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

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

Case No: 1258/2015

In the matter between:-

MPUSI LEONARD MPHUNYETSANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM:

MBHELE J

HEARD ON:

14 JUNE 2019

DELIVERED ON:

09 OCTOBER 2019

- [1] On 05 April 2013 a motor vehicle collision occurred between a vehicle with registration letters and numbers [...] driven by one Olebogeng George Pule (The insured driver) and the Plaintiff who was a pedestrian at the time of the collision.
- [2] The Plaintiff sustained bodily injuries as a result of the collision. The Plaintiff issued summons against the defendant claiming damages in the amount of R 1 300 000, 00.
- [3] Defendant is resisting the Plaintiff's claim; it denies liability and in the alternative prays for apportionment of damages in terms of the apportionment of damages act 34 of 1956.

Plaintiff's case:

Plaintiff testified in support of his case. His evidence was, inter alia, to the effect that on the date of the accident he was walking with his friend from Steyn 2 to Bronville in Welkom.

- [4] He was walking on the left shoulder of the road between Welkom and Virginia where he was hit by a vehicle coming from Virginia. When he was about to cross the road he saw a truck approaching, he waited for it to pass. When the truck was about to pass a motor vehicle emerged and hit him. He did not notice this vehicle coming, when he saw it, it was already on him and he could not find ways to avoid the collision. He denied when it was put to him that when the collision occurred him and his friend were in the middle of the road, crossing to the other side and carrying a steel pole.

- [5] He further testified that before the collision he was a street vendor, selling fruits and vegetables and earning R15000.00 per month. He did have a bank account but there were no bank statements to prove that he was indeed earning the amount he claimed he was earning.
- [6] Both his legs are broken. He has no heel on his right foot. He was a soccer player before the collision and he cannot play soccer anymore. He worked in Durban as a construction worker in 2010 and earned R1800 per month. It was not clear how he managed to save R80 000 within 12 months with a salary of R1800 per month that he had to live on and send his family money in Lesotho. He used the R80 000.00 he saved to start a fruit and vegetable business in Welkom.
- [7] **Dr. R. Khan**, a medical doctor examined the Plaintiff and made the following diagnosis.
- The Plaintiff had Webber C fracture R fibula, Webber C fracture L fibula, Right calcaneus fracture, proximal fracture 1st metatarsal bone right foot. Intermediate cuneiform fracture right foot, fracture proximal head of 3rd Metatarsal right foot and de-gloving injury of the right heel (the flesh on the heel was totally removed).
- [8] **Plaintiff's complaints:**
- He has lost the right heel. He had difficulty standing, walking uphill, going upstairs, walking on uneven ground, squatting and doing recreational activities like playing soccer. He is unable to do heavy work like pushing, pulling, climbing, carrying a bucket of water, walking on even ground without shoes, walking for over 15 minutes.

- [9] He opines that the Plaintiff will not be able to do manual work especially the type of work he was doing before the accident. He has 20% chances of developing osteoarthritis. He may be able to sit down and sell vegetables and fruits but he will need assistance to secure stock, pull and push trolley and carry all the other items that will enable him to run his business. The Plaintiff has 15% whole person impairment. In his view even if the Plaintiff gets heel replacement he will still struggle to do manual work.
- [10] **Joshua Francois Rosslee** an actuary testified to the effect that he prepared his report based on the Industrial Psychologist's report Susan Van Jaarsveld. The plaintiff's income was assumed at R33 200 per annum with his retirement age estimated at 66 .5 years. The actuary assumed past loss of income at R167 279.00 and future loss of income at R652 744. 00.
- [11] Contingency was factored in at 5% Premorbid and 15% Post morbid. In cross examination he conceded that he did not have any proof of income but used the income levels as provided by the Industrial Psychologist.
- [12] Susan Van Jaarsveld, the Industrial Psychologist noted that the plaintiff went to school until class 7 in Lesotho which is an equivalent of grade 4 in South Africa. She is of the view that he will not continue doing his job as a hawker because of limitations imposed on him by the accident. He cannot do sedentary job either because of his low standard of education. She stated that the plaintiff did not provide him any proof of income. She was informed that he had a bank account but she never saw the bank statements. She opined that bank statements would not have given a true reflection of the plaintiff's income because it is difficult to determine income levels in an informal sector.

[13] At the end of the plaintiff's case the defendant moved an application for absolution from the instance. Ms Ferreira, on behalf of the defendant submitted that the plaintiff failed to show what his earnings were before the accident and as such has failed to prove loss of income. She contended that the plaintiff failed to bring evidence upon which the court might in his favour. She contended further that because the defendant disputed his earnings the plaintiff must have obtained bank statements to show that he indeed earned an income which he deposited into a bank account as he alleged. She further submitted that the plaintiff failed to prove quantum of general damages.

Mr. Berry argued that the plaintiff qualifies for compensation for general damages which were not rejected by the defendant. He submitted that the accident was a life changing event for the plaintiff and his life has been altered to the worst permanently. He contended, further that it cannot be disputed that there was loss of earnings following the collision. Failure to provide bank statement and proof of earnings does not indicate that the plaintiff did not lose earnings as a result of the accident.

Legal Principles

[14] The test to apply in an application for absolution from the instance is set out as follows in **Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA)** at 92 F-H:

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Danie* 11976 (4) SA 403 (A) at 409G - H in these terms:

' . . . (When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by

plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2)1958 (4) SA 307 (T).)'

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (**Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2).**"

- [15] The defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity. (See **Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A)** and **Santam Versekeringsmaatskappy Beperk v Byleveldt 1973 (2) SA 146 (A)**).

- [16] The above principle was echoed in **Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE)** where the following was said:

"A person's all-round capacity to earn money consists, inter alia, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring

into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. ... At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil.”

- [17] It is so that the plaintiff bears the onus to prove that before the accident he earned an income and that such income has been lost as a result of the accident. The plaintiff is the only source of information in relation to the nature of his employment and his earnings. The experts who testified based their findings on the information provided by the plaintiff which was not supported by any documentary proof. I am being asked to take the plaintiff’s word as conclusive proof that he indeed earned an income prior to the accident without proof that such income existed. Plaintiff’s bank statements would have shed light on the plaintiff’s earnings but such was not presented before me.

In the unreported matter of **Mlotshwa v Road Accident Fund (9269/2014) [2017] ZAGPPHC 109 (29 March 2017)** at paragraph 21 the following was said when the court dealt with the loss of earnings for a claimant in an informal sector:

“The court is alive to the nature of the informal sector in South Africa and that the livelihood of many of our people is dependent on generating an income in this sector. Our courts can never discriminate against members of society engaged in this sector. However, the courts cannot turn a blind eye to the duty of a litigant, where he bears the onus, to provide sufficient proof of income. The proof of such income even if based on estimates or averages, is after all, often than not, peculiarly within the knowledge only of the plaintiff. The

defendant cannot be prejudiced simply on the say so of a litigant of an average income he earns per month and what remains after payments, without providing evidence as to how the average before the payments was generated.”

[18] I agree with the sentiments expressed above. In the current matter the plaintiff could have produced proof of income because he had a bank account where his earnings were deposited but such was not presented before court. The information before me is insufficient to help me estimate the plaintiff’s past loss of income and future loss of earnings. I am unable to find that the plaintiff managed to prove his heads of damages for loss of income and future loss of earnings. He has however made out a *prima facie* case for general damages. In the result the following order is made.

Order:

- Absolution from the instance in respect of past loss of income and future loss of earnings is granted.
- Absolution from the instance in respect of general damages is dismissed.
- Costs to stand over for later adjudication.

NM MBHELE, J

On behalf of the plaintiff:

Adv Berry

Instructed by:

McIntyre Van Der Post
BLOEMFONTEIN

On behalf of the defendant:

Instructed by:

Adv Ferreira
Maduba Attorneys
BLOEMFONTEIN