



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 11177/2014

In the matter between:

NEIL MOODALIAR

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

ORDER

In the premises it is ordered that:

The plaintiff's claim is dismissed, with no order as to costs.

JUDGMENT

Mathenjwa J

Introduction

[1] The plaintiff instituted action against the Road Accident Fund ("the RAF") claiming liability for damages arising from injuries sustained by him in a collision with an unidentified vehicle whilst on his motorcycle on 19 September 2012 near the intersection of O-Flarty and Clare Roads in Durban.

[2] As a result of the collision, the plaintiff sustained serious injuries including a fracture of the right femur, a laceration of the right knee cruciate ligament and injury

to the right knee. The plaintiff's claim for general damages and future medical expenses has been settled. In this court the plaintiff claims loss of earnings under three headings: early retirement, applicable contingencies and one year delay in earning trajectory. Therefore, the issues to be determined in this case are firstly, whether the plaintiff will be compelled to retire early and secondly whether the plaintiff's delay for a period of one year before joining his wife in the United States of America ("the USA") resulted in him losing earning capacity. In making a finding that the plaintiff has incurred a loss of earnings when he delayed joining his wife in the USA, I would have to draw a conclusion that the delay was linked to the accident

Evidence

[3] The plaintiff testified that after his collision, he was admitted to St. Augustine's Hospital where he was treated for ten days. He underwent various surgical procedures and had several screws inserted into his bones. He then underwent physical therapy. Thereafter, he stayed at home for two months, but during this time he was paid his full salary. After the accident, he had to use crutches for a year. From January 2014 to December 2014, he went on sabbatical leave for purposes of completing his degree. At no time after having sustained injuries was he unemployed.

[4] At the time of the accident, he was employed by Dervico as a senior system analyst. He had been working for the same company for 15 years. After sustaining injury, he had to work at home. Although he was paid his salary, he lost out on opportunities for promotions and bonuses. Two years later, he joined his wife who was in the USA where he, together with others, opened a software company. His role in the company was head of development and operations. Since the screws were not removed from his bones the healing of his femur was delayed. He is still feeling a lot of pain, and years after the accident, he again went for surgery on his right leg.

[5] The plaintiff's occupational therapist Ms Tori Sharratt and the defendant's occupational therapist Mr Henry Msimango in their joint minutes agreed that the accident resulted in the plaintiff sustaining impairment including persistent instability pain in the knee, reduced range of motion and muscle strength in the right knee,

back pain, bilateral integration and sequencing of lower limbs, difficulty with high level of mobility, reduced balance, and reduced physical endurance. The therapists also agreed that the plaintiff's functional capacity had been significantly reduced post-accident and that he would not be legible for employment that requires full-light, medium, heavy, and very heavy work. They further agreed that the plaintiff presented with residual psychological symptoms adversely impacting self-confidence and self-worth with increased levels of stress.

[6] The therapists agreed that if the accident had not occurred, it was likely that the plaintiff would have continued working with the opportunity of promotion and would have been competitive in the open market. They also agreed that post-accident, the physical demands placed on the plaintiff in a workday were restricted to no greater than a sedentary to light capacity, with modifications and accommodations; his occupational performance and productivity had been diminished; consequently, the available job opportunities outside his current employment were diminished, considering his residual symptoms and functional capacity. The therapists agreed that the plaintiff's employment and earning capacity had been compromised and early retirement was anticipated, which would be a curtailment of his working life.

[7] The plaintiff's industrial psychologist Ms Louise Neveling and the defendant's industrial psychologist, Ms Sandra Moses, agreed in their joint minutes that after the accident, the plaintiff continued working for his then-employer Dervico, until the end of 2013. In 2014, the plaintiff went on sabbatical leave for the entire year. He used the time whilst on leave to complete his B. Com degree, which he had started in 2004; therefore, his absence from work in 2014 was not accident related. The plaintiff procured work in January 2015 with a company called Digital Gaming Corporation ("DGC") as head of products and development. He later became the chief operating officer of both DGC and a subsidiary business, Mahigaming LLC, and received income.

[8] Ms Sharratt testified that her report was based on the interview she had conducted with the plaintiff and collateral information she had collected in respect of the plaintiff. Mr Msimango also testified that he interviewed the plaintiff virtually and

completed the assessment. After the accident, the plaintiff was required to do his normal work with some adaptation. Msimango repudiated his initial viewpoint in the joint minutes when he had agreed that the plaintiff would not be able to compete with peers in labour markets nor receive bonuses, since factually, he did compete with peers. Although the accident occurred in 2012, the plaintiff still completed his degree in 2014. Msimango opined that it was outside the area of an occupational therapist to determine whether the plaintiff's earlier retirement is curtailed by five years. Under cross-examination by the plaintiff's counsel Msimango stated that there is no indication that the plaintiff's physical condition will degenerate due to injury because it does not occur with everyone that with age the physical condition degenerates.

[9] Ms Nivelling, called by the plaintiff, testified that she had an interview with the plaintiff in her office. She also collected his collateral information and spoke to his previous and current employers. Nivelling opined that the plaintiff now competes at a physical and psychological disadvantage for his own occupation and that as a result of his functional deficits, available job opportunities outside of his current employment are diminished. For these reasons, Nivelling recommended that a higher-than-normal contingency for unemployment be considered in his injured state.

[10] Ms Sandra Moses, the industrial psychologist called by the defendant, testified that she based her findings on reports made to her and other collateral information received from other experts. She opined that the plaintiff is likely to continue working in his current capacity and noted that the plaintiff had progressed extremely well. She agreed that a high contingency should be applied but opined that there is no probability of the plaintiff becoming unemployed. Under cross-examination she admitted that she did not interview the plaintiff, and her conclusion was based on other experts reports and other collaterals.

Analysis and applicable legal principles

[11] The current payslip from the plaintiff's employer shows that the plaintiff is currently earning a salary of \$340 413.33 per annum. The plaintiff's counsel accepts that the amount accurately reflects the plaintiff's current annual earnings. The first issue for consideration is the plaintiff's contention that the accident resulted in him incurring a one year delay in earning trajectory in the USA.

[12] The principle regarding determination of loss of income was restated in *Rudman v Road Accident Fund*¹ where it was held that where a person's earning capacity has been compromised, "that incapacity constitutes a loss, *if such loss diminishes the estate*" and "he is entitled to be compensated *to the extent that his patrimony has been diminished*"; however it is not sufficient that a person's disability giving rise to a diminished earning incapacity has been proved, the evidence must prove that his incapacity constituted a loss which diminished his estate.² Applying the principle to the present case means that, the mere fact that the plaintiff sustained injuries which compromised his earning capacity would not constitute a loss if the loss of income is not linked to the compromised capacity to earn income.

[13] The evidence before court shows that the plaintiff was never out of employment after the accident save for the one year when he went on sabbatical leave. The plaintiff had used the time when he was on leave to complete his B. Com degree. Even though the plaintiff would not have received income when he was on leave that loss of income was not related to his incapacity to earn income, instead the purpose of taking leave was to enable him to complete his degree, something he could not achieve for the past eight years prior to the accident. For these reasons, the claim based on the one year delay in earning trajectory should fail.

[14] This brings me to the claim based on early retirement. There is no doubt that the plaintiff's earning capacity does appear to have been affected, as he had to be accommodated in a sedentary position with modifications and accommodations. However, the watershed moment is that all experts' predictions that the plaintiff's occupational performance and productivity had been diminished as a result of the accident which diminished the available job opportunities outside his current employment were proven wrong.

[15] The difference of opinion that has emerged between the parties experts on the issue of the plaintiff's early retirement arose from the stark contrast between their initial view in their joint minutes that the accident would have significant repercussions on promotional opportunities and the plaintiff's actual achievement

¹ *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA).

² *Ibid* para 11.

after the accident. It is evident that following the accident, the plaintiff experienced growth and secured a salary that greatly exceeded what he would have earned at the time of the incident. Consequent to the wrong prediction about the plaintiff's promotional opportunities post-accident, Mr Msimango repudiated his initial view and contended that the plaintiff would not be compelled to take early retirement due to injuries. Ms Sharratt opined that the plaintiff would retire five years earlier and Msimango had agreed initially that the plaintiff would retire early, without fixing the years of early retirement.

[16] The defendant's counsel referred to Dr Rajah's report, the orthopaedic surgeon, who examined the plaintiff and recorded that his life expectancy was unaffected by the accident, and argued that there is no evidence that the plaintiff's employability may be limited due to pain, or physical limitations as a result of the injuries sustained in the accident. Furthermore, the argument went, although the plaintiff's occupational therapist contends that the plaintiff will suffer chronic pain, the defendant's counsel submitted that the court must draw an inference from Dr Rajah's silence on his findings regarding the plaintiff's loss of income. The plaintiff's counsel argued that although the plaintiff is an extremely motivated high performer who, despite constant pain and diminished working capacity, had reached his expected career ceiling; the focus should not only be on the immediate aftermath of the accident, but the real focus should be on the next 18 years.

[17] In my view, the performance of the plaintiff post-accident is one, but not the only determining factor in establishing whether the plaintiff's retirement years would be curtailed due to the accident or not. Mr Msimango's evidence was not credible on material aspects. His rejection of the proposal that as the plaintiff grows older, his health condition would be exacerbated is untenable, considering the plaintiff's evidence that he still feels the pain, and still has screws in his bones. When elaborating on the plaintiff's emotions after the accident, he only attributed them to the plaintiff's divorce and self-esteem without reference to the serious injuries that affected the plaintiff. Although in the joint minutes with the defendant's occupational therapist, he opined that the plaintiff's retirement age will be curtailed due to the accident, in court, he took a different stance on the issue and contended that the

industrial psychologists would be the appropriate experts to determine the issue of the plaintiff's early retirement.

[18] Ms Moses did not conduct interviews with the plaintiff. She drew a conclusion based on collaterals and reports drawn up by other experts. The function of an expert witness was articulated by Wallis JA in *AM and Another v MEC for Health, Western Cape*³ in the following terms:⁴

'...The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.' (Footnotes omitted.)

[19] Applying the above principles to the facts of this case, it is clear that Mr Msimango's views are not based on facts or general knowledge concerning his discipline. His evidence that there is no likelihood that the plaintiff's bone injuries will degenerate as he grows older is unsubstantiated speculation. His selective speculation of the facts that contributed to the plaintiff's emotional state and total failure to consider the serious injuries sustained by the plaintiff cast further doubt on the credibility of his evidence. Ms Moses's evidence does not assist the court because it is based on reports compiled by other experts. She did not interview the plaintiff, and there is no evidence that she even consulted with the experts who drew these reports to verify the authenticity thereof. It is trite that for an expert opinion to be underpinned by proper reasoning, it must be based on correct facts. In circumstances such as the present, where Moses neither interviewed the plaintiff nor verified the authenticity of the collaterals with the source they originated from, her opinion does not add value to the issues before the court.

³ *AM and Another v MEC for Health, Western Cape* [2020] ZASCA 89; 2021 (3) SA 337 (SCA).

⁴ *Ibid* para 17.

[20] It is a well-established principle that the plaintiff carries the burden of proof regarding future loss of earnings, which can only be fulfilled by presenting credible evidence to substantiate his claims. The inadequacy of the defendant's witnesses does not relieve the plaintiff of this burden. The plaintiff cites Ms Sharrat's assessment, which suggests that his retirement age will be reduced by five years. However, Sharrat fails to provide a foundation for her conclusion about this reduction and does not elaborate on how she determined the five-year decrease in retirement age.

[21] A distinctive aspect of this case is that both parties initially agreed that the plaintiff's job performance and productivity had declined following the accident; consequently, it was believed that his employment opportunities outside his current position were also limited due to his remaining symptoms and functional ability. This assumption has been proven incorrect. In fact, post-accident, the plaintiff has made significant progress, securing senior roles in a new job outside his prior employment and earning an income in dollars that greatly exceeds what he earned before the accident.

[22] The principle applicable in determining damages for loss of earnings was asserted in *Southern Insurance Association Ltd v Bailey NO*,⁵ where Nicholas JA stated as follows:⁶

'Any 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. 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.'

[23] In my view, while assessing loss of earnings requires speculation about the future, such predictions need to be grounded in factual evidence. In this case, the evidence indicates that prior to the accident, the plaintiff earned an annual income of

⁵ *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A).

⁶ *Ibid* at 113F-H.

approximately R735 864 per annum. Post the accident, his earnings increased to around \$340 413,33, significantly exceeding his pre-accident income. Therefore, it would be unreasonable to forecast any loss of earning capacity that contradicts these established facts. Additionally, Ms Sharrat's perspective is largely speculative and lacks a substantiated rationale; it stands in contrast to orthopaedic evaluations, which determined that the plaintiff's post-accident injury would not impact his life expectancy. I acknowledge that while the finding regarding life expectancy does not automatically imply a lack of future earning capacity loss, without substantial evidence indicating that the plaintiff will experience a decline in income, this aspect assists the court in making informed judgment about how the injury may influence his future earning capacity. Ultimately, the plaintiff has failed to demonstrate that he will incur a future loss of earning capacity as a result of the injuries sustained in the accident. Based on my assessment, it is unnecessary to deal with contingencies.

[24] This then brings me to the issue of costs. It is undisputed that the plaintiff sustained significant injuries in the accident and that he acted neither recklessly nor frivolously in pursuing his claim against the defendant, an organ of state. However, he failed to discharge the onus of proof required to demonstrate any past loss of income or that his retirement would be adversely affected, resulting in a diminished income due to the accident. In my opinion, this case is one where costs should not follow the result; rather, each party should bear its own costs.

Order

[25] In the premises, the following order is made.

The plaintiff's claim is dismissed, with no order as to costs.

Mathenjwa J

Appearances

Applicant's counsel:	MA Oliff
Instructed by:	Thorington-Smith& Silver La Lucia
Respondent's counsel:	N Govender
Instructed by:	State Attorney KwaZulu- Natal
Date of hearing:	24-25 March 2025; 20 June 2025
Date of judgment:	6 November 2025