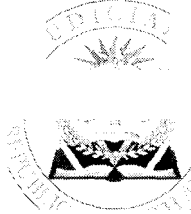


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/3/17

CASE NO: 49425/2014

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

29 MARCH 2017

DATE

.....
SIGNATURE

In the matter between:

RICHARD PRETORIUS

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 14 May 2011 in which he sustained serious bodily injuries. The plaintiff was a passenger in a motor vehicle with registration number [F...] at the time of the collision.

ISSUE IN DISPUTE

[2] Merits have previously been settled 100% in favour of the plaintiff and an undertaking furnished in terms of section 17(4)(a) of the Road Accident Fund Act for future medical expenses. 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. 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: Sandra Moses (Industrial Psychologist) and Chari du Plessis and Alex Munro (Actuaries).

ISSUES OF COMMON CAUSE

[3] The evidence in the reports of the experts, Dr SK Mafeelane and Professor JH Fleming (Orthopaedic Surgeons), Adelaide Phasha and Natassha Annandale (Occupational Therapists), Professor P Lekgwara (Specialist Neurosurgeon), 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: head injury; fracture of the right hand with tendon damage; multiple soft tissue injuries.

[5] According to Doctor Mafeelane the plaintiff has lost 5% loss of work capacity but should be able to work until normal retirement age. Professor Lekgwara observes that whilst the plaintiff suffered a grade 1 concussion (described as "no loss of consciousness; post traumatic amnesia less than 30 seconds), the injury does not normally give rise to long term sequelae. A small percentage of patients may suffer from post-concussion headache and neuropsychological complications which will need treatment. Ms Phasha holds the view that the plaintiff should be able to continue to perform pre-accident work related tasks subject to noting that load mismatches could aggravate pain in his injured right hand.

THE EVIDENCE

THE PLAINTIFF

[6] The plaintiff was employed as a salesman and operator by Talisman Hire Potchefstroom for a period of 1 year and 8 months at the time of the accident. Prior to Talisman Potchefstroom he worked at Talisman Zeerust for 6 years and 4 months. He *recalls* his income at Talisman Hire Zeerust being *"something like"* R2800 per month. At Talisman Potchefstroom he earned R4900 per month after deductions, *"but it varied"*. His basic earnings were *"plus minus R5200 per month"*, but it would vary from R6900 to R7000 per month when he worked overtime. At the time of consultation with his attorney he had no proof of his income. The reason for this he says is that he was no longer on good terms with his girlfriend who refused to hand over his personal belongings; and his former employer's attitude towards him changed because of his work performance, he resigned 3 months after the accident and all attempts at securing payslips failed. Under cross examination he testified that he was not aware that he had to produce the said documents.

[7] The plaintiff's evidence is that he *"sat at home for a year and nine months plus"* after resigning from Talisman Potchefstroom before he did occasional odd jobs. He sought employment but was afflicted by constant pain and only earnestly sought employment when his child was two years old and he had been *"sitting at home"* for three years. He secured employment as a petrol attendant at a friend's filling station, where he is currently employed in a supervisory position, earning R4800 per month. He suffers regular memory loss which has created tension between himself and employer and he has been confronted orally about his performance and a day before his evidence had received a written warning.

[8] He conceded under cross examination that his salary estimated at R6900 to R7000 per month was paid partly into his bank account and part by hand. The basic salary was always paid into his bank account and he had been provided with payslips. He does not dispute that he told the Industrial Psychologists that he earned R4500 per month from 2010 to September 2011. The reason for this he says was that he was paid money *"on the side"*. He vehemently disputes that he told Ms Moses that he currently earns R2800 per month which is what he earned at Talisman Hire. He was at pains to explain the contradiction in his evidence that he

returned to Talisman Hire Potchefstroom six weeks after the accident whilst telling Ms Moses he had returned to work after three months.

THE INDUSTRIAL PSYCHOLOGIST

[9] Ms Moses report was outdated at the time of trial. Counsel for the plaintiff indicated that reliance would still be placed on the report insofar as it relates to the plaintiff's evidence on the issue in dispute. Specific reliance was placed on the pre and post-accident employment prospects and not on the postulations regarding loss of earnings.

[10] Ms Moses noted that the plaintiff has a grade 11 level of education. At the time of the accident in May 2011 he was employed as a front counter assistant at Talisman Potchefstroom since June 2011. He had previously worked for Talisman in Zeerust for seven years. Ms Moses opines that the plaintiff would have continued as a front counter assistant or other similar position until a better position was available. Given his low level of education coupled with his work experience he would have remained in this capacity within the non-corporate semi-skilled labourer category, until his retirement at age 60-65 years. Post-accident the plaintiff returned to his employment after three months of recuperation and resigned three months later in September 2011. He thereafter remained unemployed for two years. In 2013 he worked in part time sales in Zeerust for 8 months. He was then unemployed from June 2013 to June 2014, when one Jaco Pretorius employed him to do generator repairs, a position he still occupies.

THE ACTUARIAL CALCULATIONS

[11] The actuarial calculations were premised on outdated information.

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 income to enable the court to assess and quantify the loss of past earnings and future loss of earnings.

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

Santam Versekeringsmaatskappy Bpk v Byleveldt² where the following was said at 1508-D:

"In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geeis en skade beteken die verskil tussen die vermoensposisie van die benadeelde v66r 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 Ltd³ the following was said at 9178-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**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."

¹ 2009 5 SA 406 (SECLD) at 409C-41QA

² 1973 2 SA 146 (A)

³ 1979 2 SA 904 (A)

⁴ 2016 (2) SA 109 (SCA)

[15] 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** NO⁵ 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:

'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] 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

⁵ 1984 1 SA 98

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."

[17] 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

[18] The oral evidence of the plaintiff is the only source of information on his income. Notwithstanding evidence of being furnished with payslips and deposits of his basic income into a bank account, none of this documentary evidence was adduced as evidence. The plaintiff was very disingenuous by claiming that he did not have the said documents for two reasons: he was estranged from his girlfriend who refused to hand over his personal belongings; and an employer who claimed to no longer have copies of payslips available as they too had parted ways on a bad note. This evidence is contradicted under cross examination when he testified that he was unaware that the documents were required. These issues speak to credibility of the plaintiff on this very pivotal evidence required to assist in the assessment and quantification of his claim. The reliability of the information furnished to Ms Moses is in stark contrast to the plaintiff's evidence and he calls her credibility into question on the incorrect income he furnished to her. There is no basis to question the reliability of Ms Moses report when regard is had to the plaintiff's constant contradictory evidence and his assumptions on what he earned. He would want the court to assess on these assumptions that cash payments to hand which would

⁶ (1946) (PTY), LTD 1952 (3) SA49 (T)

by implication have escaped the eye of the Receiver of Revenue, be taken into account to assess his heads of damage. On the paucity of contradictory evidence, the plaintiff calls on 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.

[19] 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:

"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."

[20] The conduct of the legal representatives of the plaintiff in persisting with the claim, mindful that there was no documentary evidence in the form of payslips or bank statements; and armed only with the outdated Industrial Psychologist report is most unfortunate.

[21] 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:

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



AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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

Appearances:

On behalf of the Plaintiff: TSEBANE MOLABA INC

On behalf of the Defendant: MPHELA AND ASSOCIATES

DATE HEARD: 16 November 2016

DATE OF JUDGMENT: 29 March 2017