



IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

MBOMBELA (MAIN SEAT)

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

CASE NUMBER 745/2023

25/07/2025
DATE

SIGNATURE

DIRECTOR BUTIBUTI MASHELA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SHAI AJ

Introduction

[1] This is a claim for damages arising from an accident on 9 March 2022. When the matter came before this court merits had already been settled between the parties. General damages had been rejected and the claim was subsequently abandoned by the plaintiff.

[2] The court was called upon to make a determination on compensation for past and future loss of earnings.

[3] Viva voce evidence was given by the following witnesses:

3.1 Director Mashele, the applicant

3.2 M Shana, Occupational therapist.

[4] In proving their case, Plaintiff made an application for evidence to be placed before the court in accordance with the provisions of Rule 38 (2). The application was granted. Plaintiff then filed reports by the following experts:

4.1 Dr SL Kayuba, an orthopaedic surgeon;

4.2 Mr Oscar sechudi, Industrial Psychologist; and

4.4 Johan Sauer, an actuary.

[5] By agreement between the parties, the plaintiff filed confirmatory affidavits by all of the aforesaid experts which affidavits were received as exhibits. The Plaintiff's expert reports were received into evidence in terms of rule 38(2) by agreement between the parties.

[6] Counsel for both parties made well-reasoned and thorough submissions which I found helpful and for which I express my sincere appreciation.

Facts

[7] The admitted evidence can be summarised as follows:

7.1 Plaintiff sustained a head injury, a chest injury and right clavicle fracture.

7.2 He was pre-morbid employed as an infra-worker at Transnet and he is still, post-morbid, employed in the same position. Although, post-morbid, he initially was assigned heavy duties, he is now not performing any duties as the employer is still looking for suitable duties for him. The only loss he is suffering as far as his salary is concerned is the money earned for overtime. His salary is still the same, with an annual increment.

[8] The overtime earnings depend on the number of days he works within a month but he was, pre-accident, guaranteed 2 weekends.

[9] His average overtime pay, reflected as “adhoc overtime” (reflected as call out O/T, call out S/T and Standby allowance) is R2500¹

Issue

[10] The issue for determination is whether the plaintiff suffered loss of earnings occasioned by the sustained injuries.

10.1 If found that loss was suffered it should be determined whether it is total or partial loss and how the loss should be quantified.

Onus

[11] The Plaintiff should discharge the onus resting upon him to show that he has to be compensated for the loss of earnings or earning capacity.

Rule 38(2)

[12] Some of the evidence adduced herein was given on affidavit in terms of rule 38(2). Rule 38(2) provides:

"38(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

[13] The consent by the Defendant that affidavits may be filed should not be misconstrued or interpreted by the Plaintiff as the defendant's admission of evidence. The Defendant is still entitled to highlight issues arising out of the evidence, refer to contradictions between witnesses and deal with improbabilities.

[14] The postulation, however, is that the parties directly or indirectly agree to submit the expert reports by way of affidavit and then *ex lege* agree that the

¹ See payslips on pages 481 and 483 of the bundle

defendant will be able to build an argument based on the plaintiff's expert reports and will be able to dissect the said expert reports. However, once an expert report is admitted into evidence there is no room for submissions that the expert reports are flawed in any way and are inadmissible.

[15] Submissions regarding the law of evidence and admissibility of evidence must be done before expert reports are admitted into evidence and marked as exhibits. It is at this stage that the credibility of the witnesses should be attacked.

[16] Once the reports are admitted as evidence, the defendant has to forego the right or opportunity to attack the credibility of the plaintiff's witnesses, bearing in mind that there was no cross-examination put forth affording the experts an opportunity to defend their opinions.

[17] The credibility of the expert witnesses cannot be simply attacked in heads of argument or oral submissions. If the parties agree that the deponent to the affidavit will not be cross-examined, the factual allegations in the affidavit stand unchallenged and no dispute of fact in regard thereto arises.

[18] It was held in *Road Accident Fund v Zulu and Others (50/11) [2011] ZASCA 223 (30 November 2011)* that:

“[14] ...A useful guide to the approach of expert evidence is found in *Michael v Linksfield Park clinic (Pty)Ltd* where the court stated:

‘...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”

Loss of earnings/earning capacity

[19] 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, if that loss diminishes the estate.²

[20] The defendant should, therefore, if the onus has been discharged, make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed.³

[21] In a case of personal injury, the court must calculate on the one hand the present monetary value of all that the Plaintiff would have brought into her estate had she not been injured, and, on the other hand, the total present monetary value of

² *Dippenaar v Shield Insurance Co Ltd* 1979 (2) 904 AD at 917 A-B

³ *Ibid.*

all that the Plaintiff would be able to bring into her estate whilst incapacitated by her injury.⁴

[22] The court, in determining any loss suffered, is entitled to take into account the claimant's home background.⁵

[23] It is worth noting that in some instances, the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage would be nil.⁶

[24] The evidence in this matter is based on experts' reports of nine experts. As alluded hereinbefore, what is required in the evaluation of such evidence is to determine whether or to what extent their opinions advanced are founded on logical reasoning.⁷

Quantum and contingencies

[25] In the event that the court finds that there is a loss, quantum should be determined. An 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.'⁸ The court, in this enquiry, can refer to actuarial calculations, which are an informed guess as opposed to a trial judge's blind guess.⁹

[26] There are two approaches to determining loss of income:

26.1 one is for the judge to make a sound estimate of an amount which seems to him to be fair and reasonable.

26.2 The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence.¹⁰

[27] If there is an admission of damage, the Court should not be deterred by reason of the difficulty of computing an exact figure from making an award of damages.¹¹ The question that must be answered in the assessment of damages is

⁴ Dippenaar *supra*, at 917 D-E

⁵ Southern Insurance Association v Bailey NO 1984 (1) 98 AD

⁶ Prinsloo v Road Accident Fund 2009 (5) SA 406 (SECLD) at 410 D

⁷ Michael and Another v Linksfield Park Clinic (pty) Ltd and Another 2001 (3) SA 1188 (SCA) at 1200 I

⁸ Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) at 113F-113E

⁹ *Ibid*, at 114C-D

¹⁰ Mlotshwa v Road Accident Fund (9269/2014) [2017] ZAGPPHC 109 (29 March 2017), at paragraph 17 referring to *Bailey supra*

¹¹ Lazarus v Rand Steam Laundries 1952 (3) SA 49 (T) at page 53, 8-F

and what must be determined is whether there is a disability which is likely to impair the injured person's earning capacity.¹²

[28] It is sometimes simply not possible to place evidence of potential earning before Court and there may be no evidence upon which a mathematical calculation can be made.¹³

[29] Once the court is satisfied that pecuniary damage has been suffered, it must make an award of an arbitrary amount of what seems to be fair and reasonable even though the result might be more than an informed guess.¹⁴

Evaluation

[30] I will, herein, not deal with the detail of the expert reports. I have considered the contents of the said reports, in light of the submissions by both Counsel. There is no basis for rejecting the evidence and conclusions of the experts. The experts made their conclusions based on facts and applicable data. I accept their respective opinions.

[31] There is a thread that runs through all the reports, which is to the effect that, in my view, Plaintiff has indeed been rendered vulnerable and that the accident-related sequelae have had significant life-changing implications for his future employability and overall functioning.

[32] It is evident from the reports that Plaintiff suffered a head injury, a left-sided large abrasion, a chest contusion, right shoulder clavicle fracture and a left shoulder soft tissue injury.

[33] It is settled law that the amount to be awarded as compensation for general damages can only be determined by the broadest general considerations and the figure arrived at must be uncertain pending on the Judge's view of what is fair in all the circumstances of the case¹⁵. The Judge should consider previous decisions on injuries similar to the one dealt with. This means that comparable awards should be looked at.

[34] In *casu*, the Plaintiff is still employed in the same position he was employed pre-accident. His basic salary has not changed. The only loss he suffers on a monthly basis relates to an average amount of R2500.

¹² Ibid, at page 30

¹³ Griffiths v Mutual and Federal Insurance Co Limited 1994 (1) SA 535 (A)

¹⁴ supra, at 546F-G

¹⁵ Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199

[35] The actuarial calculations are based on different Paterson level entries to the market. This goes against the established fact that his employment position hasn't changed post-morbid. Any unforeseen circumstances can be taken care of in contingencies.

[36] In my view, this is a matter wherein I have to make a sound estimate of an amount which seems to me to be fair and reasonable. In doing so, I have considered that the plaintiff is left with 35 years to reach the retirement age of 65. I then multiplied the average loss of R2500 by twelve months in each year for 35 years. I arrived at a figure of R1 050 000.

Conclusion

[37] I am satisfied that the Plaintiff successfully proved, on a balance of probabilities that he has to be compensated for loss of earnings/earning capacity.

[38] I have considered that he only lost a monthly average amount of R2500. I have considered the actuarial calculations relating to loss of earnings/earning capacity. I rejected such calculations based on the reasons given above.

[39] Consequently, the following order is made:

1. The Defendant is ordered to pay to the Plaintiff a total amount of R1 050 000 for loss of earnings.
2. Defendant is ordered to pay costs of suit, including costs of Counsel, on a party and party Scale B.



SHAI AJ

DATE OF HEARING: : 26 February 2025

DATE OF JUDGMENT : 25 JULY 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be **11h00** on **25 JULY 2025**.

FOR THE PLAINTIFF: TOOHEY NYEZI RAMBAU (TNR) ATTORNEYS
C/O PATRICK MAHLALELA ATTORNEYS
32 BELL STREET
MBOMBELA
TEL: 012 433 6301
E-MAIL: toohey@tnrattorneys.co.za

FOR THE DEFENDANT: THE STATE ATTORNEY-MBOMBELA
3RD FLOOR, ADMIN BLOCK, WEST WING
R104, SAMORA MACHEL DRIVE
MBOMBELA
EMAIL: caswellm2@raf.co.za