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**THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION**

Case No: 213/2017

In the matter between:

O C

PLANTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

Coram: Opperman, J

Heard: 26-27 FEBRUARY 2019

Delivered: 17 APRIL 2019

Judgement: Opperman J

Summary: Loss of earnings – expert evidence

JUDGEMENT

I INTRODUCTION

1. The judgement is seized with the issue of the plaintiff's loss of earning capacity/future loss of earnings. The plaintiff was hit by a

motor vehicle on the 26th of December 2015. He was a pedestrian. The defendant has admitted 100% liability on the merits.

2. On the 13th of June 2017 an order was issued against the defendant to pay the plaintiff an interim amount of R200 000.00 in respect of loss of earnings as well as to issue an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of future medical expenses. The plaintiff's claim for general damages was rejected by the defendant and the rejection was confirmed by the HPCSA.

II INJURIES AND RESULTANT PROJECTIONS BY EXPERTS

3. The plaintiff suffered a fracture of the left tibia and fibula according to the joint minutes of the orthopaedic surgeons dated 14 November 2017.
4. Sequelae are the scars on his legs that can be addressed by a plastic surgeon. The section 17(4)(a) undertaking will cover this.
5. Further, the plaintiff could not return to school because he could not walk for long distances and did not have the means for transport. He would however have been able to return to school by 2017.
6. The joint minutes of the surgeons state that:
Mr. Chakane's long-term prognosis is relatively benign. His condition will improve once the internal fixation has been removed from his left tibia and the scars have been revised. Dr Bogatsu reported that Mr Chakane did return to school following the incident. He walks with an antalgic gait.

7. One of the surgeons noted that he was not provided with any clinical record by the instructing attorney. He was told that the plaintiff suffers from mechanical pains. The plaintiff did not report any cosmetic complaints during his interviews on 9 October 2017. Said surgeon completed the RAF 4 form and confirmed that Mr. Chakane has not been left with any serious accident related impairments.
8. The other surgeon believed that Mr Chakane will benefit from removal of the internal fixation from the left tibia and excision of the scars.
9. From the above it is clear that the plaintiff did not suffer any notable permanent debilitating injuries or impairments that will impact on his capacity to make an earning.
10. This was confirmed in the joint minutes of the occupational therapists.¹ Their findings were that the plaintiff does indeed have residual physical and earning capacity. They found that his current employability has been negatively affected by the accident and that he is not equal to his uninjured peers currently. They do agree that because he is 21 years old, with grade 10 as highest educational level and his standard of residual physical capacity; he requires guidance and treatment in order for him to pursue employment opportunities.

¹ INDEX: JOINT MINUTES: Page 8.

11. The joint minutes of the industrial psychologists compared his pre-accident capacity with the situation post-accident and they agreed that he does have the residual physical capacity for sedentary to occasional light work and that it renders him unsuited to perform the majority of unskilled work roles in line with his level of education at present.
12. The above must be regarded with the reports of the orthopaedic surgeons that his condition will improve with treatment.
13. These two experts later diverted completely and concluded that a total loss of income is foreseen. This does not make sense on the facts *in casu*.
14. They do however accede that the pre-accident likely earnings should be used as a basis to quantify the claim. They do acknowledge that the contingency will be the prerogative of the court.
15. The actuary² based his conclusion on the findings of the industrial psychologists only and as is the situation currently; without treatment accommodated with the section 17(4)(a) certificate and as recommended by the orthopaedic surgeons with a positive outcome of maximum recovery. It does not reflect the evidence of this case in toto. The facts specific to the case were not regarded; 25% is a general calculation.³

² Exhibit A dated 12 June 2018 handed in by the plaintiff during the hearing.

³ Plaintiff's Heads of Arguments at paragraph 12.

[18] In the Quantum Yearbook (by Robert Koch, 2017 Edition, p 126) the learned author points out that there are no fixed rules as regards general contingencies. However, he suggests the following guidelines:

"Sliding scale: Yz% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age.

Normal contingencies: The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies."

[19] I accept that this approach is only a guideline as contingencies, by its very nature, is a process of subjective impression or estimation rather than objective calculation.

III THE CLAIMS

16. The claim in the Particulars of Claim⁴ reads that:

Wherefore the plaintiff claims from the Defendant:

- a) Payment of the total damages amounting to R950 000.00
- b) Interest on aforementioned damages calculated at the mora rate of 3,5% above the repo rate calculated up to the date of payment, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended;
- c) Costs of suit.

17. The evidence of the actuary and the Heads of Arguments of the Plaintiff now indicate a claim based on the matter of Phalane v RAF (48112/2014) [2017] ZAGPPHC 759 (7 November 2017) and with no residual income capacity. It is not contested that the plaintiff falls under the auspices of "youth". The calculations are now as follows:

14. Consequently, it is submitted that a 20 % contingency should be applied when calculating Plaintiff's future loss of earnings.

15. If a 20% contingency is applied and using the calculations of Sauer, the nett result is that Plaintiff has suffered future loss of earnings in the amount of R1 825 568.80 (R2 281 961.00 – R456 392.20= R1 825 568.80).

16. In conclusion it is submitted that Plaintiff is entitled to judgement in the amount of R1 825 568.80 for future loss of earnings together with costs and further orders in terms of the Draft Order presented to the court.

18. The defendant agreed with the Draft Order but for the future loss of income. They opposed the claim and stated that the plaintiff does have a residual income capacity on the proven facts of the case. The following outcome is suggested:

Future loss of earnings	R2 230 394.00
Less contingency of 60%	R1 338 236.40
Total	R892 157.60
Less interim	R200 000.00
Total	R692 157.60
Total entitled to	R892 157.60

IV EXPERT EVIDENCE^{5 6}

19. The dispute lies in the interpretation of the experts' evidence. The defendant claims that the evidence indicates a residual earning capacity whilst the plaintiff relies on the letter of the word of the finding of the experts that he has no earning capacity whatsoever.
20. 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.

⁵ Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingbekämpfung MBH 1976 (3) SA 352 (A), Louwrens v Oldwage 2006 (2) SA 161 (SCA), Michael And Another v Linksfield Park Clinic (Pty) Ltd And Another 2001 (3) SA 1188 (SCA), Raf v Zulu & Others [2012] JOL 28456 (SCA), Rex v Jacobs 1940 TPD 142, S v Malindi 1983 (4) SA 99 (T).

⁶ <https://www.hg.org/legal-articles/the-role-of-expert-evidence-in-south-africa-27251> dated 12 April 2019.

21. Counsel for the defendant`s argument is strongly supported by his reference to 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.

[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.

22. National Justice Compania Naviera S.A v Prudential Assurance Co Ltd 1993 (2) Lloyds Reports 68-81 set out the duty or 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."

23. The above duties were reaffirmed in Nicholson v Road Accident Fund (11453/2007) 2012 SGHC (unreported):

"A number of expert witnesses called on behalf of the plaintiff overstepped the mark by attempting to usurp the function of the court and to express opinions based on certain facts as to the future employability of the plaintiff and to express views on probabilities. It is the function of the court to base its inferences and conclusions on all the facts placed before it."

24. Mathebula v RAF (05967/05) [2006] ZAGPHC it was stated that "An expert is not entitled, anymore more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence".

25. In Schneider NO & Others v AA & Another 2010 (5) 203 WCC, which was quoted in the Nicholson judgment, Judge Davis stated that 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."

26. 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: "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".

27. The common theme is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings.
28. The facts that caused the expert opinions in this case are vital. It was sourced from the plaintiff.

V THE PLAINTIFF

29. The plaintiff's educational psychologist reported that numerous inconsistencies were noted in the information given by the plaintiff compared with the information related to other experts, mostly related to his scholastic history. He even altered information regarding his school progress at the assessment noting within a different context that he had never repeated any grades in school. She stated that: "He was not regarded a reliable historian." This shows that the facts on which the conclusions were based lacks veracity.
30. The plaintiff, born on 25 January 1996, was 19 years old at the time of the incident. At the time of his assessment in 2018 his highest level of education was grade 10 and he was unemployed. His father held a grade 12 certificate and was employed with the Military Police. In 2011 the father was killed in a motor vehicle accident. The plaintiff, his mother and two siblings lived off the father's pension until her sudden passing away. He and his brothers continued to reside in the family home. They currently rely on an income of R1800.00 per month from renting out two rooms on their property. He was involved in a relationship from which relationship a daughter was born in 2015.

31. He has never been employed pre-and-post the incident. He had just completed grade 10 when he was involved in the accident. He was not allowed back to school due to his age. He remained at home during 2016. He enrolled at a training centre to complete grade 11 but was unable to walk daily long distances and did not have the finances to travel with public transport. He stopped attending after a few weeks.

32. That said; she reported from further information from the plaintiff that he did attend pre-school but repeated grade 1 and grade 2 and failed grade 3. He again later failed grade 7. He had to terminate his grade 9 studies because his mother could not afford school fees for three children. According to the plaintiff he completed N2 and N3 studies at a college but never received the results. He never returned to education after the accident. The evaluation is that:

Pre-accident: From the available information and my assessment results, he was an individual with learning problems pre-accident. His learning challenges influenced his functioning and progress in school. He was a learner with average intellectual ability. In the current school system, he would have been able to complete grade 12. He would have obtained an NQF4 qualification, but with lower marks and without exemption and 2 years later than the norm. He probably would have entered the labour market in line with his parents and siblings, 2 years later than his peers. He would have relied on strength and stamina to find practical employment. He would have been able to care for himself with the basics as seen in his family.

Post-accident: The accident under discussion left him with challenges and disfigurement. His problems influence him negatively and had a significant impact on his emotional and psychological functioning. Post-accident, he is not able to do practical work comfortably relying on his strength and stamina. He is rendered an unequal competitor in the open labour market. He is not

suitable for administrative work and from practical perspective, with his aptitude; physical and psychological restrictions, he is probably unemployable for the competitive open labour market.

VI CONCLUSION

33. The evidence shows that the foundation of the experts' conclusions is shaky and contradictory. What has been proven is that the plaintiff's pre-accident earning ability and record is a major contributor to his current unemployability; more so than the injuries. The injuries are stated to have a possibility of radical improvement but the contradictory finding is that the plaintiff is probably unemployable for the competitive open labour market. The facts on which the opinions are based are unconfirmed in that the background of the plaintiff is contaminated by his ambiguous evidence.

34. The plaintiff has a residual income capacity and a contingency of 45% is an apt and generous measurement that is supported by the case in its totality.

Future loss of earnings	R2 281 961.00 ⁷
Less contingency of 45%	R1 026 882.45
Less interim	R200 000.00
Total entitled to	R1 055 078.55

VII ORDER

⁷ Sauer calculation dated 12 June 2018.

1. The Defendant is liable to pay 100% (Hundred percent) of the proven or agreed damages.

2. The Defendant to pay the Plaintiff's attorneys the sum of R1 055 078.55 in respect of loss of earnings into the Plaintiff's Attorney's trust account with details.

ACCOUNT HOLDER: VZLR INC

BRANCH: ABSA BUSINESS BANK

HILLCREST

BRANCH CODE: 632005

TYPE OF ACCOUNT: TRUST ACCOUNT

ACCOUNT NUMBER: [...]

3. In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.25% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date until the date, as per the Road Accident Fund Act, of payment.

4. The issue of loss of earnings is separated from all the other issues in terms of Rule 33(4), with the remainder of the issues of quantum being postponed to the pre-trial roll of 12 August 2019.

5. The Defendant to pay the Plaintiff's taxed or agreed party and party costs in the above-mentioned account, for the instructing- and correspondent attorneys, which costs shall include, but not be limited to the following:

5.1 All reserved costs to be unreserved, if any;

- 5.2 The fees of Senior Junior Counsel;
- 5.3 The costs of obtaining all expert medico legal- and any other reports of an expert nature which were furnished to the Defendant and/or its experts;
- 5.4 The costs of obtaining documentation / evidence, scans, considered by the expert(s) to finalise their reports;
- 5.5 The reasonable taxable qualifying, preparation and reservation fees of all experts, including the costs of consultation fees with the legal teams, if any;
- 5.6 The reasonable traveling- and accommodation cost, if any, incurred in transporting the Plaintiff to all medico-legal appointments;
- 5.7 The reasonable costs for an interpreter's attendance at the medico legal appointments for translation of information, if any;
- 5.8 The above-mentioned payment with regard to costs shall be subject to the following conditions:
 - 5.8.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

5.8.2 The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs;

5.8.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at the prescribed mora rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

M OPPERMAN, J

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