REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)
(MAIN SEAT)

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

[redacted] 19/07/2024

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CASE NO: 1484/2019

In the matter between:

MARIA SISTENCE LUBISI **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

Delivered: This judgment was handed down electronically by circulation to the parties by email. The date and time for hand-down is deemed to have been 10h00 on 19 July 2024.

JUDGMENT

MOLELEKI AJ:

[1] The plaintiff is Ms Maria Sistence Lubisi an adult female of Mkuhlu in Mpumalanga Province. The Defendant is the Road Accident Fund, a juristic body with legal personality established in terms of section 2(1) and with section 15 of the Road Accident Fund Act 56 of 1996 with its main object, the payment of compensation for loss or damage wrongfully caused by the driving of a motor vehicle.

[2] The plaintiff claims for damages suffered by her as a result of injuries she sustained in a motor vehicle collision on 30 November 2017 along Kiepersol main road when a taxi she was travelling in (the insured vehicle) lost control and rolled several times before hitting a pavement. In the accident plaintiff sustained injuries on the upper eye, scalp and dislocated her knee. As a result of the bodily injuries and the sequelae, plaintiff claims loss of income/ earning capacity.

[3] The defendant conceded the merits. The defendant disputed liability for general damages. It leaves the court with no jurisdiction to assess the award of general damages. The issue of general damages is therefore, to be postponed *sine die*.

[4] The plaintiff brought an application in terms of Rule 38(2) for the admission into evidence of all the expert reports by way of affidavit. The following expert reports for the plaintiff were admitted:

a. Dr GK Tsolo (Orthopaedic Surgeon);

b. Phiwakahle Manana (Occupational Therapist);

c. Mudzunga Makhado (Industrial Psychologist); and

d. DT Mureriwa (Actuary).

The defendant did not file any expert reports. It appears that the defendant would rely on the reports of the plaintiff's experts. The defendant, however, takes issue with the contingency deduction to be applied to future loss of earnings.

[5] Pre-morbid, the plaintiff's highest level of education is grade 9. Her work history revealed that she has work experience as a farm worker. At the time of the accident the plaintiff was 38 years old and at an establishment phase of her career. She was left with 6 years and 11 months to reach her career ceiling at the age of 45. There was 12 years left to reach active involvement in the open labour market before she reached the retirement age of 65 years. However, this would depend on a variety of factors such as her health, personal circumstances, business demands, economic conditions and conditions of employment. Her earning was R3 001.13 per month as a farm worker which translated to R36 013.56 per annum. The plaintiff's earnings fell between the median and upper quartile for unskilled workers within the non-corporate sector.[1]

[6] Post-accident, the plaintiff was taken to Matikwane Hospital where she received the following treatment: clinical and radiological examination and a diagnosis of soft-tissue injury. She was discharged from hospital the same day but attended for follow up treatment. This was the plaintiff's first motor vehicle accident. Her current complaints are a painful lower back, painful right knee associated with stiffness and a painful right shoulder which is aggravated with overhead activities. X-rays were conducted on 13 April 2022. Radiologically, the shoulder is normal. The right knee shows narrowing of the joint space and this is in keeping with osteoarthritis. The lumbar spine indicates loss of lumbar lordosis and levoscollosis which is in keeping with paraspinal muscular spasms.

[7] The plaintiff was absent from work for a period of two months after the accident. However, she was remunerated in full while she was recuperating at home. Upon her return to work she was accommodated to work at a factory as she was experiencing pain when standing for too long and when climbing trees.

[1] R Koch The Quantum Year Book, 2017

[8] As stated, medico-legal experts were appointed to assess the plaintiff. They submitted their respective reports which form evidence before this court. I do not intend to traverse these expert reports in detail. Reference will only be made to certain salient features of these reports.

[9] The orthopaedic surgeon, Dr GK Tsolo, indicated that the plaintiff continues to suffer moderate pain on the right knee and lower back. He is of the opinion that the plaintiff can be managed with surgical and conservative methods.

[10] From a functional perspective, Ms Manana, the Occupational Therapist, opined that the plaintiff does not meet the demands of her current employment as it requires prolonged period of standing. This aggravates her right lower limb and lower back pain, consequently her performance. The Occupational Therapist stated that there is no other position that the plaintiff can be suited for in her employment. This has however proved incorrect as the plaintiff was moved to work at a factory within the farm. The employer provided her with reasonable accommodation for her injuries and restrictions. The Occupational Therapist indicated, however, that should the plaintiff lose her current employment she may struggle to obtain another employment. Her chances of sustaining and obtaining employment in the open labour market have therefore been compromised.

[11] Mr Mudzunga Makhado, the Industrial Psychologist, indicates that as a result of the injuries, the plaintiff will not be able to compete fairly and efficiently for employment opportunities like she would have, had the accident not occurred. She is now vulnerable in the open labour market and would require a sympathetic employer. Therefore, the accident and its sequelae has affected her future employment and earning potential. He postulates that had the accident not occurred, the plaintiff would have continued working in the same position, with annual inflationary increases until she reached retirement at 65 years.

[12] According to the plaintiff's actuarial calculations the plaintiff suffered loss of past income and future loss of income in the sum of R50 588 for past loss of income and R402 797 in respect of future loss of income, totalling the amount of R453 385.

[13] The issue between the parties appears to be the disagreement with regards the percentage of the contingency deduction to be applied to the future loss of earnings.

[14] The plaintiff's counsel submitted that a 15% contingency deduction should be applied to past loss of income pre-morbid, and 25% contingency deduction in respect of future loss of income, post-morbid. The defendant on the other hand submitted that there is no actual loss of future earnings rather loss of earning capacity. A 15% contingency deduction pre-morbid future loss and a 30% post-morbid future loss is contended for by the defendant.

[15] The defendant's counsel argued that the plaintiff was remunerated in full whilst recuperating and that she has been accommodated to work at a factory. It was submitted further on behalf of the defendant that the plaintiff is still employed; that the accident will not hinder her career growth. The plaintiff is not necessarily unemployable but rather that she has been considered a vulnerable employee within the labour market. For these reasons, the defendant's counsel submitted that a higher contingency deduction should be applied.

[16] In ***Phalane v RAF*** [2] Fourie J remarked as follows:

> *"Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Insurance Co v Van Jaarsveld reported in Corbett & Buchanan, The Quantum of Damages Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (Shield Insurance Co Ltd v Booysen* ***1979 (3) SA 953*** *(A) at 965G-H).*

[2] Phalane v RAF *[2017] ZAGPPHC 259*

Contingencies for which allowance should be made, would usually include the following:

- *(a)* *the possibility of illness which would have occurred in any event;*
- *(b)* *inflation or deflation of the value of money in future; and*
- *(c)* *other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event (Corbett, The Quantum of Damages, Vol I, p 51).*

[17] The approach in assessing damages for loss of earnings was set out in **Southern Insurance Association v Bailie NO** [3] as follows:

a. *"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 guesswork, 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".*

[18] The Plaintiff bears the onus to prove her case on a balance of probabilities. She is required to provide a factual basis that allows for an actuarial calculation. This is a process designed to assess actuarial/mathematical calculations based on the evidence as well as overall assumptions resting on such evidence (this is the actuarial approach). This approach seeks to determine the loss of earnings as realistically as possible to what may be the plaintiff's actual loss. This is so particularly since actuarial reports and calculations

[3] Southern Insurance Association v Bailie NO 1984(1) SA 98 (A) at 112E 114F

are premised upon the assumptions of the industrial psychologist or prepared on instructions.

[19] It is an established principle that the plaintiff bears the onus to prove on a balance of probabilities that the injuries he sustained have reduced his earning capacity, which will result in actual loss. [*See Rudman v Road Accident Fund 2003(2) SA 234 (SCA); Road Accident Fund v Kerridge 2019(2) SA 233 (SCA)*]. The court in Kerridge said at para 25 "Indeed, a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income…" That is, there must be proof that the disability gives rise to patrimonial loss. This of course is dependent on the nature of the work that the plaintiff had done prior the accident or would have done had the accident not occurred.

[20] The Supreme Court of Appeal in **Michael v Linksfield Park Clinic (Pty) Ltd**[4] confirmed the approach of our courts to expert evidence as follows: *"what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning"*

[21] Before a court can assess the value of an opinion it must know the facts on which it was based. If the expert has been misinformed, about the facts, or has taken irrelevant facts into consideration or has omitted to consider relevant ones the opinion is likely to be valueless.[5]

[22] The expert reports and admitted evidence are very clear. The plaintiff's work history is that she has been a farm worker since 2011 to date. Her duties involve planting and harvesting fruits of the season. To do this, according to the reports, she must carry a bag where she puts the fruits when harvesting from the trees. At times she would use a 20-liter bucket. Her employment requires frequent standing, walking, bending, crouching and knee squatting. This therefore requires physical strength. Reasonable accommodation was implemented at the workplace. She was placed at

[4] Michael v Linksfield Park Clinic (Pty) Ltd 2001(3) SA 1188 (SCA)
[5] Twine and Others v Sharon Naidoo and Other (38940/14) ZAGPJHC 288.

the factory. Her job title remains the same although her duties have been changed. Her work classification is now light physical demand.

[23] Following the accident, the plaintiff could not go back to work for a period of two months for which she was fully remunerated. Although the actuary calculated an amount of R50 588 for past loss of income, it is clear the plaintiff has not incurred any past loss of income.

[24] The Industrial Psychologist indicated that the plaintiff's earnings would have increased mid-point between the median and upper quartile, unskilled non-corporate. Her source of growth would have been inflation related. It is significant to note that the Industrial Psychologist is saying, now that the accident has occurred the plaintiff is unlikely to progress. It was postulated that her remuneration would have doubled in seven years. This is improbable and no basis for this assumption was put forward. Of significance is that her salary is increasing. Since the accident, her salary has increased to R4 270. Although the experts state that she experiences painful lower back, right shoulder and right knee, there is no collateral information to suggest that she has ever requested time off work. The injuries have clearly not hindered her working ability over the past seven years whilst working at the factory. She has been accommodated to do light physical work since 2017 and it has been almost 7 years post-accident where the employer has accommodated her whilst she retains the same job title.

[25] The actuarial calculations are based on the assumption that the plaintiff's salary would have doubled from R36 014.28 to R75 000 by age 45, which is improbable. The basis for this assumption was not explained. Post-accident the plaintiff earns more than what she was earning pre-accident. From the actuarial calculations, the actuary applied 15% contingency deduction on pre-accident future loss and 25% on post-accident future loss of earnings, with the resultant loss of R402 797.00.

[26] It cannot be denied that the plaintiff's life has changed from a physical point of view and continues to suffer moderate pain on the right knee and lower back. The

orthopaedic surgeon has recommended the type of interventions that would be necessary.

[27] I am not persuaded that the plaintiff suffered any loss. Contrary to the opinion of the Occupational Therapist, the plaintiff's employment does have another position suited for her. This accommodation by the employer is likely to allow her to maintain productivity at her current work which may enable her to retain employment until retirement. At the time of the accident the plaintiff was 38 years old. It was postulated that she would reach her career ceiling by age 45. She is currently 44 years old, turning 45 in three months' time.

[28] It is my considered view that the plaintiff's earning capacity does not appear to have been affected. She was accommodated by placing her at a factory. She continues to be employed by the same employer in a different capacity. The upshot of it is that she performs all the necessary tasks in her new position, albeit with attendant pain. Be that as it may, there has been no change in her remuneration. Instead, her salary increased. Had the accident not occurred, she would presumably have continued working until age 65, subject to inflationary increases. There is no proper foundation to conclude that the plaintiff will not achieve her pre-morbid earnings level. The mere fact that she experiences some degree of residual pain does not translate into the conclusion that she will not reach her pre-morbid earnings level. It would be fair to assume that her current remuneration would continue until her retirement at 65 years.

[29] I am cognizant of the view expressed in **Hulley v Cox**[6] that "*we cannot allow our sympathy for the claimants in this very distressing case to influence our judgment*".

[30] The well-established position in our law is that courts need to be mindful of the current situation of the plaintiff and exercise a measure of common sense and judicious discretion in avoiding an award that would amount to a windfall to which the plaintiff would not be entitled. The onus is on the plaintiff to prove the loss.

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[6] *1923 AD 234 at 246:*

[31] The actuarial calculation is premised upon the information provided by the Industrial Psychologist to the effect that by the age of 45 years, the plaintiff's earnings would have increased to the average of the median and upper quartile of the unskilled worker's scale in the amount of R75 500. Thereafter, the salary inflationary increases until retirement at the age of 65 years. This would have been an annual increase from R36 001.19 to 51 246.72. There is no corroboration nor was the court apprised of the facts on which this opinion was based.

[32] In Twine and Others v Sharon Naidoo and Another[7], Vally J stated, "before a court can assess the value of an opinion it must know the facts on which it was based. If the expert has been misinformed, about the facts, or has taken irrelevant facts into consideration or has omitted to consider relevant ones the opinion is likely to be valueless"

[33] I am alive to the fact that the admission of expert evidence is open to abuse. An expert witness is not expected to use speculative reasoning but should rather bring specialised knowledge to the court. The industrial psychologist's instruction to the Actuary reflects assumptions, which were based on facts that were not supported by any evidence or are inconsistent with the evidence led. The Industrial Psychologist should have stated all the facts and the assumptions upon which he based his opinion. The facts upon which she relied should have been proved by admissible evidence. While an expert witness is entitled to make assumptions, they should avoid basing their opinions on conjecture or speculation for once they do so they place their evidence at risk of being disallowed. I can therefore place no reliance on the opinion of the Industrial Psychologist in so far as it relates to the information she gave to the Actuary.

[34] I am not bound by, nor am I obliged to accept the evidence of the expert. His opinion in so far as the salary of the plaintiff becoming double by age 45 was not properly brought forward nor is it based upon foundations which justifies the formation of such opinion.

[7] (38940/14) ZAGPJHC 288 [2018] 1 ALL SA 297 (GJ) (16 October 2017)

[35] On the body of evidence before me, I am unable to conclude that the plaintiff's capacity to fulfil the tasks of the job has been affected materially. The plaintiff has failed to prove her damages for past loss of income and future loss of earnings. Similarly, for this court to attach weight to an expert opinion, the facts on which it is based must be proven. The actuarial calculations which have been provided are therefore of no assistance to the court.

[36] On a conspectus of all the evidence presented, I am of the view that the plaintiff has failed to establish the facts in support of her case to the satisfaction of the court in respect of the past loss and future loss of earnings.

[37] There is no reason to deviate from the general principle that costs follow the result.

[38] In the result I make the following order:

1. The plaintiff's claim for loss of earnings is dismissed.

2. General damages are postponed *sine die*.

3. The plaintiff is ordered to pay the costs of suit.

[redacted]

MOLELEKI AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

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Date of hearing: 29 April and 2 May 2024

Date of Judgment: 19 July 2024