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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **1143/2017**

In the matter between:

D S
(Identity Number: [...])

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: DAFFUE, J

HEARD ON: 15 MAY 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 4 JULY 2019

I INTRODUCTION

- [1] The matter was set down for trial on 14 and 15 May 2019. On the first day the parties requested time for settlement negotiations. They came to an agreement on some issues, but due to the lapse of time it was agreed to proceed the next day with the hearing of evidence. In his opening address plaintiff's counsel informed the court that the parties had settled the merits of the claim 70/30% in favour of plaintiff, that the Road Accident Fund ("the RAF") had agreed on past medical and hospital expenses in the amount of R120 495.01 as claimed and that the RAF would furnish the required undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 56 of 1996. The plaintiff's averment that he has suffered a serious injury has been rejected by the Health Professions Council of South Africa ("HPCSA") and consequently, the claim for general damages cannot be adjudicated by the court. Therefore the court was called upon to adjudicate plaintiff's claim in respect of past and future loss of earnings only. It soon became evident that plaintiff did not intend to claim for past loss of income.

II THE PLAINTIFF

- [2] The plaintiff is D S, an adult male employed as a farm manager in the district of Thabazimbi, Limpopo Province at the stage when summons was issued. At the time of the trial he was a Potato

Certification Officer resident in Christiana and employed by the Potato Certification Service with head office in Pretoria *ex facie* plaintiff's latest payslip.

- [3] Plaintiff was 23 years old when he sustained injuries in a motor vehicle collision on 10 January 2016. The collision occurred 6 days before his 24th birthday. At the time he was a pedestrian. He was unemployed then, having obtained his B Agric degree at the end of 2015. He was 27 years old when he testified.
- [4] Plaintiff started off as a farm manager for parents of a friend of him, apparently sympathetic employers, as he was still ambulating on crutches at the time. His income was R10 000.00 per month. After eleven months he obtained employment as a sales representative for Vetrivier Boeredienste CC at an increased gross salary of R15 000.00 per month. On 1 January 2018 he commenced employment with his present employer at a monthly salary of R30 000.00. That increased to a total monthly package of R41 843.08 by the time he testified.

III THE RELIEF CLAIMED

- [5] Plaintiff initially claimed the amount of R550 000.00 in respect of past and future loss of income. I accept that this was an estimated amount. Plaintiff averred in his particulars of claim that he might increase the amount upon receipt of further medical reports. The particulars of claim was amended as recently as 2 May 2019 in terms whereof the amount of R550 000.00 was increased to R880 764.00. This was done on receipt of the actuary, Mr T

Doubell's report dated 25 February 2019. At that stage the actuary made his calculations based on income assumed to be R30 000.00 per month or R360 000.00 *per annum*. It remains incomprehensible why the actuary could not be provided with the correct figures earlier. He was instructed by plaintiff's legal team during the trial to make new calculations based on the correct figure, to wit the total monthly package of R41 843.08. I shall deal with the outcome hereunder.

IV THE DISPUTE TO BE ADJUDICATED

- [6] As mentioned above, the only dispute that requires the court's attention is the amount to be awarded for future loss of earnings.

V EXPERT EVIDENCE

- [7] Several expert reports have been filed by both parties. These include reports from orthopaedic surgeons, occupational therapists, industrial psychologists and an actuary. None of them testified, save for Mrs Susan van Jaarsveld, an industrial psychologist and Mr Doubell, the actuary, who testified on behalf of the plaintiff. The court was not told whether any of the other reports may be accepted as part of the evidential material in the absence of *viva voce* evidence. Consequently I shall refrain from relying on any reports, except insofar as these have been confirmed as correct under oath and/or insofar as Mrs Van Jaarsveld referred to other reports which have not been questioned and successfully attacked during cross-examination.

- [8] Mrs Van Jaarsveld made certain assumptions which I regard as not sustainable. Mr Doubell, in turn, relied on her assumptions in order to calculate plaintiff's loss of earnings. I shall explain later. The RAF closed its case without leading any evidence.

VI FACTS NOT IN DISPUTE

- [9] Plaintiff's employment history is not in dispute. Although the extent of his injuries was not pertinently agreed to during the course of the hearing or earlier, I am of the view that it may safely be accepted that plaintiff sustained the following injuries as reported by Mrs Van Jaarsveld, relying on various other expert reports, to wit fractures of the left femur, the left tibia and fibula and the right elbow. It was also not contested that plaintiff was walking with a limping gait and that he was experiencing several difficulties from a physical point of view such as walking on uneven terrain, walking long distances, climbing stairs and lifting and carrying heavy objects of 25 kg to mention some. His right arm lacks strength due to the elbow injury. I repeat that plaintiff's claim that he suffered a serious injury was rejected by the HPCSA.

VII THE REQUEST TO INCREASE THE CLAIM

- [10] Notwithstanding the recent amendment to increase the claim for loss of earnings mentioned above, plaintiff informally and after the closure of both parties' cases applied for a further amendment in paragraph 3.6 of the heads of argument filed by his counsel, seeking an increase from R880 764.00 to R2 137 858.00. This is a 250% increase from the recently amended amount. This is an opportunistic approach based on Mr Doubell's calculations and in

particular the 3rd of his three supplementary reports filed in the course of giving his evidence. I shall deal with this aspect under the next heading. It may perhaps be explained that, once the parties closed their cases, both counsel sought an opportunity to file written heads of argument for me to adjudicate the matter in chambers. I received both heads of argument on 23 May 2019. The RAF's counsel did not make any submissions pertaining to the belated attempt to amend, but rather opted to submit that the claim for loss of earnings be dismissed *in toto*. The actuary testified and supplemented his initial two reports in order to rely on the correct and admitted salary package of the plaintiff and was cross-examined briefly, but the RAF failed to lead any evidence to dispute his version. It may be argued that there is no reason why the court may not in its discretion increase the amount claimed to an amount it regards just and equitable, bearing in mind the evidence led, even if this amount is higher than the amount claimed. However, if the RAF was alerted during the hearing of an intention to amend, the matter might have followed a different course. Even though three different reports were handed in as exhibits, plaintiff's counsel did not seek an amendment before the close of his case. An amendment might have caused the RAF not to close its case, but instead, to lead evidence, especially insofar as the plaintiff's serious injury assessment was rejected by the HPCSA. More vigorous cross-examination of the actuary might have followed as well. More importantly, the RAF apparently settled the merits on the 70/30% basis, having regard to the recent amendment of the claim to R880 764.00. It might have decided to contest the merits if it was confronted with a claim in excess of

R2m. Clearly, the RAF will be prejudiced if an amendment is allowed at this stage.

VIII LOSS OF EARNINGS

- [11] There is no doubt that plaintiff suffers from a physical disability, but that does not mean, on its own, that he is suffering a reduction of his patrimony. Proof of actual loss must be established.
- [12] In order to assess plaintiff's future loss of earnings a comparison should be made between what he would have earned pre-morbid and what he is likely to earn post-morbid. *In casu*, the plaintiff was injured more than three years ago. He did not suffer past loss of earnings. As is generally the case with the adjudication of future losses, it is virtually impossible to be determined with mathematical precision because of unknown facts and to an extent speculative evidence.
- [13] Experts are frequently called in to assist our courts, but courts are not bound by the opinions of experts. It is the duty of the expert to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusions so as to enable it to form an independent judgment by the application of these criteria to the facts proved in evidence.¹ In the evaluation of the evidence of

¹ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MHB* 1976 (3) SA 352 (A) 370H – 372A.

experts it is required to determine whether and to what extent their opinions are founded on logical reasoning.² This approach has been consistently followed. In *Linksfield*³ the SCA warned presiding officers against adjudicating evidence by applying the yardstick used by expert scientific witnesses who tend to assess likelihood in terms of scientific certainty. Presiding officers should not be seduced to apply to the expert evidence the standard which the expert applies, but instead, the balance of probabilities must be ascertained based on a review of the totality of the facts.

- [14] In *Medi-clinic v Vermeulen*⁴ Zondi, JA, writing for a unanimous SCA bench, stated with reference to the judgment of that court in *Michael and another v Linksfield Park Clinic (Pty) Ltd* that an opinion expressed without logical foundation can be rejected.
- [15] An aspect that cannot be disregarded, although Mrs Van Jaarsveld was not cross-examined in that regard, is the remark in paragraph 6.6 of her report. During her interview with plaintiff he requested her not to contact his employer “as he had only recently started and that he had not disclosed the fact that he was in an accident and sustained serious injuries.” She consulted and evaluated the plaintiff on 17 January 2018, less than three weeks after he commenced employment with his present employer. It is now 18 months later and plaintiff is still employed at the same employer.

² *Michael and another v Linksfield Park Clinic (Pty) Ltd and another* 2001 (3) SA 1188 (SCA) paras [36] – [40] and *Medi-clinic v Vermeulen* 2015 (1) SA 241 (SCA) at paras [5] – [8] & [25], [26] & [31].

³ Op cit at par [40].

⁴ Op cit at par [5].

- [16] Another aspect that must be accepted in considering an award for loss of earnings in this instance is the plaintiff's ability to work without his employer noticing his alleged disability. Contrary to the sub-standard performance that might have been expected of a disabled person, plaintiff was even granted huge salary increases of up to 50% in less than 18 months. Unlike what courts encounter in many similar cases, the employer was not called to testify in order to show that it was sympathetic towards the plaintiff and accommodated him notwithstanding his inability to give 100%. It cannot be forgotten that the plaintiff was not injured during the course of his present or previous employment, but when he was still unemployed just after having obtained his B Agric degree.
- [17] There is no logical foundation for Mrs Van Jaarsveld's assumption in paragraph 6.8 of her report "that Mr S will not be able to work at the same rate as prior to the accident and that his productivity had been negatively affected by the injuries he sustained during the accident." This assumption is totally incorrect and rejected. There is no evidence of a decline in the plaintiff's performance. His employer did not complain about his performance and quite the contrary appears to be true: he received a huge increase in salary in a short period of time. In any event, he became employed long after he had sustained the injuries and did not testify that he could not cope with his obligations. I accept, however, that plaintiff's injuries may in future have a negative effect on his ability to perform at his peak. It is accepted, based on experience in other similar matters and what Mrs Van Jaarsveld testified, that the type of leg injuries sustained, although healed, may in future affect plaintiff's knee, hip

and even ankle. The elbow may also present further problems in future.

[18] The application of contingencies must be considered. General contingencies, also referred to as normal contingencies, have generally become accepted at 5% and 15% in respect of past and future loss of earnings respectively. In a recent judgment of the Supreme Court of Appeal,⁵ Willis, JA referred to the normal range of contingencies in respect of future loss of earnings as between 15 and 20%. However, the ‘sliding scale’ approach in terms whereof ½% is allowed for each year to retirement is also recognised by our courts and I refer to *Guedes*⁶ in particular. It may be accepted as a guide and can never be the alpha and omega. Different contingency percentages may be applied to pre-morbid and post-morbid income as was the case in *Guedes*. In *Kerridge*⁷ the majority held that “(C)ontingencies are arbitrary and also highly subjective” and “(I)t is for this reason that a trial court has a wide discretion when it comes to determining contingencies.”

[19] Mrs Van Jaarsveld submitted that contingencies should be applied based on the following aspects, to wit

- (a) plaintiff will not be able to work at the same rate post-morbid as pre-morbid and therefore his productivity will be negatively affected which can also impact negatively on his career progression;

⁵ NK v MEC for Health, Gauteng 2018 (4) SA 454 (SCA) at par [16].

⁶ See the discussion in RAF v Guedes 2006 (5) SA 583 (SCA) at par [9] and also the eventual 20% contingency percentage applied at paras [17] & [18] in the ‘but for scenario’, contrary to the 30% percentage having regard to the accident.

⁷ RAF v Kerridge 2019 (2) SA 233 (SCA) at par [42]. See also paras [41] – [44].

- (b) his lack of productivity can result in his retrenchment or dismissal or his inability to generate the same income;
- (c) if he is to lose his work, he will need to be accommodated by a sympathetic employer as he will be an unequal competitor and
- (d) he will not be able to work until normal retirement age.

I already indicated that I do not agree with the witness' assumptions.

[20] Mr Doubell relied on the assumptions and submissions of Mrs Van Jaarsveld in order to prepare all his reports, save for the ultimate report dated 14 May 2019, accepted by the court as exhibit "D". In the first two reports contained in exhibit "A", dated 12 April 2018 and 25 February 2019 respectively, he calculated the loss of earnings to be R844 051.00 and R880 764.00. The second report was merely an updated version. He relied on a 15% reduction on plaintiff's pre-morbid income and 25% on the past-morbid income. The income of plaintiff was estimated to be R30 000.00 per month. In his third report, dated 14 May 2019, admitted as exhibit "B", he used the same methodology as in the first two reports, but calculated the loss on the exact income of plaintiff, arriving at an amount of R1 013 306.00. Mr Doubell testified that actuaries usually make use of a standard deviation of 10% between future pre- and post-morbid income. In the fourth report of the same date, accepted as exhibit "C", the actuary came to a figure of R1 925 282.00, after allowing for contingencies of 19% and 38% in respect of pre-morbid and post-morbid income respectively and a retirement age as in the previous reports of 65 years. In his last

report mentioned above, the actuary applied 19% and 36% contingencies on the basis of Ms Kheswa, the industrial psychologist's report obtained by the RAF, that plaintiff might be forced to retire between the ages of 60 and 65 years. Also, Ms Kheswa stated that plaintiff's career ceiling might be a bit higher than estimated by Mrs Van Jaarsveld. Mr Doubell conveniently did his calculations on a retirement age of 62.5 years and arrived at a loss of R2 137 858.00.

[21] Mr Doubell explained that although actuaries in the past usually calculated loss of income in similar situations on the basis of a 10% deviation as mentioned above, they have now changed their practice by applying the $\frac{1}{2}\%$ *per annum* principle. Although the sliding scale principle has received judicial recognition years ago⁸, the actuary did not provide a logical reason for the percentages applied *in casu* and why he differentiated so much between the pre-and post-morbid percentages. I am not prepared to find that the calculations in the last two reports are based on a logical foundation. The actuary's first three reports were based on a standard deviation of 10% and the third report is dated the same day as the last two reports.

[22] No doubt, the determination of contingencies is a process of subjective impression or estimation rather than an objective calculation. The application of contingencies is largely arbitrary and depends on the trial judge's impression of the case. The future is uncertain and it is difficult to judge how a person's career prospects may change over a considerable period of time and/or

⁸ See Guedes at footnote 6.

what other factors may influence the career, either positively or negatively. The facts and all relevant circumstances must be considered as best as possible in order to adjudicate the matter.⁹

[23] I criticised Mrs Van Jaarsveld's approach above and do not intend to repeat myself. In my view plaintiff proved that he is capable to continue with his employment obligations. He impressed his employer to the extent that he received huge salary increases in a short period of time. He is not expected to crouch underneath objects or to sit on his haunches or to walk for kilometres at a time or to carry heavy objects weighing 25 kg over certain distances, aspects that cause him some difficulty at this stage. As a graduate with a B Agric degree, employment opportunities in the agricultural field are wide-ranging. He may also improve himself in his present employment environment in order to be promoted to a managerial or supervisory position in future. Surely, it is not expected from managers in the particular environment to do much, if any, field work. Juniors are tasked to do that. The mere fact that the head office of plaintiff's employer is in Pretoria is indicative of the fact that much administrative work is conducted in an office environment. The difficulties that plaintiff may experience as a result of his injuries may be overcome as he gets promoted in future. In saying this I do not turn a blind eye to the possibility that plaintiff may in future and as he gets older – he is still a young man

⁹ Ndokeni v RAF 2014 (7A4) QOD 9 (ECP) at A4-11 and Bonesse v RAF 2014 (7A4) QOD 1 (ECP) at A3-17 and Pickering, J's reliance on the well-known Bailey judgment.

of 27 years - have more difficulties to cope than at present for the reasons advanced. However, I am not satisfied that the standard deviation of 10% between pre- and post-morbid loss of earnings should be applied in respect of contingencies.

[24] The actuary's third report, exhibit "B", is based on the actual and correct salary package of the plaintiff, whilst the same does not apply to the second report contained in exhibit "A." Even if I could have awarded an amount higher than claimed, I would have decreased the 10% deviation to about 5%, the reason being that I am not as negative about the plaintiff's post-morbid career prospects as testified to by Mrs Van Jaarsveld. I say this notwithstanding the fact that a 10% difference is in line with the judgment in *Guedes*.¹⁰ The plaintiff's future in *Guedes* was regarded to be "precarious" which clearly does not apply to the plaintiff *in casu*. I am prepared to find that plaintiff has proven a loss of earnings equal to the amount claimed in the particulars of claim. The calculations to arrive at the figure claimed were done on a lower income than the actual amount proven, but plaintiff received the advantage of a 10% deviation between pre- and post-morbid income, contrary to what he is entitled to in my assessment. Instead of referring the matter back to the actuary and thereby incurring extra costs, I prefer to finalise the matter on this basis which I believe is just and fair to both parties.

[25] RAF's counsel incorrectly relied on *RAF v Sweatman*.¹¹ This judgment, dealing with the statutory limits of loss of income or so-

¹⁰ Op cit.

¹¹ 2015 (6) SA 186 (SCA).

called capping, does not apply *in casu*. The statutory limit at the time of the accident was R237 850.00 *per annum* which is much higher than claimed by plaintiff.

IX CONCLUSIONS

[26] In summary, I am satisfied that the plaintiff has proven an entitlement to the amount claimed in the particulars of claim. I stated above that the parties agreed at the onset of the trial on a 70/30% apportionment of damages in favour of plaintiff, the effect being that the RAF is liable for payment of 70% of plaintiff's proven damages.

[27] The amount found to be fair, to wit R880 764.00, must be reduced with 30% and therefore an amount of R616 535.00 shall be awarded in respect of loss of earnings. The parties agreed on the past medical and hospital expenses in the amount of R120 495.01. 70% thereof is R84 347.00 and this shall be added to the amount of R616 535.00 which equals R700 882.00.

X THE ORDERS

[28] Judgment is granted against defendant in favour of plaintiff as follows:

1. Defendant shall pay to plaintiff an amount of R700 882.00 (seven hundred thousand eight hundred and eighty two Rand).

2. Defendant shall pay interest on the above amount at the prevailing legal interest rate calculated from 30 (thirty) days after judgment to date of final payment.
3. Defendant shall furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 to plaintiff in respect of 70% of the costs of future accommodation of plaintiff in a hospital or nursing home, or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the collision of 10 January 2016, and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.
4. Costs of suit together with VAT thereon, including the reasonable qualifying, preparation, reservation and attendance fees, as well as the accommodation and travelling costs, if applicable, of all experts employed by the plaintiff.
5. Interest on the costs of suit at the prevailing legal interest rate from 14 (fourteen) days after the Taxing Master's allocator to date of payment.

J P DAFFUE, J

On behalf of Plaintiff : Adv EG Lubbe
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