

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

9/3/18

CASE NO: 87933/2016

Not Reportable

Not of interest to other judges

In the matter between:

JEROME ALPHONSUS DU PLESSIS

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PETERSEN AJ

Introduction

[1] The plaintiff instituted action against the defendant for damages arising from a motor vehicle accident at or near Grahamstown Road For Beaufort, Eastern Cape Province on the 30 April 2015 in which he sustained serious bodily injuries as a passenger.

Issues of common cause and issues in dispute

[2] Merits have been conceded 100% in favour of the plaintiff. The issues in dispute at the commencement of the trial included general damages and loss of earning capacity. The plaintiff subsequently accepted an offer of R550 000.00 in settlement of general damages.

[3] The remaining issue calling for determination by this court is the determination of loss of earnings or earning capacity. The central issue is the employment history of the plaintiff on which the experts rendered opinions and the actuary premised calculations.

Synopsis of the evidence

[4] The joint minutes of the industrial psychologists, orthopaedic surgeons, occupational therapists and actuary of the plaintiff were admitted including the respective reports of the said experts. The reports constitute evidence which this court may have regard to.

[5] The plaintiff testified in support of his claim. No oral evidence was presented by the defendant.

The evidence

The Plaintiff

[6] The plaintiff testified that he was a plumbing technician at the time of the accident on 30 April 2015. He was employed by Mr. Alfons du Plessis, who is engaged in the construction industry. A reading of the papers shows that the latter is the plaintiff's father. He could not indicate when his employer commenced business or what the juristic nature of the business was. He had been employed by his father for 2 years and he is currently unemployed as result of the accident and was remunerated in cash at a rate of R1500.00 per fortnight. The plaintiff consulted many doctors for purpose of this matter and informed them that he was employed in the construction

industry. He disputes having told any of the experts that he was unemployed at the time of the accident.

[7] Under cross examination the plaintiff testified that he attended his consultations with the various experts alone and only he had supplied information to them. The consultations were in English in which he is fully conversant. The plaintiff was taken through personal data he furnished to Myburgh the occupational therapist. This included completing standard 8 (grade 10), working for Game and Dion Wired for one year, as a painter at Paint Shuttle for about one year. He worked as a construction worker for most of his life on both an employed and self-employed basis. He confirmed that this information emanated from him. On the question why he failed to mention plumbing or a plumber, the plaintiff maintained that "they" do everything. He agreed that he had testified in examination in chief that he was a plumbing technician but cannot explain why he failed to tell Dr Myburgh this. He further agreed it was his evidence that he was employed by his father. It is his evidence that he was self-employed when he was not working for his father. When confronted with a contention that there would have been periods that he was unemployed or not employed by his father he testified that, (we), would go out on our own at times. (We) would sit at home for maybe a week or a month and go look for work. He conceded that there were periods he would be at home for weeks without work.

[8] In a similar vein, the plaintiff was taken through the report of the plaintiff's industrial psychologist. He confirmed that he had told the industrial psychologist that he completed Grade 9; that pre-accident he was unemployed for 6 months before the accident and post-accident he has been unemployed, having reported specifically "since before the accident to date." When confronted with the contradictory versions given to the experts, the plaintiff testified that there was a mistake as they were on their way from work on the day of the accident. When told that he had not mentioned to the aforementioned experts that he was a plumbing technician or in construction he repeated that on the day of the accident they were from work. He was drawn to silence when confronted on the contradictory reports and his evidence in court and when pressed for an answer testified that he does not know what to say about the varying information given to the experts. When confronted with further

contradictory reports made to the experts, including why he had told the industrial psychologist he earned R1000.00 per fortnight as opposed to his evidence that he earned R1500.00 per fortnight he maintained that something was not right. He was reduced to silence when told that nobody could confirm his employment with Mr Alfons du Plessis or produce salary advices showing how much he earned.

[9] In re-examination, the plaintiff testified that he had not told any of the experts that he was unemployed. He confirmed his evidence under cross examination that he was unemployed at times whilst looking for work in the construction industry. The plaintiff testified that when he was not employed by Mr Alfons du Plessis he would earn anything between R1000.00 to R2000.00 per week depending on the work. To explain the contradictions in his reports to the experts he maintains that he could have made a mistake. He could not recall when he consulted with the experts but as shown to him he had not been to any of the experts within a month of the accident as he had been hospitalised for 2 months.

The expert evidence

[10] Counsel for the plaintiff highlighted extracts from the expert reports of both the plaintiff and defendant. It was pointed out that the plaintiff was seen by Dr Mushwana an independent examiner on 08 July 2016 and reported to him that he was job hunting. In the joint minute of the occupational therapists it was highlighted by Ms Sekele that the plaintiff informed her that he worked as a plumber. He told the plaintiff's industrial psychologist that he was unemployed at the time of the accident. He told the defendant's industrial psychologist that he was employed as a plumber at Lafirm Construction at the time of the accident on a permanent basis which his employer Mr du Plessis confirmed. He is said to have earned roughly R1500.00 per fortnight. Counsel for the plaintiff accordingly submits that the court should find on the evidence that the plaintiff was a general labourer at the time of the accident.

[11] Counsel for the defendant submits that the court is faced with three contradictory versions; that the plaintiff was unemployed, job hunting or employed, without setting a basis for any of the versions. He highlighted the conflicting reports on the work history given to the experts as opposed to the plaintiff's own evidence

and submits that the claim for loss of earning capacity should be dismissed. In the alternative he submits that if the court is inclined to find that the plaintiff was employed that a 50% contingency deduction be applied to future loss of income which will equate to an award of R486 043.05 on the postulation of the plaintiff's industrial psychologist.

Onus

[12] The onus is on the plaintiff to prove his case on a balance of probabilities. He is required to adduce sufficient evidence of his employment to enable the court to assess and quantify the loss of earning capacity.

The law

[13] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate. The law in this regard is trite as is demonstrated in a very useful exposition of the law related to a claim for diminished earning capacity, where the learned Judge in *Prinsloo v Road Accident Fund* 2009 5 SA 406 (SECLD) at 409C-41A quotes extracts from *locus classicus* on the subject:

Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 2 SA 146 (A) where the following was said at 150A-D:

'In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoensposisie van die benadeelde voor die onregmatige daad en daarna. Kyk, bv, *Union Government v Warneke* 1911 AD 657 op bl 665 ... Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoensvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien.'

Dippenaar v Shield Insurance Co Ltd 1979 2 SA 904 (A) where the following was said at 917A-D:

'In our law, under the *lex Aquilia*, 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 constitutes a loss, if such loss diminishes the estate.'

[14] The difficulty in quantifying the monetary value of loss in claims of this nature is succinctly stated in *Terblanche v Minister of Safety and Security and Another* 2016 (2) SA 109 (SCA) at paragraph [14]:

'The difficulty with claims of this nature is generally not so much the recognition that earning capacity constitutes an asset in a person's estate, but rather the quantification of the monetary value of the loss of earning capacity by a trial court. Each case naturally depends on its own facts and circumstances, as well as the evidence before the trial court concerned.'

[15] In *Southern Insurance Association v Bailey NO* 1984 1 SA 98, the court referred with approval to the case of *Hersman v Shapiro and Company* 1926 TPD 367 at 379 per Stratford J where the following was said:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

[16] On the contrary, in *Lazarus v Rand Steam Laundries* (1946) (Pty) Ltd 1952 (3) SA 49 (T) at page 53 paragraphs B-F Bressler AJ, concurring with De Villiers J, elaborated on the duty of the appellant to prove damages:

'... We were urged, on the authority of *Turkstra Ltd V Richards*, 1926 T.P.D. 276, to find that, as there was an admission of damage, the Court should not be deterred by reason of the difficulty of computing an exact figure from making an award of damages...In *Turkstra v*

Richards there was an actual valuation, 'an estimate of some sort', in the language of Stradford, J.(as he then was)...

It does not seem to me that *Turkstra v Richards*, supra, meant that, given one or two facts, including that of damages, a judicial officer should then be required to grope at large in order to come to the assistance of a litigant, especially one whose case has been presented in such a vague way. It seems to me that the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative assessment, a state of affairs which would result in injustice to one of the parties...'

[17] In an unreported appeal in the Gauteng Local Division of *Boy Petrus Modise v Passenger Rail Agency of South Africa*, case number A5023/2013 (11 June 2014) at paragraph [10] against the dismissal of a claim for loss of earnings and future loss of earnings, Wright J held:

'This is an unfortunate case. One suspects that the plaintiff did suffer a past loss of earnings and will suffer future loss of earnings. However, I may not allow a suspicion nor my sympathy for the plaintiff, to translate into a basis for awarding damages where the evidence does not allow this. The variables in the equation are simply too many.'

Discussion

[18] The oral evidence of the plaintiff contradicts several of the expert reports. He was said to have remunerated in cash. Whilst his father confirmed to one of the experts that he was employed until the accident, no further confirmation was sought about how he was paid and if payslips were available. I would accept that any registered business will issue payslips considering the fact that statutory deductions have to be made and paid to the relevant institutions, including SARS. The confirmation of employment at the time of the accident by the plaintiff's father contradicts his own evidence and that supplied to a number of experts. No explanation is forthcoming from the plaintiff why payslips are not available nor bank statements for that matter. The variables in the contradictory evidence are just too many. The court is implored, notwithstanding the contradictory evidence to essentially embark upon conjecture and speculation in exercising a wide discretion in awarding loss of income and earnings. I am not at large to do so.

[19] I am not convinced that the plaintiff has proven the heads of damage for loss of income and earning capacity on a balance of probabilities. At most at this stage he stands to be compensated for general damages sustained as result of his injuries.

Order

[20] In the result:

1. Absolution from the instance is granted in respect of the claim for loss of income and earning capacity.
2. General damages as agreed is awarded in an amount of R550 000.00.



AH PETERSEN
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Appearances

For the Plaintiff: Adv. VM Magwane

Instructed by: M G Mali Attorneys

For the Defendant: Adv. AM Masonbuka

Instructed by: Diale Mogashoa Attorneys

Date Heard: 28 February 2018

Date of Judgment: 09 March 2018