

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 3123/2013

In the application between:-

SAMUEL C MJEZU

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT BY: MOLOI, J

HEARD ON: 17 FEBRUARY 2015

DELIVERED ON: 02 MARCH 2015

MOLOI J.

- [1] This judgment is about the determination of the plaintiff's loss of earnings brought about by his becoming totally incapable of being

gainfully employed as a result of the injuries he sustained in a motor collision that occurred on the Bloemfontein / Thaba Nchu road on 27 March 2011. All the other aspects of the claim had been settled on 10 October 2014 and the defendant was found to be 100% liable for the compensation of the plaintiff. The only issue was how much did the plaintiff earn at the time of the accident in order to determine his loss of earnings since the date of the collision to his retirement age.

- [2] The plaintiff was employed as a construction supervisor and driver by one Pieter de Bruyn (de Bruyn) who owned a construction company building houses for sale since 2004. There was no proof of his earnings as he was paid in hard cash and the employer did not keep record of the plaintiff's earnings. The amount claimed under loss of earnings already suffered was R845 165-00 and that claimed as future loss of earnings was R3, 883 650-00 both of which were disputed by the defendant.
- [3] When he started working for de Bruyn the plaintiff was paid R1 000-00 per week in cash. Later his earnings were increased to R8 000-00 per month as he had increased responsibilities and saw to all work been done properly and supervised the other employees. He was paid when a house they built was completed. Any loans from the employer were deducted from the amount of the earnings, but received no salary advice, nor did he have a written employment contract.

- [4] When he threatened to leave for another construction company his earnings were increased to R15 000-00pm. Of this money he would give his wife amounts of R9 000-00 or R10 000-00 and sometimes R11 000-00 per month. After completing three houses in a year he would be paid a bonus of between R5 000-00 to R20 000-00. It took two months to complete a standard house but three to four months to complete a double storyed house. The balance of the money he used for rental, groceries, clothing etc. for himself as he was staying in Bloemfontein and his family lived at Verkeerdevlei. He also gave his niece an amount of R500-00 per month and she was staying in Bloemfontein. The people he maintained at home were his wife and his two children. He was in the process of extending his house in Verkeerdevlei. He used approximately R600-00 per week on entertainment. His wife had accounts at shops though he could not remember which. His rent in Bloemfontein was R1 200-00 per month. His groceries cost him R2 000-00 per month and transport cost him R24-00 per day.
- [5] He was confronted with the report of Munro Forensic Actuaries to whom his employment certificate showed that in 2011 his basic salary was R5 000-00 per week and he earned R1 000-00 per week in overtime work and he said if his employer made such a certificate, then he, the employer, was wrong. He was also confronted with a report by Dr. AC Strydom, an Industrial Psychologist, to whom he said he worked for Ringside Construction being a firm owned by De Bruyn since 1996 as a driver / foreman and that he earned

R15 000-00 per month plus overtime throughout till the date of the accident. He answered that Dr. Strydom was wrong. He could neither explain why he told Letitia Delport, an Occupational Therapist, that from 2003 to 2011 he was a self-employed contractor and contractor for Pieter de Bruyn. He however stated that at a stage he was unemployed and received UIF payment but not from Pieter de Bruyn. He insisted he was employed by de Bruyn.

- [6] Bongani Mjezu testified that he was a nephew of the plaintiff and as a student at the Central University of Technology in Bloemfontein he received financial assistance from the plaintiff until he completed his studies. His parents could not help him. His uncle, the plaintiff, gave him between R2 500-00 and R3 000-00 per month to cover his accommodation, meals, studies, transport and clothing, needs. The money he received from his aunt, the plaintiff's wife, and this was paid to him monthly. He would travel to Verkeerdevlei to collect the amount every month.
- [7] Pieter Sarel de Bruyn testified he was the plaintiff's employer from 2004 until the date of the accident. The plaintiff was a builder and his initial wage was approximately R1 500-00 p.m. He had been in the business of buying stands and building houses which he sold for almost thirty years. The plaintiff was indispensable for the growth of his business as he could read the plans, lay out the foundations and produced a complete house. His business flourished because of the

plaintiff's contribution and dedication. Between 2009 and 2011 he build and sold 32 houses. He would make a profit of between R25 000-00 to R150 000-00 per house sold. He was paying the plaintiff approximately R15 000-00 per month. When they did not have work he would give the plaintiff R200 to R500-00 or R10 000-00 per month, sometimes he would give the plaintiff between R2 000-00 and R6 000-00 as he pleased. He never kept records of payments he made to the plaintiff but paid him R20 000-00 on average because the plaintiff was the "*goose that laid the golden egg*" for him. His competitors wanted to entice the plaintiff to their construction companies. In 2010 he made a turnover of approximately R4m. His bookkeeper who kept the records for tax purposes had no record of what he paid to the plaintiff. In 2004 the plaintiff was paid R1 000-00 per week which grew to R1 500-00 in due course. He cannot recall how much the plaintiff was paid in 2005. He never registered the plaintiff for the Unemployment Insurance Fund (UIF) but the plaintiff was getting a minimum of between R15 000-00 and R20 000-00 per month. Confronted with a certificate of employment he made for the defendant's assessor on 29 May 2014 regarding the earnings of the plaintiff indicating that the plaintiff was been paid R2 000-00 per week he could not give a clear answer.

- [8] Mantoa Ramaele is married by custom to the plaintiff. They have two children aged 20 and 10 years respectively. She was not employed and stayed with the family at Verkeerdevlei. The plaintiff used to work as a builder / driver for de Bruyn and used to give her R10 000-00

every month from his earnings. She used the money to maintain her son not born of the plaintiff by giving him R1 000-00 every month and bought food for him for the amount of R400-00 per month. She also gave Bongani Mjezu R2 500-00 or R3 000-00 every month. For herself and the plaintiff's children she would buy groceries for the amount between R800 and R1 000-00; for the plaintiff's other dependants she would spend R1 500-00. She also paid R500-00 for electricity and R140-00 for insurance. She did not have any accounts but the plaintiff had clothing accounts. Under cross-examination she said initially the plaintiff gave her R5 000-00 per month but after an increment in 2010 he gave her R10 000-00 per month. The plaintiff knew about the payments she made to Bongani. She reiterated that the plaintiff had clothing accounts.

- [9] A psycho-legal by report Dr. Estelle Boshoff, an Industrial Psychologist, filed by the defendant was admitted into evidence by consent. The salient aspects of the report are that the plaintiff would have earned until the age of 65. Though she was told the plaintiff earned R15 000-00 per month there was no proof thereof provided. She made a breakdown table of what would be earned in the capacity as a builder / driver and as a supervisor. The calculations were based on the unproven rate of earnings of the plaintiff. The plaintiff's disability was reflected in this report based on the reports of Dr. Khan, an Occupational Medical Practitioner, and Mrs. Delport, an Occupational Therapist, remarking about the extent of the plaintiff's health and indicating that he was permanently incapable of being

gainfully employed. The plaintiff's and the defendant's cases were closed. The defendant did not lead any evidence in rebuttal of the plaintiff's case.

[10] The evidence of the various witnesses for the plaintiff raises some questions that demand the court's attention in an endeavor to determine the plaintiff's earnings at the time of the accident in order to determine his loss had the accident not taken place. According to the plaintiff he received his wages upon the completion of a house. A standard house would be completed in two months' time and a double storeyed house would take three to four months to complete. According to the plaintiffs' wife she received an amount of R10 000-00 every single month from the plaintiff. If the plaintiff is right that his wages were paid after two months or even three to four months the question that arises involuntarily is how was it possible for him to give his wife an amount of R10 000-00 every month. No evidence was led as to how that was possible. Equally, according to the plaintiff, he would give to his wife an amount of R9 000-00 sometimes R10 000-00 or even R11 000-00 per month. His wife, however, categorically stated the amount she regularly received from the plaintiff was always R10 000-00 every month.

[11] According to the plaintiff the money he gave to his wife was for the household, namely the wife and his two children. He did not mention his wife's child not born of him nor the extended family she testified

about least of all did he refer to Bongani who received a substantial financial contribution of R2 500-00 to R3 000-00 per month from the amount he gave his wife. The plaintiff testified he would give his niece who was staying in Bloemfontein where he also lived an amount of R500-00 per month to cover her schooling expenses. Bongani was also staying in Bloemfontein where he attended school but the money was send to Verkeerdevlei to be fetched by Bongani every month. According to the plaintiff's wife the plaintiff was well aware of the payments she made to Bongani. Why would he allow Bongani to incur transport expenses to Verkeerdevlei to fetch the money there leaving the plaintiff in Bloemfontein where they both lived was not explained as he did with the niece because she was living in Bloemfontein, where he also lived and he gave the money to her directly.

- [12] Pieter Sarel de Bruyn who employed the plaintiff did not help the court to make sense of how much he paid the plaintiff. His evidence raised more questions than answers. What he claimed to have paid to the plaintiff was throughout his evidence in approximate terms. He had a bookkeeper as a business with a turnover of approximately R4million per annum should. Even his bookkeeper did not know how much he paid his workforce, particularly the plaintiff. Wages in a construction business is a major overhead. He would pay the plaintiff in cash and did not know exactly how much he paid him but it was between approximately R15 000-00 to R20 000-00 per month. When they did not have work to do and in order to retain the plaintiff's

services, he would at random give him sometimes R200-00 or R500-00 or even R10 000-00 or between R2 000-00 and R6 000-00. This he would do because the plaintiff was the “*goose that laid golden egg*” for him. He never kept record of what he paid. This does surely not tell the court what the plaintiff earned and is causing more confusion than clearing it. The worst came when he was asked by the defendant’s assessor to complete a certificate of service for the plaintiff. This was done on 29 May 2014 more than three years after the accident. At the time he knew about the plaintiff’s claim and knew that the more the plaintiff earned the higher the compensation would be for loss of future earnings. In his own handwriting and at his own time he stated that the plaintiff earned R2 000-00 per week with R50-00 per hour overtime. According to the evidence only at the beginning of his employment was the plaintiff paid per week. Since he became such an important cog in his operations he was paid per month. Suddenly in 2014 he started a weekly payment as per certificate of earning, when throughout his evidence in court he was talking about monthly payments.

- [13] In an endeavor to show that the plaintiff earned above average and to justify his claim, the plaintiff stated that he paid cash for all his purchases and services he received. He denied having had an account but his wife did. The wife, on the other hand, denied having had accounts as she paid cash for everything she bought. According to her it was the plaintiff that had accounts to pay. One cannot ignore the possibility of making up the story about the plaintiffs’ earnings

bearing in mind the relationship between all the witnesses for the plaintiff. Otherwise it would be simple to explain how much the plaintiff earned. At any rate these contradictions are not of assistance to the court.

- [14] In order to succeed with a claim, the vehicle the court must resort to is proof of a claim. The proof is based on all the evidence placed before the court. The argument addressed to the court is not evidence: **Law of Evidence**: CWH Schmidt P. **Pillay.Krishna** 1946 AD 946 at 952 and **Coch v Lichtenstein** 1910 AD 178 where it was stated that

“the mere production of evidence which makes the existence of ... facts probable does not in itself shift the onus though it may go a long way towards satisfying it”.

A litigant requesting a remedy must prove that he is entitled to it by adducing probable evidence: **Mobil Oil Southern Africa (Pty) Ltd v Mechin**, 1965(2) SA 706 (A) at 711.

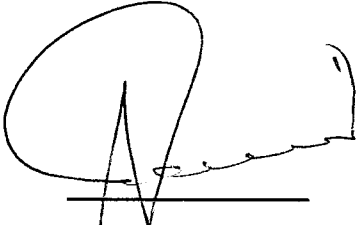
- [15] In this case, the central issue to be decided is, in the light of the confusing evidence, what is the probable amount the plaintiff would earn had it not been for the accident. This amount can only be determined by what he earned before the accident. This evidence must be clear and be supported by facts. The absence of evidence in rebuttal does not make the assertion of having earned R15 000-00 per month probable unless one ignores the contradictions characterizing the entire evidence of the plaintiff. Much was said

about the report of Dr. Boshoff as indicating the basis of the plaintiff's earning but what was overlooked was the fact that the assertion was made on the assumption that the plaintiff earned R15 000-00 per month which was not proven. In his evidence the plaintiff stated that at a stage he earned R8 000-00 per month from R1 500-00 per week. This was when he had greater responsibilities and had to be compensated for that. He had been earning R1 000-00 per week before his earnings were raised to R1 500-00 per week. Suddenly his earnings were increased by a whopping 90% to R15 000-00 per month to prevent him from leaving the company. The question is how probable is that increase in the set of circumstances where even the date of that huge leap in his income is unknown. Although no evidence was led or was hinted at the unsophistication of the plaintiff and other witnesses the court was urged to take that lack of sophistication into account. Even if the court would do so that cannot serve as compensating for the lack of probable evidence.

- [16] Having considered all the evidence of the plaintiff's rise in stature with the company, first earning R1 000-00 per week, next increasing his earnings to R1 500-00 per week and later to R8 000-00 per month, and the employer stating in the Certificate of Service that the plaintiff earned R2 000-00 per week, I am of the view that the probable earnings of the plaintiff at the date of the accident was R8 000-00 per month. It is not a coincidence that the certificate of service mentions an amount equal to R8 000-00 per month mentioned by the plaintiff.

[17] I therefore make the following order:

- (a) The earnings of the plaintiff as at the date of the accident being 27 March 2011 was an amount of R8 000-00 (Eight Thousand Rand) per month.
- (b) Costs to stand over.



K. J MOLOI. J

On behalf of the plaintiff:

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Instructed by:

HONEY ATTORNEYS

BLOEMFONTEIN

On behalf of the defendant:

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