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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

Not reportable

Case No.: 833/2022

In the matter between:

ERIC STRYDOM

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Noncembu J:

[1] The plaintiff lodged the current action for damages arising from a vehicle collision which occurred on 13 April 2019 in Gqeberha. As sequelae of the collision, he sustained serious orthopedic injuries more specifically, a right compound (bone pierced the skin), comminuted (fracture in two or more sites), proximal tibia and fibula fracture, a right talus head intra-articular fracture and a right tibia posterior eminence evulsion fracture.

[2] Subsequent to the issue of summons, certain issues became settled between the parties and on 3 December 2023 an order of court was obtained wherein, *inter alia*; liability was conceded for 100% of such damages as the plaintiff may prove; the defendant was ordered to pay R550, 000 in respect of general damages and payment of an amount of R1,500, 000 as interim payment in respect of plaintiff's claim for past and future loss of earnings and earning capacity was ordered.

[3] Initially the trial was set to proceed on the issues of past hospital and medical expenses as well as the plaintiff's claim for past and future loss of income and earning capacity. Prior to the hearing however, the parties, by agreement, sought and obtained an order that the claim for past hospital and medical expenses be separated from the claim for past and future loss of income and earning capacity and be postponed *sine die*. Accordingly, the only issue for determination before this court is in respect of the plaintiff's claim for past and future loss of income and earning capacity.

[4] In the amended particulars of claim the plaintiff is claiming an amount of R7, 022,492.50 in respect of his claim for past and future loss of income and earning capacity. The defendant has filed a plea of no knowledge to the claim.

The Expert Evidence

[5] Pursuant to a pre-trial conference held on 8 February 2024, the parties agreed that the following documents may be admitted into evidence without the necessity of formal proof:

- (a) the RAF 1 medical report by Dr M Swart, dated 9 May 2019;
- (b) the radiologist reports of:
 - (i) Dr H Vawda, dated 14 April 2019;
 - (ii) Dr H Vawda, dated 15 April 2019;
 - (iii) Dr P Pretorius, dated 25 April 2019;
 - (iv) Dr O Shenxane, dated 29 April 2019;
 - (v) Dr P Pretorius, dated 29 April 2019;

- (vi) Dr O Shenxane, dated 15 June 2020;
- (c) medico-legal report by clinical psychologist, Mr I Meyer, dated 12 July 2021;
- (d) employment report by employment specialist, Mr D Williams, dated 24 March 2022;
- (e) the joint minute between occupational therapists, Ms R Shivambu and Ms A van Zyl, dated 10 May 2023;
- (f) the joint minute between orthopedic surgeons, Dr B Perry and Dr S Bismilla, dated 16 May 2023;
- (g) the joint minute between industrial psychologists, Ms A Engelbrecht and Mr S Vilakazi, dated 31 May 2023; and
- (h) the actuarial calculation by Mr G Whittaker, dated 1 June 2023.

The Joint Minutes

[6] In their joint minute the orthopedic surgeons, Dr Perry and Dr Bismilla, agree on the following:

- (a) that the plaintiff presented with no pre-existing pathology prior to the accident. As a result of the accident, he sustained a right compound comminuted proximal tibia and fibula fracture as well as a right talus head intra-articular fracture. On 13 April 2019 an open reduction and internal fixation of the right proximal tibia fracture was performed with a plate and screws inserted. He was discharged with conservative management of the right talus fracture in the form of a frame walker boot;

(b) that the plaintiff's present symptoms include pain in his right leg, ankle and foot exacerbated by cold/inclement weather and strenuous physical activities; he is unable to stand for long periods of time, walk long distances, jog or run. He currently walks with a limp/ antalgic gait and has a limited range of motion of the right ankle/ foot; and

(c) he is restricted to sedentary or light duty-type of work.

[7] Dr Perry is further of the view that the plaintiff sustained a displaced right tibia posterior eminence fracture / posterior cruciate ligament evulsion fracture, which was not diagnosed in the hospital records, but which is apparent on a CT angiogram scan of the right leg performed on 25 April 2019. (Dr Bismilla did not have access to the scan.)

[8] The occupational therapists, Ms Shivambu and Ms van Zyl agree that:

(a) the plaintiff's previous position could be regarded as having medium to heavy physical demands;

(b) the plaintiff demonstrated the residual physical capacity to manage a job with light physical demands or a complete sedentary job. They are thus of the view that it is reasonable that the plaintiff did not return to his job at Welfit Oddy after the accident and that he is not best suited to his previous position due to the specific physical demands thereof; and their view is that

(c) the plaintiff will find it difficult to re-enter the open labour market in his injured state.

[9] In a joint minute prepared between Ms Engelbrecht and Ms Vilakazi, the Industrial psychologists, on 31 May 2023, they agree that:

(a) the plaintiff holds a grade 12 level of education;

(b) he completed CO2, MIG, TIG and High-Pressure Vessel Welding Certificates between 2015 and 2016 and that he wanted to obtain further qualifications in that regard;

(c) he formerly held a forklift and overhead crane operator license and was in possession of a learner's Code 14 license, which was valid from February 2018 to February 2020;

(d) in respect of his pre-morbid career and earnings, they agree on the following postulation-

(i) the plaintiff would have continued working at Welfit Oddy as a Grade 4 welder until approximately the end of 2019;

(ii) towards the end of 2019 he would have pursued employment opportunities abroad in the United States of America for approximately three and a half years;

(iii) upon his return to South Africa, he would have secured employment as a Grade 4 welder and would have progressed further in a technical capacity of coded welder progressing to a Grade 5 welder by the age of approximately 43 years, where his career earnings would have plateaued;

(iv) he would then have continued until he reached the retirement age of 65 years; and

(v) the Metal and Engineering Industries Bargaining Council (MEIBC) wage schedule and the Koch (2020) earning ranges would have found application;

(vi) he would have enjoyed employer contributions towards his medical aid of 50%; and

(vii) employer contributions towards provident fund of 8.5% of his basic salary; and

(viii) an annual bonus (equivalent to a 13th cheque); as well as

(ix) allowances and overtime.

(e) In respect of the plaintiff's post-morbid career and earnings, the joint minute agrees on the following:

(i) the plaintiff was unable to return to his previous position at Welfit Oddy after the accident;

(ii) he has made attempts to continue working in his injured state but he has not been able to cope with the physical demands thereof and sustain any of the positions;

(iii) he is restricted to positions with no physical demands, however, given his work experience, skills, abilities and his aptitude, he has limited residual skills to offer the open labour market;

(iv) he will not be able to find employment in a consulting, coaching or in a supervisory capacity due to his experience and the demands of such a role will not be suited to his current condition;

(v) at best, he will be suited to a sympathetic employment environment where his employer will be reliant on accommodating and supporting him.

In the absence of any existing employment relationship, this appears highly unlikely;

(vi) his post - morbid positions held and earnings are as set out in the report of Ms Engelbrecht;¹

(vii) in the best-case scenario, he may secure sympathetic employment from time to time in a light duty capacity, where he will at best earn approximately R4500 per month seasonally for three months of the year (2023 terms).

[10] In addition to the above reports, a recruitment specialist, Mr David Williams, filed a report dated 24 March 2023, pertaining to the plaintiff's employment prospects. He states in the report that it is unlikely that the plaintiff would obtain a position of a sedentary nature given his basic educational record, lack of skills and expertise within this field and his various impairments. He expresses the view that the open labor market offers a vast array of candidates with related experience and skills, good educational levels who are able bodied who would receive preference ahead of the plaintiff.

[11] He is further of the view that the plaintiff is unlikely to obtain sympathetic employment as these types of employers are few and far in between given the harsh economic climate and trading environment that employers are exposed to. He further asserts that one tends to find that sympathetic employment is afforded to a person who is an employee of a company at the time of the accident. Very rarely would one find an employer who is prepared to afford a new recruit such an employment opportunity.

[12] He concludes by stating that it is unlikely that the plaintiff will secure employment within the sedentary and non-sedentary forms of employment and that he will, in all likelihood, remain unemployable for the remainder of his working career.²

¹ Expert Index: p165.

² Index to admitted reports: p55.

Plaintiff's evidence

[13] The plaintiff testified in support of his claim. His evidence, which perhaps for obvious reasons, was not seriously challenged, is summarized below.

[14] He is 31 years old, and he passed matric in 2010 without having failed any grade in school. He started working at Parmalat in 2010, where he fulfilled various positions whilst still completing his matric. From December 2013 until February 2015, he worked as a merchandiser, then a packer and as a cashier at Spar in Blue Water Bay.

[15] In February 2015, he started working for Furman Trading, a company that is subcontracted to Welfit Oddy, as a sandblaster. Whilst working at Furman Trading, he completed certain welding qualifications after hours with Welfit Oddy. Thereafter he secured employment with Welfit Oddy as a fabricator.

[16] Welfit Oddy is in the business of building stainless steel containers. In his position as a fabricator, the plaintiff was required to collect and assemble the various components necessary to build the frame within which the container tanks are placed. The work he did was extremely physical, and it required the lifting of steel products, climbing of ladders, etc. Part of his job required the manual lifting of steel beams sometimes weighing in the region of 500 kilograms when the hydraulic hysters or cranes were not functioning.

[17] When the accident occurred on 13 April 2019 he was working as a fabricator at Welfit Oddy. He was not able to return to work after the accident other than to undergo certain medical examinations. He was later informed in an HR meeting that was held, that he could not perform the functions of a fabricator, and that the only work he could physically perform involved computers (sedentary work), which work he was not suitable for given his lack of experience and qualifications. He was therefore retrenched.

[18] As a result of the accident, he sustained injuries in his right leg where he sustained a fracture to his right foot and his right knee. He underwent surgery to his tibia/ fibula and conservative treatment was undertaken in respect of his foot fracture in the form of a moon boot. He wore the moon boot from the time of the accident until November 2019. He thereafter used crutches to ambulate, after which he used a cane which he uses up to date.

[19] As sequelae to the injuries he sustained in the accident he is unable to squat, crouch, kneel, jog, walk or stand for long periods of time. He is also unable to carry heavy objects due to the pain he feels in his right foot and right leg, and furthermore, his ankle is often stiff and immobile. He is in constant pain as a result of the injuries and this also affects his sleeping patterns adversely, thus causing him frequent bad moods and feelings of inadequacy as he is now financially dependent on his wife.

[20] He made various attempts to secure employment after the accident, and although he was successful in doing so, he could not maintain any of such employment due to the injuries. To illustrate this point, he was able to obtain work at Sutol Engineering as a fabricator in June 2020 but resigned after 3 weeks as the work involved standing, carrying weights and welding, as such he was unable to cope with the physical demands.

[21] In April 2021 he was again employed by Welfit Oddy as an assembler after being placed by King Recruitment. The work involved a lot of walking, steps and climbing ladders. He was informed by the Doctor at Welfit Oddy that he was a health risk and therefore medically unfit for the job. His employment was terminated in May 2021.

[22] In November 2021 he managed to secure employment at Bay Braais through a family friend. The job was less physical than his previous employment as it entailed welding braais, however he still struggled with it. He was still working at the business when it closed down in February 2022.

[23] All his further attempts at securing employment have since been futile, and he has not worked since February 2022.

[24] At the time of the accident he was working as a grade 4 welder³ at Welfit Oddy with aspirations of obtaining his Red Seal / Grade 5 qualification which is a specialist welder earning approximately twice the salary of a grade 4 welder. For one to be able to undertake the trade test to become a Grade 5 Welder, one must either obtain coding in all four forms of welding, alternatively, have worked as a welder for a period of 5 years before being allowed to undertake the test.

[25] When the accident occurred the plaintiff was in the process of securing employment in the Agricultural Sector in the United States of America (US), where he intended to work for a period of 5 years earning US Dollars, which would put him and his family in good stead financially in the future. The employment was being arranged by his father-in law who was working in the Agricultural Sector in the US at the time, for the plaintiff and his brother-in law. To that end the two had obtained code 14 learner driver licenses which they were advised would put them in an advantageous position. The employment was organised via a placement agency called Golden Opportunities, with which the plaintiff was in constant communication. His brother-in- law secured the work and left for the US in June 2019. The plaintiff, however, was unable to finalise his process because of the accident.

[26] His intention on returning to South Africa after 5 years, was to continue working as a welder at Welfit Oddy. His father-in-law had contacts there and would be able to pull strings for him to be re-employed.

[27] Due to the accident and the injuries sustained however, none of these plans came to fruition.

³ As reflected on his various pay slips which were handed into evidence in court and marked 'Exhibit B7 – B34'.

The legal principles applicable

[28] The legal position relating to a claim for diminished earning capacity has become trite. In *Dippenaar v Shield Insurance Company Ltd*,⁴ Rumpff JA stated the principle as follows:

‘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 been 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, such loss diminishes the estate.’

[29] Dealing with the issue of how to approach the problem of quantifying a claim for loss of earning capacity, Nicholas JA articulated the following:⁵

‘Any inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a predication 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 on the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

⁴ 1979 (2) SA 904 (A) at 917 B-C; See also *D’Hooghe v Road Accident Fund* (572/2007) [2009] ZAECPHC 36 (30 July 2009), unreported judgment of Chetty J.

⁵ In *Southern Insurance Association Ltd v Bailey* N.O. 1984 (1) 98 (AD) at 113F – 114E.

It is manifest that either approach involves guesswork 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 & Co* 1926 TPD367 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.”

...

In cases where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers an advantage over the second. On the contrary, once the result of an actuarial computation may be no more than an “informed guess”, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s “gut feeling” as to what is fair and reasonable is nothing more than a blind guess. (Cf *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 920).’

[30] In *D’Hooghe v Road Accident Fund*,⁶ Chetty J summarized the proper method of determining a plaintiff’s loss as follows:

‘It follows from the foregoing authorities that where, as in casu, a Plaintiff suffers a permanent impairment of earning capacity the proper method of determining such loss is – (i) to calculate the present value of income which the plaintiff would have earned but for the injuries and the subsequent disability; (ii) adjust that figure having regard to all relevant factors and contingencies; (iii) calculate the present value of the plaintiffs estimated future income having regards to the injuries sustained and the consequent disability; (iv) adjust the latter figure with

⁶ See fn 1 *supra*.

due regard to all relevant factors and contingencies; and (v) subtract the latter from the former.’⁷

Discussion

[31] The plaintiff appeared as an open and credible witness before this court and his evidence was supported by documentary evidence. He presented himself as a driven and highly motivated individual who was consistently seeking to improve himself and to achieve more in his career. This is evident from his efforts in undertaking welding courses after hours whilst working as a Sandblaster at Furman Trading. His plans of securing employment overseas (which I accept as being realistic given that they came to fruition for his brother-in-law) and obtaining a code 14 learner’s license in furtherance thereof further attest to his drive. Even his attempts at securing employment after the accident further attest to his drive and tenacity.

[32] The admitted reports of the experts and the joint minutes also talk to the evidence of the plaintiff in so far as the injuries he suffered and the sequelae thereof, thus affirming his veracity as a witness.

[33] The plaintiff’s evidence provided a sound basis for the industrial psychologists to make their postulations in respect of his pre-morbid and post-morbid career paths. Both the plaintiff’s and the defendant’s industrial psychologists are *ad-idem* in this regard (as set out above), leaving the only issue being that of an appropriate contingency deduction to be applied.

[34] Notably, the industrial psychologists in the joint minute have taken a conservative approach in their postulations. Although the plaintiff planned to work in the USA for 5 years, they have reduced this period to three and a half years. In addition, despite the plaintiff having testified to the effect that in order to qualify as a grade 5 welder, one needed to have either completed the four welding courses, or to have been working in the industry for a period of 5 years before being able to undertake the grade 5 welding

⁷ At para 19.

test, the industrial psychologists agreed that it would take the plaintiff eleven years after his return to South Africa to qualify as a grade 5 welder.

[35] Mr Whittaker, the actuary, using the joint minute of the industrial psychologists, prepared a calculation of the plaintiff's loss where he proposed two scenarios. In scenario 1 the calculation includes a residual future earning capacity which is based on the industrial psychologists' postulation of seasonal employment for three months of the year. A 50 % contingency deduction is applied in this regard. In scenario 2 the actuary applied a 15 % contingency deduction for past loss and a nil value for post-accident future earnings. In this regard a 20% contingency deduction is applied for future loss of earnings to cater for any residual earning capacity.

[36] Mr van der Linde for the defendant, has argued that whilst he agrees that the sequelae of injuries will have a significant impact on the employability of the plaintiff, there is however, no objective impediment to him obtaining employment. According to him the actuary has found a way of dealing with this in scenario 1 where he applied a 50% contingency deduction to the plaintiff's injured future loss of income, given that he will in all probabilities work for 50% of the time.

[37] Whilst I accept that according to the industrial psychologists the plaintiff has some residual employment capacity, the evidence presented suggests that this is in theory only (given that he has been out of employment since February 2022; and Mr Williams, the recruitment specialist, whose evidence is to the effect that the plaintiff has utilized all his sympathetic employment and therefore has nil chances of future employment)⁸.

[38] I am therefore inclined to accept the calculation in scenario 2 which shows a nil amount for injured future loss. In any event the allowance to be made for contingencies is a process of subjective impression or estimation rather than objective calculation that

⁸ In fact, the industrial psychologists agree in the joint minute that it is highly unlikely that the plaintiff will find any employment from a sympathetic employer given his circumstances.

falls within the court's sole discretion. The adjudication of such contingency is complicated and multifaceted with some speculation inevitably existing. The discretion must be based upon a consideration of all the relevant facts and circumstances, justice and fairness being the ultimate criteria to both parties.⁹

[39] On the evidence presented, I am of the view that the calculation in scenario 2, where the actuary applies a 15% contingency deduction for past loss of income and a 20% deduction for future loss, presents the plaintiff's total loss which, given the above-mentioned considerations, is not overly burdensome to the defendant and therefore fair. In fact, given what I have stated above, I find the calculation to be on the conservative side.

[40] Furthermore, in opening his closing argument in this regard, Mr van der Linde for the defendant, submitted that other than the fact that he had no instructions to agree, he adopted a similar approach to that adopted by the plaintiff's counsel.

[41] In scenario 2 the actuary calculates the net past loss of income in the amount of R1, 219,320 after applying the 15% contingency deduction, and the net future loss in the amount of R 5, 654, 249 after applying the 20% contingency deduction, thus totaling a net loss of R6,873,569. After applying the loss limit which is applicable in the matter the total net loss is reduced to R6,743,568. I have no reason not to accept the actuary's calculations as being correct. I find therefore, that the total loss suffered by the plaintiff is the net amount of R6,743,568, which is the amount that the plaintiff is entitled to be awarded in damages.

Order

[42] In the result, the following order is issued:

⁹ Cannon v Road Accident Fund [2023] EC case no 2473/2021 (Unreported judgment).

(a) The defendant is directed to pay to the plaintiff the amount of R5,243,568 as damages for loss of earnings and earning capacity (being the sum of R6,743,568 less the interim payment totaling R1,500,000).

(b) Payment of the aforesaid amount to be made within 180 days from the date of this order directly to the plaintiff's attorneys of record, being:

Bank:	Nedbank
Branch Code:	1[...]
Account Number:	1[...]
Reference:	MAT6312

(c) Payment of interest on the aforesaid amount at the prevailing prescribed interest rate calculated from a date 14 days after the granting of this order, in accordance with section 17(3) (a) of the Road Accident Fund Act, Act 56 of 1996, as amended;

(d) The defendant shall pay:

(i) the plaintiff's costs of suit, including costs of two counsel (where so employed) as taxed or agreed, such costs to include the costs of reports, supplementary reports, joint minutes, qualifying expenses (if any) of:

(aa) Dr M Swart;

(bb) Dr H Vawda;

(cc) Dr P Pretorius;

(dd) Dr O Shenxane;

(ee) Dr B Perry;

(ff) Mr I Meyer;

(gg) Ms A van Zyl;

(hh) Mr D Williams;

(ii) Ms A Engelbrecht; and

(jj) Mr G Whittaker;

(ii) the trial costs on 12 and 15 February 2024;

(iii) the reasonable costs of consultations of plaintiff's counsel and plaintiff's attorney with plaintiff's experts and lay witnesses in reparation for trial;

(iv) interest on the plaintiff's said taxed or agreed costs at the prescribed legal rate from the date of allocatur or agreement to date of payment.

V P NONCEMBU
JUDGE OF THE HIGH COURT

Appearances:

Counsel for Plaintiff:	<i>A Frost (with K D Williams)</i>
Instructed by:	PBK Attorneys Gqeberha

Counsel for Defendant: *van der Linde SC*
Instructed by: Office of the State Attorney,
Gqeberha

Date Heard: 12 and 15 February 2024

Date Delivered: 8 October 2024