

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO:82393/14
18/4/2017

In the matter between:

THABANE ABSON MBATHA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PETERSEN AJ:

[1] The plaintiff THABANE ABSON MBATHA instituted a claim against the defendant, THE ROAD ACCIDENT FUND, arising from a motor vehicle collision on 24 December 2011 where he as a pedestrian was struck by a white Nissan truck with

registration number [...](“the insured vehicle”).

[2] The plaintiff sustained the following injuries:

- 2.1 Multiple facial fractures;
- 2.2 Tibula fracture;
- 2.3 Severe bruising; and
- 2.4 Severe scarring over his face and upper limbs.

[3] The parties reached an agreement on the following heads prior to the commencement of the matter:

3.1 an undertaking in terms of section 17(4) (a) of the Road Accident Fund

Act, 56 of 1996, limited to 80%, for future accommodation of the plaintiff in a hospital or nursing home for treatment of or rendering of a service or supplying of goods to him, to compensate the plaintiff in respect of the said costs after the costs have been incurred and on tendering of proof thereof, arising from the collision which occurred on 24 December 2011.

3.2 compensation of general damages in the amount of **R300 000.00**

3.3 that the claim for past hospital and medical expenses be postponed *sine die*.

3.4 that the calculation in the actuarial report of Human and Morris dated 05 April 2017 in respect of loss of earning capacity was not contentious.

[4] The narrow issue for determination by this court is the contingency to be applied to the loss of earning capacity.

[5] The following reports were handed in by consent:

- 5.1 Dr DA Birrell (Orthopaedic Surgeon)
- 5.2 Dr JPM Pienaar (Plastic Surgeon)
- 5.3 Dr EJ Muller (Maxillo Facial)
- 5.4 Dr JJ du Plessis (Neurosurgeon)
- 5.5 C Macdonald (Occupational Therapist)
- 5.6 T Reynolds (Clinical Psychologist)

5.7 Dr D Schreuder (Industrial Psychologist)

5.8 Human and Morris (Actuary)

[6] The plaintiff's highest level of education is Grade 10. His employment history **is** as follows: from 2004 to 2005 he worked as a back griller at Nando's Alberton; was unemployed from 2005 to 2007; held the position of built-belt driver and cleaning spillage underground at Impulelo (Standerton) Anglo American; and he has been an Engineering Senior Assistant at Zibulo Colliery from 2010 to date. His income at the time of the accident was as follows: Basic Salary (R4733.00 per month); Bonuses (R3854.80 per month); Housing Subsidy (R3993.00 per month) and a travel allowance of R2494.00 per month.

[7] Dr du Plessis in his report recorded that *"No loss has occurred due to a brain injury. There has been a 5% loss of work efficiency due to compression fractures to his thoracic vertebrae. He will probably have to retire at the age of approximately 64 years due to the sequelae of the back injury."* The retirement age at the plaintiff's current employer is 63 years, one year shy of the prognosis of Dr du Plessis. Ms Macdonald postulates that *"Despite the symptoms Mr Mbatha complains of when working, he still copes with his job and did the past nearly five years. He can continue doing his job and should find it easier following optimal physical conditioning."* Dr Schreuder submits that *higher post-morbid contingency deduction is indicated on the same basis of quantification as for the premorbid scenario to make provision for loss of earning capacity, early retirement and the impact the combination of his problems has on his work efficiency and productivity."*

[8] The plaintiff returned to work after his ordeal and has continued working in the same capacity for the last five years notwithstanding his medical constraints. An undertaking has been given for future medical expenses which should ameliorate the impact of his medical conditions.

[9] Adv Williams SC for the plaintiff submitted that in the circumstances of this matter it would be fair and equitable to apply a contingency differential between uninjured and injured income of 10%. The basis of this contention is that the plaintiff still has some 30 years to work, that there is a risk of the plaintiff losing his employment as result of his medical conditions without being able to secure alternative employment given his qualifications.

[10] Adv Nyandeni for the defendant submitted that a contingency differential between uninjured and injured income of 5% should be applied. The basis of the contention is that the plaintiff is still young and he is still employed in the same position he held pre-accident.

[11] It is widely 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. In *Dippenaar v Shield Insurance Co Ltd*¹ the following was said at 917B-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."

The law in this regard is therefore trite. 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*² 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."

[12] The determination of contingency allowances remains within the discretion of the court, which varies appreciably amongst judicial officers. *Shield Insurance Co Ltd v Booysen*³. 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*⁴ 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,

¹ 1979 2 SA 904 (A)

² 2016 (2) SA 109 (SCA)

³ 1979(3) SA 953(A) at 965 G-H

⁴ 19841 SA98

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.'

[13] The plaintiff and defendant are not far apart on their submission of what would be a fair amount. Upon a careful preponderance of the facts of this matter I am satisfied that the submission advanced on behalf of the plaintiff would account for any of the eventualities envisaged in the next 30 years before the plaintiff reaches retirement age.

[14] In the result I accept the 10o/o differential as set out in Human & Morris's report which amounts to a nett loss of **R788 451.00**. The nett loss with the amount agreed in respect of general damages totals **R1088451.00**. From this amount 20% as agreed must be deducted bringing the loss of earning capacity to **R870 760.80**.

[15] The order granted is accordingly in terms of the order attached marked X, duly incorporated into this judgment, with the insertion of the amount of **R870 760.80**.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Plaintiff: Adv Williams SC

Instructed by Marais Basson Incorporated

On behalf of the Defendant: Advocate Nyadeni

Instructed by TM Chauke Incorporated

DATE HEARD: 18 April 2017

DATE OF JUDGMENT: 18 April 2017