



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

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

01/09/2025
DATE


SIGNATURE

CASE NUMBER A73/2024

FOSTAH NYATHI

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

SHAI AJ

Introduction

[1] This is an appeal against the whole of the judgment and order of Phahlamohlaka AJ, dated 2 May 2024.

[2] Leave to appeal to the full court was granted on 30 September 2024.

[3] The appeal is opposed by the respondent, who was the defendant in the trial court.

Brief litigation history

[4] The action arose from a motor vehicle collision that occurred on 3 March 2021.¹

[5] At the time when the trial court heard the matter, the respondent had conceded liability (100%) and made an undertaking for future damages in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, as amended.

[6] The trial court had to determine the amount of general damages and the future loss of earnings or earning capacity.

[7] In the pre-trial minutes, the respondent admitted the reports of the experts appointed by the appellant. It was further agreed that evidence by the experts would be furnished via affidavits in accordance with the provisions of Uniform Rule 38 (2).

[8] The trial court was thus tasked with adjudicating on the amount of compensation to be awarded for general damages and deciding on contingency deductions applicable to calculations for loss of earnings.

[9] The trial court awarded an amount of R650 000.00 for general damages and R365 800.35 for future loss of earning capacity. It is the award for future loss of earning capacity, where the appeal is directed.

¹ See Particulars of Claim for further details

[10] In determining the amount for future loss of earning capacity, the trial court worked on the premise that the plaintiff's pre and post-accident earnings or earning potential are the same². This conclusion contradicts the postulations of various experts, particularly the actuary, whose calculations reflected pre-accident and post-accident earnings of R7 256 007 and R5 747 107, respectively. The trial court applied contingencies on the amount of R7 256 007 for both pre and post-accident earnings. Contingencies of 15% and 20% were applied to the pre and post-accident earnings, respectively. The award of R362 800.35 was thus arrived at.

[11] The appeal is against the award for future loss of earnings.

Issues

[12] The issues for determination are:

12.1 Whether the trial court misdirected itself in dealing with the issues placed before it for determination; and

12.2 If it is found that there was a misdirection, and if this court disagrees with the trial court on the amount of the award, it must consider whether the damages awarded warrant this court's intervention.

The law

[13] In an appeal of this nature, the appeal court should consider the evidence adduced during the trial.

[14] The court of appeal is barred from setting aside the decision of the trial court merely because it would have reached a different conclusion based on the same facts³. It may

² Paragraph 22 of the judgment

³ Naylor v Jansen 2007 (1) SA 16 (SCA) at 23G-24B; MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 SCA at 624E-H

interfere only when it appears that the trial court failed to exercise its discretion judicially, or that it had been influenced by wrong principles or misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.⁴

Rule 38(2)

[15] The evidence adduced herein was given on affidavits 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."

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

[17] The postulation, however, is that the parties directly or indirectly agree to submit the expert reports in the form of affidavits. Then, *ex lege*, agree that the defendant will be

⁴ National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at 14B-D.

able to build an argument based on the plaintiff's expert reports and will be able to dissect those 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.

[18] 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.

[19] 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.

[20] The credibility of the expert witnesses cannot simply be attacked in the 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.

[21] 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

[22] 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.⁵

[23] 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.⁶

[24] 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 all that the Plaintiff would be able to bring into her estate whilst incapacitated by her injury.⁷

[25] 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 this event, the damage would be nil.⁸

[26] Relevant to this appeal is that the evidence in this matter is based on reports of six experts. As alluded to hereinbefore, what was required of the trial court in evaluating such evidence was to determine whether and to what extent their advanced opinions are founded on logical reasoning.⁹

[27] The experts stand as single experts in their respective fields of expertise, as the respondent called no additional experts.

Quantum and contingencies

⁵ Dippenaar v Shield Insurance Co Ltd 1979 (2) 904 AD at 917 A-B

⁶ Ibid.

⁷ Dippenaar supra, at 917 D-E

⁸ Prinsloo v Road Accident Fund 2009 (5) SA 406 (SECLD) at 410 D

⁹ Michael and Another v Linksfeld Park Clinic (pty) Ltd and Another 2001 (3) SA 1188 (SCA) at 1200 I

[28] 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.¹⁰ The court, in this enquiry, can refer to actuarial calculations, which are an informed guess as opposed to a trial judge's blind guess.¹¹

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

29.1 One is for the judge to make a sound estimate of an amount that seems fair and reasonable to him.

29.2 The other is to try to make an assessment, by way of mathematical calculations, based on assumptions resting on the evidence.¹²

[30] 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.¹³

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

Evaluation

[32] The actuarial calculations herein are in line with postulations by the experts, particularly the Occupational therapist and the industrial psychologist.

¹⁰ Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) at 113F-113E

¹¹ Ibid, at 114C-D

¹² Mlotshwa v Road Accident Fund (9269/2014)[2017]ZAGPPHC 109 (29 March 2017), at paragraph 17 referring to *Bailey supra*

¹³ Lazarus v Rand Steam Laundries 1952 (3) SA 49 (T) at page 53, 8-F

¹⁴ *supra*, at 546F-G

[33] The trial court did not find that the experts' postulations were not founded on logical reasoning.

[34] Contingencies should therefore have been applied to the figures provided by the actuary.

[35] There is no rationale supporting how the trial court applied contingencies.

[36] I have considered the contents of the said reports, together with other evidence. In my view, there is no basis for rejecting the evidence and conclusions of the experts. The experts made their conclusions based on facts and applicable data. To the extent that the trial court did not accept their opinions, it was misdirected. In other words, it misdirected itself by applying contingencies based on blind guesses rather than informed actuarial estimates or calculations.

[37] Central to this misdirection was the trial court's finding that the appellant was unemployed at the time of the accident and had no estate, a finding that is not supported by the evidence.

[38] The actuary found that the pre-accident earnings would have been R7 256 007 and the post-accident earnings R5 747 107. I am of the view that a contingency of 20% on pre-accident earnings and 25% on post-accident earnings should be applied. Applying such contingencies, with a differential of 5%, one arrives at figures of R5 804 805.60 and R4 310 330.25 for pre-accident and post-accident earnings, respectively.

[39] The loss suffered by the appellant is, therefore, R1 494 475.35

[40] Consequently, the following order is made:

1. The appeal succeeds.

2. Paragraph (a) of the trial court's order is set aside and replaced with the following:

2.1 The defendant is ordered to pay the plaintiff the sum of R2 144475-35, being R1 494 475-35 as compensation for future loss of earning capacity and R650 000 for general damages.

3. The Respondent is ordered to pay costs of this appeal, including costs of Counsel, on a party and party Scale C.


SHAI AJ

I agree and it is so ordered.


RATSHIBVUMO DJP

I agree


TSHETLO AJ

DATE OF HEARING: : 14 MARCH 2025

DATE OF JUDGMENT : 01 SEPTEMBER 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be **14H00** on **01 SEPTEMBER 2025**.

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