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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

Case Number: 25773/2013

In the matter between:

DATE: 10/6/2015

PIETER EDUARD TOERIEN VILJOEN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

POTTERILL J

- [1] The plaintiff instituted action against the Road Accident Fund (hereinafter referred to as “the Fund”) for personal injuries flowing from a collision on 17 May 2008 wherein the plaintiff was a passenger. The Fund conceded the merits of the matter on a 100 % basis in favour of the plaintiff.
- [2] The parties settled general damages in an amount of R300 000. The Fund gave an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 for future medical hospital and related expenses.
- [3] The only issues in dispute were the loss of earnings and/or the loss of earning capacity of the plaintiff. The Fund had no expert reports and accepted the expert reports filed on behalf of the plaintiff.

Summary of evidence

- [4] The plaintiff was [...] years old at the time of the accident. He testified that after the accident the paramedics examined him and told him that his injuries were “*not too bad*” and he was accordingly not taken to hospital. Dr. Pretorius, the industrial psychologist, stated that he was in fact informed that the plaintiff waited for two hours after the incident for an ambulance to arrive and later just went home. The plaintiff did however experience a stiff neck and his lower back was painful. He

went to his personal doctor, whose name he cannot recall, and the doctor prescribed a muscle relaxant.

- [5] The plaintiff gave no evidence as to what impact the accident had on his health from the day following the accident until August 2011, i.e. a three year, three month period. From Dr. Piet Engelbrecht's, the orthopaedic surgeon, report it is clear that the doctor also had to question the patient as to what transpired in this period and I quote from page 3 paragraph 3 of his report:

"At this stage the patient was questioned directly regarding the period 2008 until 2011. He states that his left arm started to be symptomatic with loss of sensation approximately one month after the incident. Initially symptoms subsided spontaneously, only to recur during the period of 2008 to 2011."

- [6] In 2011 he came to Pretoria to visit and he was suddenly immobilised in that he experienced a loss of sensation and function of his left arm. He went to see a doctor and he was referred to Dr. J. du Plessis. After consultation Dr. Du Plessis suggested that a neck operation must be performed immediately. This in fact transpired and he spent two days in ICU and four days in the unit. He was booked off for six weeks after the operation.

- [7] It was his evidence that he still has constant pain in his neck and lower back despite the operation. He therefore attends sessions at a physiotherapist when he can afford to do so. He also takes muscle relaxants on a chronic basis. The injuries impacted on his life in that pre-accident he was very sporty and did archery, fishing whenever he could, hunting and he played cricket. He cannot partake in these activities any longer. He cannot do basic tasks in his everyday life for instance he could not carry a 20 kg dog food bag or cut the lawn as the vibration of the lawnmower caused him pain.
- [8] In his work life he is hampered because he cannot sit and stand for long periods. Currently he is a lecturer at Sol-Tec College where he is a theory lecturer fitter and turner. This requires from him to stand from 08:00 to 15:00 every day and he finds that difficult. He finds the stairs at Sol-Tech challenging and he also struggles to carry his study material. He also struggles to sit and mark papers for lengthy periods of times.
- [9] Despite these challenges he dearly would want to become an artisan himself and to do so he would need to obtain his "Rooi Seël". To achieve this he would have to take 18 months to 2 years off work. This would put him in a position to also teach the practical part and not only theory. He does however foresee that lecturing in the practical part would be an uphill battle as he cannot stand long hours at the machines. He would also battle to physically handle the machines as it would cause

him pain. The vibration of the machines vibrates in his neck and causes him pain and suffering. He did however persist in attaining this goal as it would afford him an opportunity to move up to the Head of the Department or even be the Head of Sol-Tech. On a question by court he conceded that his ambition to obtain this goal is futile and misplaced and reliance thereon in scenario 2 (actuarial calculation of loss of earning capacity) is thus not achievable. This was also confirmed by his evidence that another college had approached him, he had obtained the job, but then had to inform the college that he would not be able to do the practicals and he did not obtain this employment. Dr. Pretorius also testified that scenario 2 is not the correct scenario to employ.

[10] Although the witness initially testified passionately that he wanted to move upward in an institution like Sol-Tech, he then when confronted with the futility of the scenario, informed the court that his real passion is teaching at school level.

[11] From his employment history it was clear that he started his career at Hoër Tegnies Tom Naudé Skool employed as a governing body post which he did for two years. From the report of Dr. Pretorius it seems that he moved from Hoër Tegniese Tom Naudé Skool to Laerskool Pietersburg. Thereafter he worked as a shop assistant in a bow shop and followed that up with employment at Hoërskool Frans du Toit for a year. He then in 2012 took up a teaching post at Hoërskool Overkruin followed by in 2013 teaching at Hoër Tegniese Skool John Vorster. From both the occupational

therapist's report as well as Dr. Pretorius' report it was noted that he left Tom Naudé Higher Technical School for a better salary. On the occupational therapist's report he left Pietersburg Primary School and Overkruin High School for better salaries. According to Dr. Pretorius' report he left Hoërskool Frans du Toit because of the fusion and his prolonged absence from work. From the occupational therapist's report it was noted that he left the school as he was unable to coach rugby due to neck pain. In his evidence in chief Mr. Viljoen persisted that the fact that as a male teacher he could not coach any sport he would not be able to advance to a Department Head or a Principal. He was also not competitive as the schools would opt for a male teacher who could coach as well.

[12] It was strange that the witness was being appointed at schools as an educator without him having any qualification. From questions from the court it became clear that they appointed him on the subjects that he had passed doing his Civil Engineering degree. It later in his evidence transpired that in fact he had attained a civil engineering degree, but he had never obtained the degree certificate due to having outstanding fees.

[13] Despite this he the next year started with mechanical engineering again at the University of Pretoria. The plaintiff however proceeded to study his BEd in the year 2004 at the University of Pretoria. He did so after he had obtained his degree as a civil engineer. He did not complete his studies after 2006 as he had financial

limitations due to the passing of his father. He started studying BEd at Unisa in 2007 up to 2015. Unisa did not recognise any of the subjects that he had passed at the University of Pretoria. To Dr. Pretorius he had reported that out of 40 modules he only had 15 modules to complete. In evidence in chief he testified that dependent thereon that he passes 3 modules this year he would be left with 22 modules. The witness has thus been studying from 2004 until 2015 to obtain his BEd degree. He acknowledged that without a degree any upward movement in teaching is unrealistic. According to the witness this is however not the problem, the main career limiting element was that he could not coach sport. It was however n cross-examination revealed that despite him not coaching he was at the very least acting as a cricket umpire which entailed that he would stand for at least 3 hours at a time.

[14] The plaintiff also called Dr. Pretorius to testify. He sketched two potential career scenarios:

Scenario 1

Employment as a teacher at a primary or secondary school. With satisfactory work performance the plaintiff would have grown his career earnings with at least one notch per annum. He would also have been able to secure a HOD position at around age 40. His chances to secure a promotional position after the age of 40 is unclear considering his education and work history. The very small possibility of promotion to a Deputy Principal at around 50 to 55 could however not be ignored.

Scenario 2

Alternatively Mr. Viljoen could have completed his training as educator and could then have secured employment at a FET college like Sol-Tech. He could have secured a lecturing position. He however in evidence in chief conceded that scenario 1 was the better scenario.

[15] In a nutshell Dr. Pretorius testified that but for the accident the plaintiff's career as an unqualified teacher would have followed a pattern of limited unemployment and constant renewal of contracts and his earnings would at least be comparable to his post accident earnings. Put differently, the rate that he earned pre and post accident in a teaching role postulated no difference. If he had qualified as an educator towards the end of 2014 then at very best for the plaintiff there could only be a past loss of income for the period 2015 up to the date of the trial.

[16] Dr. Pretorius found it strange that the plaintiff never informed him of his engineering studies and that he had in fact obtained a degree. He also confirmed that if that had been revealed to him it would have impacted on his report. Dr. Pretorius testified that the impact on the plaintiff's earning capacity was only that his growth would be slower; it would take him four years longer to reach a Head Department post. The sequelae of his injuries would accordingly not affect him reaching the pinnacle of his career, it would just take him longer. It was also his opinion that the

plaintiff would be less competitive because of his inability to coach sport in that it would impact on his promotion. It was further his opinion that the plaintiff had a 15 % loss of work capacity and not 30 % as opined by Dr. Engelbrecht. He reiterated that the plaintiff did not suffer any past loss of income.

[17] Mr. Viljoen did not make a good impression on the court. From beginning to end there was a thread of inconsistencies in his evidence. The record shall reflect that the witness testified that the day after the accident he went to his *“personal doctor”* but he could not remember his name. In cross-examination he said that it was not his personal doctor it was a GP i.e. a general practitioner. This is relevant as to the treatment he received and how reliable the treatment was. The only treatment was muscle relaxants for the period; not indicative of a serious injury. Directly after the accident he went to work; once again not indicative of any serious injury. In court he testified that the paramedic told him that his injury is not “too bad” yet he informed Dr. Pretorius that the paramedics took so long to come that he just went home.

[18] This witness is silent about any doctors’ visits, therapy or any kind of medical treatment for the period 2008 (after date of accident) until the date of the operation in 2011. The defendant’s submission is correct that if Mr. Viljoen was in such severe pain and agony he should have mitigated his damages by seeking another doctor’s opinion, going to the physiotherapist and/or rendering his environment

friendly to his situation, for instance ergonomic chairs, a briefcase on wheels, a tilted working station etc. By not taking these steps and not testifying to any of these steps being taken the plaintiff exasperated his situation.

[19] In court he testified that at the time of the collision he worked in the bow shop (an archery shop) where he had to assist clients. This was confirmed by the occupational therapist, but the industrial psychologist submitted that at the time of the accident he worked at the Laerskool Pietersburg. In cross-examination when confronted by a letter from a Mr. Potgieter from Laerskool Pietersburg the witness admitted that he did work at Laerskool Pietersburg at the time of the accident. He also told the court that he had to leave the bow shop because he could not actively assist the clients anymore due to his injuries, yet in the occupational therapist's report on page 6 the following is stated:

"... He states that he worked at The Bow Shop as a manager in Polokwane. He had worked there for a few months before the accident occurred. Upon his return to work his job description remained the same. Mr Viljoen states that he continued with his work functions and then subsequently went on to work as a teacher (unqualified) as described in the table above."

Nothing was said to the occupational therapist that he had to leave The Bow Shop because he could not perform his functions.

[20] This witness obtained employment at Sol-Tech in 2014, six years after the accident and three years after the operation. He told the court that he loved anything technical and loved technical teaching. That is why after civil engineering he went to mechanical engineering. This was his passion and he wanted to be a Head of Department at Sol-Tech or in fact he wanted to be the Head of Sol-Tech itself. In his evidence in chief he told the court that Sol-Tech was putting pressure on him to teach the practical but that he could not do this due to his inability to stand and illustrate with the machines and also physically work with the machines. Dr. Pretorius contradicted this and testified that Sol-Tech would love to attain his services at the theory level because the students were performing brilliantly. In fact Sol-Tech had given him two options, not only pressuring him to do the practical; if he did a BEd he could stay on as a lecturer of theory. This “pressure” does not exist and was created and blown up to cater for a post-accident scenario wherein his dreams have been crushed; but for the accident he would have attained a full time post at Sol-Tech. He simply could not have achieved this, he did not have a BEd and he did not have a “Rooi Seël” pre-accident. When he was confronted with the futility of this scenario he then informed the court of his real passion.

[21] This passion was teaching at school level. The reason was that he could impact on the forming of a student’s life at school level whereas the N1 and N2 students did not want to be at Sol-Tech and he had little impact on them as people. The

accident had however impacted on this dream because he could not renew contracts and compete with male counterparts who could coach athletics, soccer, cricket and rugby. Yet again there is a question mark about this evidence because his own occupational therapist reports that the plaintiff left most of his posts teaching for better salaries. The situation is simply the following; he had no teaching qualification and without any teaching qualification he would only be appointed on contract. He did not have a BEd before the accident and until today he does not have such qualification. Dr. Pretorius could not forward any reasons as to how the accident had impacted on the plaintiff not obtaining his degree. The plaintiff himself testified that for 2011 he did no studying due to the fact that he could not sit and stand for long periods. Even if I accept that for 2011 he could not write examinations, three years later the plaintiff still has no qualification. In the report of Dr. Pretorius it recorded that Unisa did not recognise any of the subjects that he passed at the University of Pretoria in the years 2004 to 2006. Yet in court he testified that the BEd is 80 modules, but that Unisa had recognised 40 so he only had to complete 40 modules. The plaintiff thus had from 2004 to 2015 (11 years) not obtained his BEd. The non-obtaining of the BEd is definitely not due to the accident.

- [22] The only question thus remaining is whether the fact that the plaintiff cannot coach renders him a monetary award for loss of earnings or earning capacity. Dr. Pretorius testified that he would obtain a job as a teacher, but the fact that he did

not coach would impact in that it would take him four years longer to reach Head of Department. The plaintiff himself testified that he could not compete because he could not coach, yet in cross-examination he informed the court that he went on cricket and rugby tours and on the cricket tour he umpired for three hours at a time; i.e. standing still for three hours. The afterthought of *“yes, but he could move a little bit while standing”*, is rejected because he can also move a little bit while lecturing or coaching.

[23] The court does not readily deny a plaintiff a patrimonial claim for a true loss of earning capacity. On the other hand a court is loath to grant an unjustified claim and has a duty to protect the taxpayer’s money. In *Bvuma v RAF* 2012 SA (GSJ) case number 2010/17220 delivered by Satchwell J on 14 December 2012 the following was found:

“[10] There is no information before the court from the Department of

Education or elsewhere:

a. ...

b. Setting out the duties and responsibilities of South African primary school teachers with regard to afterhours extra-mural activities. I do not know if there could be any adverse consequences if Mrs Bvuma cannot or does not coach sports.”

“[13] It is expected in litigation seeking compensation for loss of earnings or earning capacity that evidence is obtained by the attorneys from the horse’s mouth – as opposed to hearsay information distilled through such ‘medical experts’ who may not seek out original sources concerning employment.

[14] For instance, in Fulton v Road Accident Fund (2007/31280) [2012] ZAGPJHC 3; 2012 (3) SA 255 (GSJ) (1 February 2012), claimant’s direct employer, the principal of the school at which she was teaching, testified to what exactly was required of her in the classroom and on the sports field and by way of administrative duties and he was able to comment exactly how and to what extent she was or was not able to carry out those responsibilities post accident and the implications for the school and for her career. Similarly, in Seconds v RAF [2008] JOL 22074 (EL), the principal of the school where the claimant taught gave evidence as to the activities required of a primary school educator, the nature and amount of mobility required of the claimant in the classroom, the content of applicable regulations concerning both mobility and performance of extra-mural activities and retirement options available to teachers.”

[24] In *casu* I have the expert stating that the plaintiff shall be appointed as a teacher despite the plaintiff not being in a position to coach. The plaintiff contradicted this and stated that he will not be appointed and his contracts were in fact not renewed. I have no evidence from the Principal or the Education Department to clear up the conflicting evidence. I am in any event not convinced that if the plaintiff can umpire he cannot coach.

[25] I have no evidence from the Department of Education or Principal that if the plaintiff is an excellent teacher, which he seems to be, he would not be promoted to Head of Department because of his lack of coaching. This was the only factor left to base a decision on as to whether there was a loss of earnings or loss of earning capacity.

[26] I find it disturbing that the counsel for the plaintiff would persist with a claim for past loss of income when the plaintiff's own expert testified that there was no past loss of income.

[27] I am accordingly satisfied that the plaintiff did not prove any loss of earnings or earning capacity.

[28] I mark the draft order "X" and make it an order of court. I have in paragraph 1 filled in the amount of R300 000 constituting the amount of general damages for pain and suffering.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 25773/2013

HEARD ON: 7 May 2015

FOR THE PLAINTIFF: ADV. R.D. DE ALCANTARA

INSTRUCTED BY: Savage Jooste & Adams Inc.

FOR THE DEFENDANT: ADV. T.K. MOTLOUNG

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DATE OF JUDGMENT: 10 June 2015