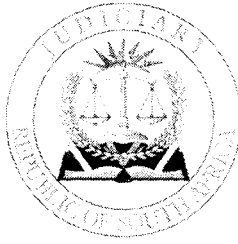


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

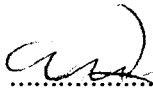
GAUTENG DIVISION, PRETORIA

29/3/17

CASE NO: 9269/2014

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED |

29/03/2017
DATE


SIGNATURE

In the matter between:

MTHOKOZISI THEOPHILUS MLOTSHWA

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 on the 01 June 2012 in which he sustained serious bodily injuries. The plaintiff was a passenger in a motor vehicle with registration number DVG 749 GP when it overturned.

ISSUE IN DISPUTE

[2] Merits and general damages have previously been settled in favour of the plaintiff. The only issue in dispute is the determination of past loss of income and loss of earning capacity. The plaintiff testified in support of proof of his income, whilst no oral evidence was presented by the defendant. The reports of the following experts, whilst handed in by consent forms part of the issue in dispute: Angelique Da Silva (Industrial Psychologist), Dr MC Kgosana (Industrial Psychologist), the joint report of the Industrial Psychologists (Dr MC Kgosana and Talia Talmud) and the updated actuarial calculations of Gerard Jacobson.

ISSUES OF COMMON CAUSE

[3] The evidence in the reports of the experts, Dr Imran Ahmad Khan (Orthopaedic Surgeon), Frizelna Steyn and Talia Tamud (Occupational Therapists), Natassha Annandale (Occupational Therapist), Dr André Vlok (Orthopaedic Surgeon) and the joint minutes of the Occupational Therapists (Frizelna Steyn and Natassha Annandale), is not in dispute and were handed in by consent.

[4] The plaintiff sustained the following bodily injuries as a result of the motor vehicle accident: right side rib fractures; right side haem pneumothorax; right patella fracture; laceration on the forehead; and a soft tissue injury to the right shoulder.

[5] The occupational therapists agree that the plaintiff's pre-accident work as a plumber, classified as medium to heavy work and his post-accident status no longer allows him to cope with the demands of being a plumber. He will not be able to cope with running his own plumbing business, due to the fact that he will not be able to engage in manual work. He has suffered occupational dysfunction and his career choices have been narrowed considerably due to the accident. He will remain disadvantaged in the

competitive manual labour fields of work in terms of efficiency, effectiveness and productivity as compared to a normal healthy individual of the same age and education level.

THE EVIDENCE

THE PLAINTIFF

[6] The plaintiff worked as a plumber for seven years prior to the accident. He currently works as a cashier at a Tavern where he earns R2500 per month. He is married and has 5 children, aged 15years, 6years, 5years, 3years and 6 months from four different mothers. Two of the 5 children live with him and his wife. Prior to the accident he maintained his children who were born at that time and currently continues to maintain all his children. Each child pre-accident received a maintenance contribution of R800 per month and he contributed financially to the school transport costs of his children. He currently spends R450 per month on his own transport costs. He maintained his mother with a R500 per month contribution. He rents a room at a house in Middelberg shared with his wife and two children, for R650 per month.

[7] The plaintiff himself maintains that he can no longer work as a plumber as a result of the injury to his knee and pain in his right shoulder. The plaintiff confirmed under cross examination that he was a self-employed plumber with two employees prior to the accident, generating an average monthly income of R19 000. From this income he paid his two employees at a rate of R110 per day, made business purchases and would be left with no less than R11 000, which he utilised for his personal needs and obligations.

[8] He conceded that he has no proof of any bank statements to prove his income, having been paid cash to hand by his clients; and he was not registered for income tax purposes with the South African Revenue Service (SARS). He in fact has no documentary proof of his income. He conceded that whilst he had a bank account pre-accident he only deposited small amounts of cash at any given time. He also has no proof of the maintenance payments he made as he disposed of the receipts once the money was paid. The plaintiff conceded that he now realises the importance of keeping records of his income and the maintenance payments.

[9] The plaintiff was confronted with the information he gave to the Industrial Psychologists, Talia Talmud and Dr MC Kgosana regarding his income. In the joint minutes of the said experts he reported that he generated R11 000 and R10 000 per month respectively. He maintains he had told both experts that he earned a minimum of R11 000 per month. He has no idea on what basis Dr Kgosana stated that he earned R10 000 per month.

[10] When confronted with Dr Kgosana's recordal of an amount of R8000 per month as his income at the time of the accident, he assumes this may have been the result of a language barrier between himself and Dr Kgosana. In all fairness to the plaintiff, it is evident that Dr Kgosana may have erred in this regard. In his report notes he records the R8000 as income earned for the period 2007-2012 and the R10 000 as income earned for the period 2006-2007, whereas in the joint minutes he defers to the R10 000 as income earned at the time of the accident.

THE INDUSTRIAL PSYCHOLOGISTS

[11] The Industrial Psychologists note in their joint report that the plaintiff attempted his Grade 12 during 1999, failed the year, and did not repeat it. At the time of the accident he was self-employed as a plumber working in the Middelberg area in Mpumalanga. He reported to Ms Talmud that he made a profit of R11 000 per month and to Dr Kgosana that his earnings amounted to R10 000 per month. Ms Talmud contacted a plumbing business in Middelberg to enquire if an R11 000 profit per month was reasonable. The information is hearsay by nature and no evidential weight can be attached to thereto in the determination of the plaintiff's earnings. As correctly in my view conceded by Ms Talmud in the report, the plaintiff having provided only an estimate of earnings she has to defer actual earnings to factual information.

[12] The Plaintiff reported that he remained unemployed from the date of the accident until November 2013 and although he attempted to recommence with his plumbing business he was unable to work as result of his weak right arm and knee. He thus suffered a loss of earnings during his period of unemployment. The plaintiff has secured work as cashier after the accident earning R2500 per month which was confirmed by his employer Mr Philemon.

THE ACTUARIAL CALCULATIONS

[13] The parties defer to the actuarial calculations of M.S. Jacobson of Gerard Jacobson Consulting Actuaries. Mr Jacobson was requested to assess the loss of income of the plaintiff, relying on the profit of R11 000 and R10 000 respectively reported to the industrial psychologists. His calculations were thus a culmination of disputed figures.

ONUS

[14] The onus is on the Plaintiff to prove his case on a balance of probabilities. He is required to adduce sufficient evidence of his income to enable the court to assess and quantify the loss of past earnings and future loss of earnings.

THE LAW

[15] 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**¹, quotes extracts from *locus classicus* on the subject:

Santam Versekeringsmaatskappy Bpk v Byleveldt² where the following was said at 150B-D:

"In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie van die benadeelde vóór 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 vermoënsvermindering 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 Ltd³ the following was said at 917B-D:

¹ 2009 5 SA 406 (SECLD) at 409C-410A

² 1973 2 SA 146 (A)

³ 1979 2 SA 904 (A)

"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."

[16] 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**⁴ at para [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."

[17] The approach to adjudicating loss of earnings is often argued from the perspective of the passage found at 113F-114E of the *locus classicus* of **Southern Insurance Association v Bailey NO**⁵ where it was said:

"... 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 an estimate, which is often a very rough estimate, of the present value of the 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 guess-work, 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.

It is manifest that either approach involves guess-work to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman v Shapiro and Company* 1926 TPD 367 at 379 per Stratford J:

⁴ 2016 (2) SA 109 (SCA)

⁵ 1984 1 SA 98

'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.'

[18] I agree with the salutary practice proposed in the above quoted paragraphs of **Bailey**. It has mustered approval in numerous judicial pronouncements and is widely accepted as the best practice available. I wish to add however, what the learned judge said further at page 379, which is omitted in **Bailey**. The two sentences which follow immediately upon the quote in **Bailey** are apposite:

"...It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it."

[19] In **Lazarus v Rand Steam Laundries**⁶, Bressler AJ, concurring with De Villiers J, elaborated on the duty of the appellant to prove her damages. At page 53 at paras B-F:

"...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..."

EVALUATION

[20] The plaintiff is the only source of information regarding his employment history and earnings. The recommendations of the industrial psychologists are premised on the information supplied by the plaintiff and the actuarial

⁶ (1946) (PTY), LTD 1952 (3) SA 49 (T)

calculations are in turn based on the industrial psychologists reports. The paucity of the evidence of the plaintiff is that he generated an average income of R19 000 per month and after certain payments he would be left with no less than R11 000 per month on average. In evidence in chief the focus was predominantly on disbursements made by the plaintiff in respect of maintenance and transport costs for his children, a payment to his mother and payment of a non-fixed daily remuneration for each of two employees. The evidence provided no direct detailed evidence of income. It also provided no basis, even if premised only on estimated values, on which the court could make a reasonable and fair determination of the plaintiff's income. Costing charges germane to the plumbing profession, if applicable and applied by the plaintiff, which would include, *inter alia*, call out fees, hourly rates, out of hours work, drain cleaning, installations and costs of materials and profit mark up on same, was not tendered.

[21] 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. It appears common cause between the parties that there has been a past loss of income and there will in all likelihood be a future loss of earnings. However, the paucity of evidence is such that it calls upon me, in exercising the wide discretion I am afforded, to embark upon conjecture and speculation in quantifying the damages. I am not at large to do so.

[22] In conclusion, an analogous situation arose in an unreported appeal of the Gauteng Local Division, **Boy Petrus Modise and Passenger Rail Agency of South Africa**⁷. On appeal against the dismissal of a claim for damages for loss of earnings and damages for future loss of earnings, Wright J, Carelse J concurring, held:

⁷ Case number A5023/2013 (11 June 2014) at para [10]

"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."

[23] In the result, the plaintiff has failed to prove his heads of damages for past loss of income and future loss of earnings.

ORDER:

In the result:

[24] Absolution from the instance is granted with costs.



AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Plaintiff: Lekalakala Attorneys

On behalf of the Defendant: Tau Pahlane Attorneys

DATE HEARD: 15 November 2016

DATE OF JUDGMENT: 29 March 2017