



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

Reportable/Not reportable
Case no: 3312/2018

In the matter between
DENIS JOHAN VILJOEN
and
ROAD ACCIDENT FUND

PLAINTIFF
DEFENDANT

Neutral citation: *Viljoen v RAF* (3312/2018) [2025]
Coram: MPAMA AJ

Heard: 21-22 January 2025 – Heads of argument filed on 5 and 7 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 09H30 on 22 May 2025.

Summary:

ORDER

1 The defendant is liable to pay 80% of the plaintiff's proven or agreed damages.

2 The defendant is ordered to pay the plaintiff for loss of earnings in the amount to be calculated and such calculation shall make provision for a contingency deduction of 15 % pre-morbid income and 30% in respect of post-morbid income.

3 The plaintiff is directed to obtain updated actuarial calculations regarding plaintiff's loss of income in accordance with the court's relevant finding on the plaintiff's retirement age with the aforesaid contingency deductions and apportionment.

4 A copy of the updated actuarial calculations shall be served upon the defendant by the plaintiff.

5 The plaintiff shall submit the updated actuarial calculations together with an updated draft order (to be prepared by the plaintiff and the defendant) to the Office of the Registrar in order to obtain a further order for the payment of the plaintiff by the defendant.

The draft order must make provision for the payment of taxed or agreed fees by the defendant on scale B as contemplated under R67A of the Uniform Rules of Court, reasonable and qualifying expenses of the expert witnesses.

JUDGMENT

MPAMA AJ

[1] On 16 April 2016, the plaintiff, Denis Johan Viljoen, was a driver on the N1 South Highway when he was involved in high velocity motor vehicle accident and sustained cervical trauma with resultant dislocation of the cervical spine at C6/C7. Arising from the injuries sustained in the accident, the plaintiff commenced action proceedings against the defendant, the Road Accident Fund, and sued it for general damages, loss of income and medical costs.

[2] On 30 July 2024, this court, per Daffue J, granted an order in terms of which the defendant was ordered to pay 80% of the plaintiff's proven or agreed damages, R640 000 for general damages and to deliver an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act) to the plaintiff.

[3] On 29 October 2024, by agreement between the plaintiff and defendant, the court granted an order for an interim payment in the amount of R1 000 000, in terms of rule 34A of the Uniform Rules of Court, for plaintiff's past and future loss of income, alternatively loss of earning capacity.

[4] At the commencement of the proceedings, the parties informed the court that the only issue for determination was the plaintiff's past and future loss of income, a point of discord being the plaintiff's pre-morbid retirement age and potential income post normal retirement age.

[5] Two expert witnesses, both industrial psychologists, testified: Ms Madeleine Pretorius testified for the plaintiff and Mr Johannes Petrus Venter for the defendant. An application was brought by the applicant in terms of rule 38(2) of the Uniform Rules of Court for the expert evidence to be tendered by way of affidavits. The application was not opposed and the order was granted. Pursuant to the order, the following affidavits were handed in: Dr Piet Olivier, an orthopaedic surgeon; Ms Benita Krause, an occupational therapist; and Mr Wim Loots, an actuary. Most issues are common cause between the plaintiff and the defendant and in order not to overburden this judgment I will only refer to the most salient facts of these reports:

(a) Dr Olivier reported that the plaintiff sustained a severe orthopaedic injury to the cervical area, which resulted in a bifacet dislocation at the level between C6 and C7 and was fortunate not to sustain an injury to the spinal cord. The plaintiff underwent an initial stabilisation between C6 and C7 but a revision procedure was necessary. The plaintiff will experience a moderate degree of daily mechanical neck pain, which should be considered as permanent in nature. He concluded that the plaintiff's ability to perform a job that entails sedentary duties was compromised due to the necessity to alternate sitting with standing and walking, the plaintiff will probably be forced to retire prematurely and most probably at the age of sixty years. It was not expected that the plaintiff's degree of disability will improve significantly with future medical or surgical intervention.

(b) Ms Krause assessed the plaintiff on 21 January 2020. She reported that the plaintiff was suffering from severe pain due to the nature of the injuries sustained during the collision, his retirement age has to be reconsidered and the plaintiff has to be seen by an industrial psychologist to determine his future employability.

(c) Mr Loots prepared loss of earnings calculations of the plaintiff. He based his calculations on the industrial psychologists' reports and came up with two scenarios. The first scenario is based on Ms Pretorius's opinion that the plaintiff's retirement age will be 75 years with his

current salary level and the resultant loss of income being R4 084 859. The second scenario is based on Mr Venter's opinion with 70 years as the retirement age and substantial decrease in salary resulting in the amount of R1 698 159 as loss of income.

[6] Ms Pretorius for the plaintiff testified as follows. That at the time of the accident, the plaintiff was 49 years old and employed as a Business Development Manager at Sanlam Personal Portfolios in Bellville. He still holds this position. The plaintiff would most likely remain with Sanlam until the retirement age of 65 years if it was not for the accident, however, due to his injuries, he will take an early retirement at the age of 60 years. After the accident, he was on sick leave for three months. During his absence at Sanlam, he received a basic salary and did not receive any commission pay-out due to his absence.

[7] Ms Pretorius referred to the actuary's calculations and agreed that the plaintiff's loss of past income stood at an amount of R89 013. She referred to a joint minute between herself and Mr Venter. She confirmed that they agreed on the amount of loss of past income, that the plaintiff's current salary was an annual gross income of R1 923 353 and he would have continued to earn on this level with annual inflation increases until the age of 65 if it was not for the accident. They also agreed that the plaintiff would, in all probabilities, qualify as a Certified Financial Planner (CFP), with this qualification he would continue working beyond the normal retirement age or run his own financial advisory institution and earn almost the same income as before normal retirement age. The plaintiff intended to retire at 75 years.

[8] Ms Pretorius further testified that she interviewed the plaintiff's supervisor, Mr Lotriet, who reported that the plaintiff would definitely qualify as a CFP as this was a common route followed by the employees in plaintiff's position when they reach 65 years and because this is a specialised skill and CFPs earn a considerable monthly income. Moreover, she testified that the plaintiff had to abandon his studies towards qualifying as CFP due to pain suffered as a result of the accident. The plaintiff would retire at 65 years at Sanlam and, due to his injuries, he will have to take an early retirement, most probable at 60 years as a result of his injuries.

[9] Lastly, Ms Pretorius testified that, on 28 October 2024, herself and Mr Venter signed an addendum joint minute in terms of which they agreed that the only issues in dispute were whether the plaintiff would have continued to work as a CFP from the normal retirement age (65 years) up to at least 75 years or not and his potential income during this period. She said according to this minute, she opined that the plaintiff would earn between R800 000 and

R2 000 000 per annum, whereas the defendant said between R266 215 and R241 327.

[10] During cross-examination, Ms Pretorius conceded that the chances of the plaintiff continuing to work between the age of 70 and 75 years were on a 50/50 basis and a possibility existed that the plaintiff would retire before attaining the age of 75 years. When asked if there were other resources consulted to arrive at this conclusion, her response was that she could not obtain any statistics or information to substantiate her claims, however, it was still her opinion that, in South Africa, there is a general trend of people in high income groups working beyond the normal retirement age. This concluded a case for the plaintiff.

[11] Mr Venter for the defendant testified as follows. That he signed a joint minute with the plaintiff's expert, Ms Pretorius wherein he agreed that if it was not for the accident, the plaintiff would continue working until the age of 65 years at Sanlam, continue working post retirement until the age of 70 years. His further evidence was that there was insufficient information available regarding the percentage of people in South Africa who continue to work after the normal retirement age and because employees in high income groups were not expected to do physical duties many of them continue to work past the normal retirement age but not beyond 70 years. On this, he concluded by saying that working beyond the normal retirement age was dependent on a number of factors like family dynamics, including the composition of the family, lifestyle and health, it was improbable that the plaintiff would remain in good health between the age of 70 and 75 years and it was reasonable to expect the plaintiff to work until 70 years.

[12] He further testified that there were 80% chances that the plaintiff would qualify as a CFP and it was difficult to determine his income as he will be older, employed or self-employed with no stable source of income. He admitted that, initially, he had agreed with Ms Pretorius that the plaintiff would earn almost the same income he earned at Sanlam, however he later deviated from this conclusion. The reason for deviation was that he obtained some information from Analytico and indeed websites and this resulted in him concluding that the plaintiff's salary will be reduced to between R266 215 and R 241 327 post retirement. During cross-examination, he conceded that there was no credible evidence to substantiate these amounts. This concluded a case for the defendant.

[13] The court must determine the plaintiff's retirement age post normal retirement age and his potential income during this period.

[14] The onus lies on the plaintiff to prove that his earning capacity has been negatively impacted because of the injuries. Once that is established, then the claim may be assessed and quantified.

[15] It is evident from the plaintiff's expert reports that the injuries sustained by the plaintiff had a negative impact on him. This has not been placed in dispute by the defendant. The plaintiff and the defendant are also in agreement that the plaintiff will retire earlier than normal, most probable at age 60, would have worked at Sanlam until the standard retirement age (65 years), qualify as CFP with Mr Venter placing his chances of qualifying at 80% and that he would work beyond the normal retirement age if it was not for the accident. It is also common between the parties that the plaintiff, with his qualifications and experience, possesses scarce specialised skills.

[16] The plaintiff's contention is that he would work and earn an income until the age of 75 years either self-employed, running his financial advisory business or employed by another financial company. Ms Pretorius was unable to substantiate her claim that the plaintiff would be able to work until 75 years when called upon to do so. She also conceded that there was no credible evidence to corroborate this. She reluctantly admitted that the most definite scenario was for the plaintiff qualifying as CFP and working until the age of 70 years in this field.

[17] This court, per Chesiwe J, in the case of *Mahlo v Road Accident Fund* [2022] ZAFSHC 194 at para 25-26, faced with almost similar facts, expressed itself as follows:

'However, it is not unreasonable to accept that she is able to work beyond the age of 65 years (sixty-five). Though there is no case law on the retirement age of a self-employed and unskilled labourer, there are many instances where employees in the formal employment are allowed to work until the age of 70 (seventy) years and beyond such as is the case for professionals, Attorneys and Ministers, though the Plaintiff's circumstances are not comparable to some of these professionals.

It is clear from the Plaintiff's testimony that depending on her health, she will work beyond the age of 65 (sixty-five). I have my doubts that she will be able to work until the age of 80 (eighty) years as on observation during her testimony, she walked with difficulty as she approached the witness stand. The Plaintiff suffers from high blood pressure pre-accident and is already on the government old age grant, which she has been receiving from the age of 60 (sixty);'

[18] I align myself with these sentiments, it is difficult to fathom that the plaintiff will, beyond the age of 70 years, be able to enjoy a normal and productive work life. It is my opinion that considering factors like physical, mental and psychological challenges that come naturally with old age, it is unlikely that the plaintiff would still function at full capacity at the age of 70 years. Moreover, 75 years as an ultimate retirement age was not mentioned or discussed by the plaintiff with any of the experts except Ms Pretorius. A reasonable probability is that the plaintiff would be able to work beyond normal retirement up until 70 years.

[19] The defendant submitted that the plaintiff's salary would be substantially reduced post normal retirement age. Mr Venter testified that his initial view was that it will not but changed his position when he conducted a search on two websites, Analytico and indeed and concluded that it will be substantially reduced. Other than this there is no cogent evidence presented. The plaintiff and the defendant agreed that the plaintiff possessed unique specialised skills. I am unable to find that the plaintiff's income would be substantially reduced post normal retirement age.

[20] I am satisfied that a fair and reasonable compensation for the plaintiff's loss of future income would be an amount calculated at his current salary level up to the age of 70 years. The actuarial calculations need to be updated.

[21] I will now deal with the contingency deductions. The determination of a suitable contingency deduction falls within the discretion of the court. There is no dispute regarding the contingency deductions applied on the actuarial calculations presented by the plaintiff. The actuary suggested a deduction of 15 % in respect of the pre-morbid income and 30% in respect of the post-morbid income. These deductions are, in my view, fair and reasonable in the circumstances of the plaintiff.

[22] On conclusion, the general rule is that costs follow suit. I have no reason(s) to deviate from the general rule.

[23] In the circumstances, I make the following order:

1 The defendant is liable to pay 80% of the plaintiff's proven or agreed damages.

2 The defendant is ordered to pay the plaintiff for loss of earnings in the amount to be calculated and such calculation shall make provision for a contingency deduction of 15 % pre-morbid income and 30% in respect of post-morbid income.

3 The plaintiff is directed to obtain updated actuarial calculations regarding plaintiff's loss of income in accordance with the court's relevant finding on the plaintiff's retirement age with the aforesaid contingency deductions and apportionment.

4 A copy of the updated actuarial calculations shall be served upon the defendant by the plaintiff.

5 The plaintiff shall submit the updated actuarial calculations together with an updated draft order (to be prepared by the plaintiff and the defendant) to the Office of the Registrar in order to obtain a further order for the payment of the plaintiff by the defendant.

The draft order must make provision for the payment of taxed or agreed fees by the defendant on scale B as contemplated under R67A of the Uniform Rules of Court, reasonable and qualifying expenses of the expert witnesses.

L. MPAMA AJ

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Appearances

For the plaintiff:

AS Sieberhagen

P Joubert Inc, Bellville

Instructed by:

c/o Rosendorff Reitz Barry Inc, Bloemfontein

For the defendant:

J Gouws

Instructed by:

State Attorney, Bloemfontein.