

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: A15/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 29 July 2024 E van der Schyff

In the matter between:

JEAN-RAY PEARTON

APPELLANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

Van der Schyff J (Basson J *et Mpshe* AJ concurring)

Introduction

- [1] This appeal against the judgment and order of Leso AJ (the court *a quo*) is with leave of the Supreme Court of Appeal.

- [2] The appellant, Mr. Pearton, was injured in a motor vehicle accident. He subsequently instituted a delictual claim against the Road Accident Fund (RAF). On 12 April 2022, the court *a quo* dismissed the appellant's claim for loss of income and earning capacity. After setting out the evidence presented regarding the appellant's loss of income and earning capacity, the court *a quo* held that she did not regard the evidence of the Occupational Therapist and Industrial Psychologist as satisfactory, particularly because the appellant was already working after the accident. The court also considered the evidence of Mr. Erasmus (the plaintiff's employer) that the plaintiff is currently performing well.

- [3] Although the court *a quo* acknowledged that the appellant "found himself a sympathetic employer who acknowledges his shortcomings by providing human resources and other working tools and giving him leeway to work only insofar as his pain and stamina allowed", the court *a quo* rejected the experts' respective opinions that the appellant does not have the physical capacity to cope, in future, with the work demands.

- [4] The appellant's uncontested evidence was that he suffers from constant and permanent pain and fatigue, frequently experiences headaches, and is forgetful. He also testified that he now spends more time at work to complete tasks than before the accident. This evidence, counsel correctly pointed out, is consistent and borne out by the evidence of Mr. Erasmus and the relevant experts.

- [5] The appellant's evidence regarding his diminished capacity to work was supported by the various experts that were presented and accepted on affidavit. The Orthopedic Surgeon's (OS) evidence was that the spinal injuries sustained had a profound impact on the appellant's productivity. While his productivity will improve with treatment, this will decline again as the degeneration in his cervical and lumbar spine progresses. The OS further opined that provision must be made for earlier

retirement at 55. This recommendation is based on the OS having regard to the serious injuries and the fact that the appellant already showed radiological signs of post-traumatic spondylosis on multiple levels at his relatively young age. Much in line with the opinion of the OT, the neurosurgeon regarded the appellant's mood and stress disorder as the most significant factor influencing his work efficiency and career prospects. He opined that the appellant would be able to work until he retires at the age of 65 but with decreased efficiency.

- [6] The Clinical Psychologist opined that the appellant's pain experience will have a negative impact on his cognitive functioning and explained that the appellant is also experiencing significant emotional stress, which adversely affects his quality of life.
- [7] The Occupational Therapist held the view that the appellant needs to change his entire lifestyle, which includes his workload, to manage his pain optimally.

Discussion

- [8] When dealing with claims of this nature, there must be proof of loss of earning capacity before there can be any future loss of earnings.¹ Once it has been established that there is, as a fact, a definite loss of earning capacity, an amount must be attached to such incapacity.
- [9] Having regard to the uncontested evidence of the appellant regarding the physical injuries suffered by him as a result of the accident, which evidence was supported by his employer and the various experts in material respects, I am persuaded that the appellant has established that his injuries had caused him a loss of earning capacity. In this regard, the court *a quo* fundamentally misdirected itself in light of the overwhelming evidence supporting the conclusion that the appellant had clearly established a markedly reduced working capacity, and consequently a reduced earning capacity, by finding that because the *sequelae* of the accident have not

¹ D Millard *Loss of earning capacity: The difference between the sum-formula approach and the 'somehow-or-other' approach* Law, Democracy and Development. (2007) 11:1, 15-32, 17.

deterred the appellant from earning an income, he has not suffered a loss under this head of damages.

Quantification

- [10] The Industrial Psychologist's postulation of the appellant's pre-accident earnings is based on the collateral evidence of his employer the evidence of the appellant, and the expert witnesses. I considered the contingency deduction in the pre-morbid uninjured scenario of 15% as justified.
- [11] As far as the post-morbid having-regard-to-injury scenario is concerned, I agree with the assumption that it will probably take the appellant three years to gain a promotion rather than the two years that were realistic prior to the injury. As for the appellant's position closer to retirement, counsel submits that one of three possible scenarios might unfold- (i) The appellant would have to retire at the age of 55; (ii) from age 55, the appellant's income will return to that of a Non-Profit Director with no dividends, with him retiring at age 65; and (iii) from age 55 the appellant's income will return to that of a senior associate.
- [12] Counsel agreed that a just basis for calculating the capacity loss that the appellant will suffer in the later years of his employment is that the appellant's income will return to that of a Non-Profit Director from age 55. As for the applicable contingencies, I deem it fair that a 25% contingency allowance will cater to the increased risks the appellant is exposed to due to the injuries suffered in the accident.

ORDER

In the result, the following order is granted:

- 1. The Draft Order marked X, dated and signed by Van der Schyff J is made an order of court.**



E van der Schyff
Judge of the High Court

I agree, and it is so ordered.



A Basson
Judge of the High Court

I agree.



M J. Mpshe
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:

JF Mullins SC

Adv L Coetzee

Instructed by:

Gildenhuys Malatji Inc

For the respondent:

No appearance

Date of the hearing:

22 July 2024

Date of judgment:

29 July 2024