not in dispute.

[12] She testified that at the time of the accident S's duties included administrating and managing the South African international boundaries, the setting and moderating of sectional title practitioners examinations, and administering and managing state land surveys as well as land reforms and redistribution projects. S furthermore managed land advisory and research for various state and private clients as well as managing the surveying of legislative review, including writing the Act. He was a nominated member of the South African Development Tribunal and participated as a nominated member of the South African Geomatics Council.

[13] She could not obtain collateral information from S's direct supervisor at the time of the accident due to that supervisor being on disciplinary suspension. She contacted Mr. Clarke, the Acting Chief Surveyor-General at the National Department of Rural Development and Land Reform, who is seated in the Eastern Cape and in fact is a typographical surveyor and according to him there was no complaints about S's work. It is however common cause that they were not in the same field, not in the same province and Mr. Clarke was not S's direct supervisor.

[14] In the joint minute of her and Ms. Rossouw, the RAF's industrial psychologist, it was in fact agreed, in paragraph 1.4 as follows:

"Had the accident not occurred Mr. S reported that he would have continued working for the National Department of Rural Development and land Reform until the age 65, when he would have been placed on mandatory retirement, after which time he would have received an additional contract, similar to what he received post accident."

"We note as per Chapter V (Termination of Service) , Public Services Act 1994./ 16, Section (7) If it is in the public interest to retain an officer, other than a member of the services or an educator or a member of the Agency or the Service, in his or her post beyond the age at which he or she is required to be retired in terms of subsection (1), he or she may, with his or her consent and with the approval of the relevant executing authority, be so retained from time to time for further periods which shall not, except with the approval of

*Parliament granted by resolution, exceed in the aggregate two years. **We therefore agree** following his mandatory retirement, working on a contract basis for a period of time but not exceeding the two years as stipulated in the aforementioned (until age 67) for the National Department of Rural Development and Land Reform within the same position and same earning level, but with annual increases that would have been applicable. **We note** that post-accident, following his retirement, Mr S worked on a contract in his same position and same earning level for a period of 6 months."*¹

[15] This witness was in cross-examination adamant that Selig would have received a further two year contract from his old department because the Act allowed for this, his expertise and scarce skill would render it highly probable, but in any event RAF's own industrial psychologist also agreed on this scenario.

[16] In cross-examination she did not deviate from her view that S would have after the two year period with his old employer, on the open market have obtained contract work for the next three years till age 70. She said that it was probable because there was work out there; the Departments of Justice's and Human Settlements' approach to S factually supported this submission. S was the expert on land surveying and international borders, he was well-known and although he may compete with other applicants, he had above average skills and S himself would have taught most competitors. S was driven, hardworking, passionate and had the cognitive skills pre-accident to handle the high profile post with ease. The industrial psychologist of RAF did not pertinently agree with this, but did not expressly disagree and gave no reasons why she could disagree.

[16] Both S and Rossouw made a good impression on the court.

[17] RAF called their industrial psychologist, Dr. W.J. Coetzer, whose expertise and training was not in dispute. She agreed with the two year contract post-retirement scenario and I need not further address this. In oral evidence she however disagreed about the three year contract period until S reached the age of

¹ Paragraph 1.5 of joint minute

70, because he would be competing against other competitors to obtain such contract. She did take note of the fact that Ors Burkowitz and Hoffman agreed that S had been left with extensive, serious, permanent disfigurements as a result of this accident. She also took note of the joint minute of the occupational therapists that the accident injury had impacted on all spheres of S's life. She agreed that the employment of Chief Director in this post required constant (a 67 to 100 % of time) applying persuasion, negotiation, monitoring, social perceptiveness, speaking, critical thinking, complex problem solving as well as judgment and decision-making. The writers of this joint report agreed that S retains capacity to cope with tasks and expectations, but it seems that the deficits identified on a cognitive level resulted in slow application of skills and abilities thus resulting in lower than expected efficacy. In the joint minute of the clinical psychologist there were no points of disagreement on fact and in fact RAF's clinical psychologist found that the deficits were as follows:

*"4.3.3 On her assessment **Ms Tromp** found the following deficits: below average simple attention abilities; poor working memory and sustained attention; below average visual memory; inadequate auditory narrative memory abilities; below average visual-spatial and organization and integration; slowed psychomotor speed and rote verbal learning.*

*4.3.4 **Ms Tromp** is of the opinion that in light of the results of the neuropsychological findings, she is of the opinion that Mr S sustained a severe head injury."*

In the final neuro-surgical joint minute both the experts agree that S suffered a severe head injury.

[19] It is common cause that the joint minute of the industrial psychologists were done before they had the joint minutes of the other experts.

Reasons for judgment

The two year contract period after forced retirement

[20] It was purely obstructive, but more importantly futile to in cross-examination of Ms. Rossouw dispute the agreed fact in the joint minute of the industrial psychologists that S would have received such two year income on a contract basis. Despite being chastised by this court for endeavouring to cross-examine on this fact,

counsel constantly returned to this line of questioning. No evidence needs to be led on agreed matters. In the matter of **Thomas v SD Sarens (Pty) Ltd**[2012] **ZAGPJHC 161 (2012 JDR 1711 (GSJ))** the court found in paragraph 9 that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts. This is especially so where experts who investigate the facts, and with those experts then meeting and agreeing upon those facts, a litigant may not repudiate the agreement *"unless it does so clearly and, at the very latest at the outset of the trial."*² *"Thus the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in the pre-trial conference."*³ Not only has this matter been followed widely in this Division it was also endorsed in the matter of **Glenn Mark Bee v Road Accident Fund**2018 (4) SA 366 (SCA):

"[65] ... Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants' respective experts. "

In paragraph [6 6] of the **Glenn Mark Bee** matter the court found as follows:

.. Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (ie fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue."

[21] It is thus common cause, with no repudiation to the contrary, that S would have received a contract from his previous employer for two years, *"but for the accident, S would thus be entitled to a loss of income for the balance of a two year contract constituting 18 months."*⁴

The three year period

² Thomas matter supra para 11

³ Thomas matter supra para 12

⁴ Joint minute

[22] Dr. Coetzee in the joint minute did not expressly disagree with Ms. Rossouw that S would have obtained further work for three years until the age of 70 after the expiry of the two year contract with his old Department. In fact, Rossouw testified that Dr. Coetzee did not express a contrary view. In oral evidence Dr. Coetzee said she understood that if she said nothing then automatically it would constitute a disagreement. An expert not expressing an opinion can never constitute a disagreement because there is simply no opinion expressed and with no opinion expressed there is no reasoning on which a court can assess the cogency of the expert opinion. *"Absent any reasoning the opinion is inadmissible."*⁵

[23] Dr Coetzee furthermore acknowledged that in her own report she did not record any discussion with S as to what his future employment dreams and plans were, *"but- for"* the accident. She accordingly did not investigate the further two year contract of forced retirement or any other work period. This lacuna in her report impacted on the impression she made on the court. Especially as she admitted that it is the duty of the industrial psychologist to ascertain these facts. This lack of detail, coupled with her opinion, that no opinion is an opinion, rendered this court to frown upon her report.

[24] In her oral testimony she conceded that the accident rendered S non-suited for the position he held and was in fact unemployable due to the severe brain injury. She however opined that since there was no proof that S would have received another contract for three years after the age of 67 appropriate contingencies should be applied.

Reasons for judgment

[25] If proof is required of future employment then no plaintiff will ever be successful in claiming for damages for loss of income from the Road Accident Fund. I need not reiterate the trite position that it is required of the court to look into the proverbial crystal ball in many instances in ascertaining damages. But, in this matter, there is very little wizardry required. S was at the top of the ladder and his game. Proof of available contracts were before the court. There was no evidence that *"but-*

⁵ Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd and Another 2016 (2) SA 586 (SCA) para [15]

for" the accident he would not have been contracted for a further three year period on the agreed income figures utilised by the actuary.

[26] On behalf of the RAF counsel argued that only if this court accepts that S was unemployable despite having worked after the accident, then the court must apply a 50 % contingency because there was no proof of contracts. Furthermore, a 20 % contingency on the loss of earning capacity was also to be deducted.

[27] The unemployability is common cause. I have already addressed the "proof" of the contracts and I do not find that it impacts on the contingency applied by the actuary. S is currently 67 years old, yet the actuary applied a 10% contingency and not only a 2 % as normal for the age of between 66 to 70. There is accordingly an added 8 % contingency in favour of the RAF. The loss of earning capacity is common cause and no contingency need to be applied thereon.

[28] I am thus satisfied that the loss of income as calculated by the actuary must be awarded to S.

General damages

[29] Pertaining to general damages I was confronted with counsel on behalf of S and RAF agreeing that this court need not decide the value of the general damages, because they are in agreement that the amount to be allocated for general damages is the amount of R800 000. This agreement was based on case law. However, the RAF, had on the morning of the trial rejected the injury as being a serious injury and therefore the matter must be referred to the HPCSA.

[30] Counsel for S argued that general damages could not be rejected anymore, as it was not a timeous repudiation, and was contrary to the common cause facts in the joint minute. Reliance for this argument was placed on the *Bee* matter *supra* wherein it was found that the purpose of the meeting of experts was to identify areas of common ground and issues which needed to be resolved. The experts' joint minute limited the issues on which evidence was needed. *"If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (ie fair warning), the other litigant is entitled to run the case*

on the basis that the matters agreed between the experts are not in issue.”⁶ In paragraph [69] of the judgment it was found as follows: *"The limits on repudiation, particularly its timing, are matters for the trial court. The important point for present purposes is that repudiation must occur clearly and timeously."*

[31] Counsel for RAF referred me to my unreported judgment of ***JE Meyer v The Road Accident Fund*** case number 52229 / 2011 delivered the 4th of December 2013. In that matter I found that the court cannot assess whether an injury is serious. In terms of Regulation 3 only the HPCSA has that jurisdiction.

[32] This is still the position; a court does not have the jurisdiction to decide whether an injury is serious or not. But, in view of the *Bee* judgment, where there are joint minutes rendering it common cause that an injury is serious then a court is not assessing an injury to be serious. A party must give fair warning, i.e. repudiate this concession timeously, so that the other party has time to come to court prepared with the necessary witnesses.

[33] In this instance pertaining to the seriousness of the injury the joint minutes reflect as follows:

33.1 *"Drs Berkowitz and Hoffmann agree that the patient has been left with extensive, serious, permanent disfigurement as a result of this accident."* This joint minute is dated the 29th of August 2019.

33.2 The neurosurgical joint minute of Drs. Maharaj and Edeling dated 16 October 2019 states as following: *"His injuries are regarded as serious according to paragraphs 5.1 and 5.2 of the Narrative Test."* Both classify the injury as a *"severe head injury."*

33.3 The joint minutes of the psychiatrists being Dr. Matjane and Dr. Naidoo conclude that S sustained: *"a significant traumatic brain injury"*.

33.4 The trial was set down for hearing on the 29th of October 2019 and was heard on the 30th of October 2019. The joint minutes were thus obtained timeously with the agreed content that the injury is serious.

⁶ Paragraph [66]

[34] No reasons were submitted as to why, on the morning of the trial, the general damages now had to be referred to the HPCSA and rejected as not being serious. What is disturbing is that this rejection on the morning of the trial by the RAF of the seriousness of the injury is not uncommon. In fact, it has become the norm and practice of the RAF. In this Division Judges are burdened with interlocutory courts specifically created for RAF matters, judicial management meetings held before a Judge and settlement rolls specifically for RAF matters to accommodate case management. Yet, on the day of the trial matters are not finalised because the RAF rejects the seriousness of the injury. This results in private and public funds being wasted and judicial resources stretched even further and unnecessarily so. The RAF cannot be encouraged to repudiate agreements for tactical reasons.⁷ This practice is to be stopped. When joint minutes express that an injury is serious and there is not a timeous repudiation for good reasons, no matter on the morning of the trial will be referred to HPCSA for an issue that is common cause.

[35] In this matter I find that the untimeous repudiation, on the morning of the trial when the seriousness was in fact common cause, serves no purpose. No reasons were forwarded as to what the purpose for referral could be. General damages should thus be awarded in the amount of R800 000.

[36] I accordingly mark the draft order "X" and it is made an order of Court.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 49899/17

HEARD ON: 29 and 30 October 2019

⁷ Paragraph [67] of the Bee matter

FOR THE PLAINTIFF: ADV. G.J. STRYDOM SC

INSTRUCTED BY: De Broglio Attorneys

FOR THE DEFENDANT: ADV. C.H. BADENHORST

INSTRUCTED BY: Mkhonto & Ngwenya Inc.

DATE OF JUDGMENT: 21 January 2020

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 49899/2017

Before the Honorable Justice Potterill; J

On 21 January 2020

In court 8E

In the matter between:

S, R

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

By agreement between the parties and having heard counsel; it is ordered:

1. The Defendant is liable to the Plaintiff for 100% of the Plaintiff's proven damages.
2. The Defendant shall pay to the Plaintiff the total amount of R2 578 850. 13 (Two million Five Hundred and Seventy Eight Thousand Eight Hundred and Fifty Rand and Thirteen cents) In respect of loss of earnings and damages (together with interest a tempora morae calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with Section 17 (3)(a) of the Road Accident Fund Act 56 of 1996).
3. Payment will be made directly to the trust account of the Plaintiff's attorneys:

Holder	De Broglio Inc. Attorneys
Account Number	1096 451 867
Bank & Branch	Nedbank - Northern Gauteng
Code	198 765
Ref	51305

4. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, to reimburse the Plaintiff for 100% of the costs of any future accommodation of the Plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by Plaintiff in the motor vehicle accident, after such costs have been incurred and upon proof thereof.
5. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the costs of 29 October 2019, and the costs of 30 October 2019 on an attorney and client scale, the costs of Senior counsel, the qualifying fees of the experts, consequent upon obtaining Plaintiff's reports as well as the Plaintiff's reasonable travel and accommodation costs to attend the Defendant and own experts examinations.
- 5A. The Plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the Defendants Attorney of record; and
- 5B. The Plaintiff shall allow the Defendant 14 (Fourteen) court days to make payment of the taxed costs.
6. The Plaintiff is declared a necessary witness.
7. The Plaintiff has signed a Contingency Fee Act Agreement.

BY ORDER

REGISTRAR OF THE HIGH COURT

Plaintiff's Counsel: Adv. G Strydom SC- 076 642 5396

Defendant's Counsel: Adv C Badenhorst - 083 289 4030