IN THE HIGH COURT OF SOUTH AFRICA

[EAST LONDON CIRCUIT LOCAL COURT]

CASE NO: EL 248/19

In the matter between

M[…] M[…] Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGEMENT

Maswazi AJ

Introduction

[1] In terms of the court order of the 14th of October 2020 this matter was postponed to the 23rd of November 2020 for trial. The order issued on the 14th of October 2020 which was duly served upon the Defendant reads;

> **"IT IS ORDERED THAT:**
>
> 1. This matter is postponed to the 23rd of November 2020 for trial.
> 2. Costs of today shall be in the cause.
> 3. Mr Rayaan Jarley or any other authorised employee of the Defendant is directed to sign the pre-trial minute and joint practice note not later than close of business on Friday, the 23rd of October 2020.

4. In the event Rayaan Jarley or any authorised employee of the defendant failing to sign the pre-trial and joint practice note by Friday, the 23rd of October 2020, the plaintiff is granted leave to refer this matter to a judge in chambers for further directive."

[2] On the 23rd of November 2020 the matter was allocated to me and the Plaintiff's Attorneys approached me in chambers intimating that the merits of the matter had been settled together with the quantum in respect of general damages, past and future medical expenses. I was also informed that the only issue which remained for determination was future loss of earning and in that regard only the question of applicable contingencies remained for determination. T

[3] Mr Skoti who appeared for the Plaintiff advised me in chambers that all he would do is to make submissions in relation to the appropriate contingencies to be applied in order to determine the amount payable by the defendant in respect of future loss of earnings.

[4] It appeared that the Defendant and/or its relevant officials had signed the pre-trial minutes and the joint practice in honour of the court order of the 14th of October 2020. I was advised that the agreement in respect of the general damages and all other head of damages were contained in the joint practice note which by then had been filed of record. This made it unnecessary to refer the matter to a Judge in Chambers for a directive as contemplated in the court order of the 14th of October 2020, since the first part of the order had been fulfilled.

[5] I then proceeded to hear submissions from the Plaintiff in respect only of the contingencies applicable to future loss of earnings. During the hearing Mr Skoti applied for the amendment of the Plaintiff's particulars of claim to add other injuries allegedly suffered by the Plaintiff. I granted the amendment in view of the fact that a

greater balance of the amendment sought to be introduced were already incorporated into the joint practice note, it accordingly seemed to me that Defendant had consented to such. I refused the amendment in respect of those alleged injuries which were not included in the joint practice note. Mr Skoti did not insist on such amendment hence the matter proceeded as planned instead of being removed from the roll for the Plaintiff to comply with ordinary requites of the amendment of pleadings[1]

Plaintiff's injuries and impact to his earning capacity

[6] On the 15th of June 2017 Plaintiff, whilst a passenger in a motor vehicle, silver Peugeot with Registration details HKD 2[…], was injured as a result of the negligent driving of the insured driver.[2]

[7] No purpose will be served by the regurgitation of the respects in which the insured driver was negligent since that aspect has already been settled between the parties, suffice only to set out the injuries suffered by the Plaintiff since they indirectly relate to the alleged future loss of earnings.

[8] In terms of the amended particulars of claim and the joint practice note signed between the parties, the Plaintiff suffered the following injuries namely;

- A bilateral rib fracture.
- Subdural haematoma.
- Splinic Laceration
- Lung contusion
- Sternum fracture.

---

[1] *Rule 28(1) of the Uniform Rules*
[2] *This is the driver of the motor vehicle in which the Plaintiff was a passenger*

[9] It is further recorded in the joint practice note that the Plaintiff was hospitalised at the Intensive Care Unit of the St Dominic Hospital, East London. It further appears from medical records filed that Plaintiff's Glygo Coma Scale (GCS) reading was 8/15. This is an indication that the Plaintiff's head injuries were relatively severe.

[10] In terms of the joint practice note, the Plaintiff's contention in respect of the future loss of earning bolstered by the actuarial certificate of value is a sum of R7 131 141. 90. (Seven Million One Hundred and One Thirty Thousand and One Hundred and Forty on the premorbid position, whilst it is R3 562 519 .00 (Three Million Five Hundred and Sixty Two Thousand Five Hundred and Nineteen Only). The Plaintiff contends for contingencies of between 15% and 20% in respect of the premorbid position and for contingencies of between 35% and 38% in respect of the post morbid position. This is the issue at the centre of the dispute between the parties. However, as I shall demonstrate later, it does not start at the point at which the parties begin, it starts before.

[11] For its part the Defendant sees the issues differently, it claims that since the Plaintiff is still in the same position as he was prior to the accident, Defendant clamours for higher contingencies in respect of the post-morbid position. It asserts its position as follows in the joint practice note;

> "68 With regards (sic) future loss of earnings
>
> 68.1 The defendant used 7 131 141 in the post state the claimant is still employed.
> 68.2 The defendant is therefore offered loss of earning capacity rather than the actual loss.
> 68.3 The plaintiff is still employed as an administrative assistant with some accommodation, however he is s2till employable.
> 68.4 The progression to C1/C2 by age 45 years (sic) is not properly justified

68.5 The IP does not specify whether the claimant would have been promoted (pre-morbidly) beyond the level of assistant to any higher position on the Paterson C level.

68.6 There is no suggestion either from the plaintiff that he aspired to be promoted or applied for work on a high position (sic).

68.7 There is also no proof that the plaintiff was studying or working toward promotion before the accident.

69 The above points are of a factual nature and the defendant reserves the right to review its position should further evidence be placed at its disposal. Seeing that the matter is on trial and the defendant has no legal representation, these arguments should be brought to the court's attention."

[12] The Defendant proceeds to apply a contingency deduction of 30% on the Plaintiff's premorbid position on the basis that the Plaintiff is still employed and his further career prospects or lack thereof are not clearly established by the Industrial Psychologists.

[13] During the hearing, Mr Skoti referred me to the expert report prepared by Dr Moipone Kheswa an Industrial Psychologist who examined the Plaintiff on the 3rd of June 2019. In her report, the Industrial Psychologist states;

> "Mr M[…]'s physical work capacity is compromised. Following this accident, he is left with some pains, discomforts and restrictions. Having to work with pains discomforts and restrictions will mean that he will remain an unequal competitor as well as vulnerable employee.
>
> Even though Mr M[…] is still employed, according to him he is not effective in performing his duties to the best of his abilities. He is currently complaining of headaches, forgetfulness and short temperedness which was confirmed by his supervisor on the Clinical Psychologist's report that he also has confronted him regarding his increased aggression."

[14] Later in the same report, the Industrial Psychologist opines as follows;

> "Should he lose his current employment it will be very difficult for him to come across an employer who is ready to accommodate his reported limitations in the open labour market. Thus he will experience extended periods of unemployment in the open labour market."

[15] Nowhere does the Industrial Psychologist say that the Plaintiff will be totally unable to function and compete in the open labour market. This is because the Plaintiff remains employed even though there are indications of diminished capacity. I therefore agree with the Defendant's proposition that in this matter we are not dealing with loss earnings in the actual sense, but rather in the potential sense. Even in that event, the claim for future loss of earnings is predicated on an unmeasured probability of the Plaintiff losing his current employment. This makes the starting point to be whether a case has been established for loss of earning capacity in the potential sense as proposed by the Defendant. In other words, has the Plaintiff proved that as a result of the accident he will never be able to work until normal retirement?

[16] I debated this aspect with Mr Skoti, being of the view that what has been said by the Industrial Psychologist is cause for higher contingency on the morbid position, the effect may be similar in respect of the pre-morbid position as well. It depends on the approach that one uses in the calculation. In any event, since the Plaintiff remains at work and in the same position, there is no difference between the post morbid position and his premorbid state. There is not even a suggestion that he may in future be demoted from his current position as a result of being unable to function in it due to the impact of the accident.

[17] It is at that point that I requested Mr Skoti to file written submissions in this regard and true to his commitment I was favoured with such submissions which have

been helpful in relation to the question of contingencies and not on the question whether the Plaintiff has a valid claim for future loss of earnings. The nub of the issue revolves around the quoted passages of the Industrial Psychologist's report. Mr Skoti submits that the fact that the Plaintiff might not enjoy prospects of obtaining new work opportunities should he be dismissed in his current employment, may make it difficult for him to obtain new employment. How this results in actual loss of earnings is a matter I shall have to deal with later. This is based on the current problems of forgetfulness, short temperedness which Mr Skoti submits, might result in him being dismissed from his current employment which may render him unable to easily find other employment.

[18] There are pertinent countervailing factors to these submissions, the first is that none of the expert reports give a clear prognosis to these defects. *Second,* Plaintiff has been granted a certificate in terms 17(4) which takes care of his current and future medical problems, there is no indication that such future medical attention as envisaged in the certificate will not assist Plaintiff to solve or lessen his physical and cognitive defects. If the Plaintiff's future treatment will help him deal with his current vocational problems, then the probability of being dismissed does not arise and so it follows automatically that in that event there would be no basis for future loss of earnings. As an example, a person who meets with an accident in circumstances resembling those of the Plaintiff whilst training to be a pilot and is rendered unable to continue with such training would be entitled to future loss of earnings on the basis of the salaries applicable to what he was training for, from the time he would have qualified as a pilot. His loss would increase commensurate with his experienced had he qualified. This is loss of earning capacity proper since he is rendered incapacitated to pursue the career he intended.

[19] It is necessary to deal with experts' reports, this I do in order to set out the facts from which it may be argued and/or even concluded that the Plaintiff suffered future loss of earnings.

The medical experts' reports

[20] The primary report put up by the Plaintiff is a report of a Neurosurgoen Dr Praneel Ramchandra who examined the Plaintiff on the 18th of October 2018, who opines that, as at the date of the examination Plaintiff had already resumed his normal duties. The only prognosis that the expert provides is that Plaintiff will no longer be able to continue playing rugby. This finding has no direct relation with future loss of earnings, because Plaintiff was not a professional rugby player, and no suggestion is made that he held significant prospects in this regard.

[21] Dr Hardy of Hardy and Associates, did a neuropsychological serious assessment report, in their prognosis, the following appears;

> "As it has been 2 years since the accident, his neuropsychological deficits are considered permanent. MMI has been reached.[3] His injury constitutes a severe alteration in mental status, cognition and highest integrative functioning (Class III; 28%) and has led to diminished educational, vocational and psychological potential. The prominent laceration soft tissue scar on the occipital aspect of the scalp (4cm), the ICD scars bilaterally and the tracheostomy scar constitute a permanent serious disfigurement (RAF 4 section 5.1)"

[22] The report goes on to recommend supportive counselling and cognitive rehabilitation to assist him in compensating for deficits and to address his emotional distress. It further says that provision should be made for 15 sessions for immediate

[3] *This is an acronym referring to maximum medical improvement*

use and 15 sessions as the need arises. These recommendations are for obvious reasons relevant to assessment of the general damages and the future medical expenses issues which, as I have indicated, have been already dealt with and presumably to the satisfaction of the Plaintiff. They are therefore neutral in relation to even an elementary basis for future loss of earnings. There is for instance, no deference to the Industrial Psychologist in relation to the findings made.

[23] The Occupational Therapists by the name of Ncumisa Ndzungu of Work-Well Systems examined the Plaintiff on the 7th of April 2020. The closest she could come in relation to loss of earnings appears in her conclusion where she says;

> "Considering his pre-accident versus current life roles and circumstances, the impact of the in question (sic) is considered to be severe in nature and resulted in functioning limitations, limited job options, physical limitations, cognitive impairment and mood challenges. He will remain an unequal competitor in the labour market"

[24] The conclusion made herein is definitely not neutral in relation to the question of the loss of the earnings. It nonetheless has its own limitations in relation to the subject of the loss of earnings. Chief amongst these is that it does not provide a clear prognosis in relation to whether this condition is likely to last until the notional age of retirement or may be dealt with through the medical interventions proposed by other experts for which a provision has been made in the form of a section 17(4) Certificate to cater for such contingent eventualities.

[25] I shall not deal at length with the report of the orthopaedic expert, its conclusions and prognosis are nothing out of the ordinary except that it too makes it plain that the Plaintiff will not be able to play contact sports in the future.

[26] The Industrial Psychologist has made conclusions to which I have already alluded to above, I do not propose to repeat them except to indicate that her report was prepared with the benefit of all other reports to which I have dealt with earlier on.

[27] There is a clear conclusion that Plaintiff's injuries have affected the efficiency with which he is able to perform his current duties at work. This leads to the conclusion that should he lose his current employment he is likely to struggle to find a new employment because of the effect his injuries have had on his physical and cognitive abilities.

[28] A report by Koch Consulting Actuaries cc places the Plaintiff's uninjured position, also known as premorbid scenario at R7 131 141, and the injured position at R3 568 622 it goes on to conclude the total loss of future earnings at R3 635 487. I must state that these figures are based on a certificate of value and not on a complete and comprehensive actuarial calculation report. It is therefore difficult to conclude where for instance the injured state calculation comes from in view of the lack of clear prognosis by any of the Plaintiff experts in relation to loss of earnings and the fact that the Plaintiff remains at work earning the same salary. The injured income position can only be available and relevant if there is a clear probability that the Plaintiff would lose his job at a particular stage before the standard age of retirement. No such finding has been made by the Industrial Psychologist all that she has done is to toy with the eventuality of that event without telling as to when in probabilities that is likely to occur. This makes it uncertain as to whether the Plaintiff will or even might lose his employment as a result of the impact of the injuries sustained through the accident.

[29] I depart this part to deal with the principles applicable to future loss of earnings and contingencies.

The applicable law in future loss of earnings and contingencies

[30] The very first and basic principle applicable to future loss of earnings or loss of earning capacity is always that the Plaintiff has been rendered unable to work as a result of the accident and this situation will continue for the rest of his life or that whilst the Plaintiff will still be able to work, he has incurred a diminished work capacity that will for certain render him unable to work until his normal retirement.

[31] In *Goldie v City Council of Johannesburg*[4] the above principle was expressed as follows;

> "Mr Hart, who argued the case for the defendant, quoted a number of cases, such as Union Government (Minister of R & H) v Clay (1913 AD 385) Hulley v Cox (1923 AD 234) and Craig v Franks (1936 SR 41) in support of the proposition that it is wrong to calculate the amounts to be awarded under these heads of damage on the basis of annuity, and that whilst such actuarial calculations affords useful guidance, the true basis is what the court considers, under the circumstances of the case, to be fair and reasonable amount to be awarded the plaintiff as compensation. This may be so, but in the case where it is necessary to award compensation for loss of future earnings, I have difficult in appreciating what better starting point there can be than the present value of the future income which the plaintiff has been prevented from earning. From this point proper allowance must be made for contingencies, but if the fundamental principle of an award of damages under *lex Aquilia* is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not impulse or by guesswork."

[32] The principle emerging from the above dictum is that compensation is an occasion of loss and lex *Aquilia* requires that a Plaintiff be put in the position he

---

[4] *1984(1) SA 98 (A) at 112E-114F*

would have been had the injuries not occurred. This requires application of logic using what he earned which he has lost as a result of the accident. By parity of reasoning, if what he earned before he incurred injuries is equal with to what he is earning after the injuries, there is logically no loss of earnings in the future except if there is medical evidence which suggests that as a result of the accident he will not work until normal retirement even if he may work for some time after the accident. The situation in the present matter is different, as I understand the Plaintiff, the motivation for future loss of earnings is that if he loses his current employment he will struggle to acquire new employment opportunities.

[33] It is in the application of this formula that the Plaintiff's case with regard to future loss of earnings meets its dead end. It is impossible to measure the potential loss of earning capacity purely on the basis of unmeasured possibility that he may lose his current employment particularly when there is no concrete medical prognosis which discloses, on a point of probability that his current cognitive defects will not benefit through future medical attention as provided for under head of damages described as future medical expenses for which the Plaintiff is adequately compensated.

The* consent *draft order and its evaluation

[34] Prior to the hearing of the matter I requested the plaintiff's attorneys to furnish me with the draft order since it was evident from what they informed me as well as my reading of the joint practice note that they are in agreement save for the issue of contingencies in respect future loss of earnings.

[35] What is apparent from both the joint practice note and the draft order is that in principle both parties agree that the Plaintiff suffered loss of earnings and they agree more or less on the amount except only in respect of contingencies.

[36] The draft order reads as follows and I reproduce only its salient aspects;

> "1 The defendant shall pay the plaintiff the sum of R4 136 965,90 being in respect of plaintiff's general damages and future loss of earnings and/or earning capacity as a result of the injuries sustained by the Plaintiff in a motor vehicle accident that occurred on the 15th of June 2017, and Amalinda, East London.

[37] The effect of this draft order which I was asked to make an order is that at his retirement Plaintiff shall have received his full earnings in the sum of R7 131 141 and "*the loss of earnings"* in the sum of R3 526 519 paid to him merely because at the time of the accident and medical examination a possibility existed that if dismissed from employment he would find it hard to obtain further employment in the open labour market irrespective of the reasonableness of that possibility concretely measured. This is clearly a contravention of the classic principle of *lex Aquilia* which is meant to put the Plaintiff in the position he would have been at had the accident not occurred. Here, the draft order is meant to put the plaintiff in a position far better than he would have been at had the accident not occurred, and that is not what the Defendant is meant to do by law.

[38] I am therefore of the firm view that the Plaintiff will not suffer any loss of earnings in the future. I reach this conclusion on the basis of the reports of the Industrial Psychologist in particular, which does not disclose even a concrete probability of the Plaintiff losing his current employment, which conclusion can only be valid if medically established by other experts providing a clear prognosis of the

Plaintiff's cognitive defects which they say may affect his performance at work. On the contrary future medical expense have been recommended which logically are meant to ameliorate his current cognitive and physical defects.

[39] The fact that the parties are agreed that the Plaintiff is entitled to compensation for future loss of earnings does not mean that the court is a mere rubber stamp, even of agreements that are clearly unwarranted.

[40] Courts have had many occasions to consider their role in an agreements sought to be made an orders of court by consent, which similarly applies to instances where a draft order is sought to be made an order of court by agreement of the parties. More than seventy years ago in *Van Schalkwyk v Van Schalkwyk*[5] Van Den Heever J expressed himself as follows regarding the issue;

> "I do not suggest that our Courts should act as Registrars of contracts at large; all I wish to convey is that where litigants come to some arrangement in regard to their proprietary rights which are not illegal, contrary to good morals or against public policy, the court should make that settlement an order of court"

[41] Perhaps archaic and ancient as the above stated principle might be, it has received a considerable precedential embrace that has filtered through to our present constitutional dispensation. In *Eke v Parsons*[6] Madlanga J writing for the unanimous Court and concurred with by Jafta J expressed himself as follows regarding an agreement sought to be made an order of court;

> "This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement."

---

[5] *1947(4) SA (0) AT 91 at page 96*
[6] *2016(3) SA 37 CC para 25 and 26*

[42] In a paragraph immediately below the one quoted above, the learned judge held;

> "Secondly, the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order. That means, its terms must accord with both the Constitution and the law. Also they must not be at odds with public policy. Thirdly, the agreement must hold a practical and legitimate advantage for the parties"

[43] Latterly, Theron J writing in *Buffalo City Metropolitant Municipality*[7] for the for the majority, approved the *Schalkwyk* principle as expressed in *Eke v Parsons* and said;

> "There are sound reasons why a court should carefully scrutinise a settlement agreement before making it an order of court. Once a settlement is made an order of court, it is interpreted in the same way as any judgment or order and affects parties' rights the same way"

[44] The jurisprudential message emerging from the referenced cases is that a court faced with an agreement to make it an order is not a bystander, rather it is a catalyst of law and justice and must ensure these are seen to be done. An occasion where parties agree to make their agreement an order of court in circumstances where evidence and law do not justify such an order is inimical to the juridical force of the existing judicial precedent.

[45] I am therefore satisfied, firstly that the Plaintiff has not proved an entitlement to future loss of earnings and secondly, that even on the face of an agreement showing entitlement to future loss of earnings, I am entitled to depart therefrom and make an order appropriate to the facts and the law.

---

[7] 2019(4) SA 331 (CC) para 25

Conclusion

[46] In view of the position I have taken, it is unnecessary to determine what contingencies are applicable to the Plaintiff. There are none, since I have found no loss of earnings. The past loss of earnings are not affected by this finding. However the figure proposed by the Plaintiff seems rather too high in view of the fact that Plaintiff was away from work for four months, the figure most reasonable is the one proposed by the defendant. In respect of general damages, I am of the view that a figure slightly above the highest point proposed by the Plaintiff would be reasonable.

[47] I take into account the fact that the Plaintiff will continue to incur future medical expenses given the severity of the injuries and impact thereof to his cognitive and physical abilities. I shall then grant an order along the lines proposed in the draft order save omitting the future loss of earnings. Similarly I find no reason to disturb the order of costs as proposed. The Plaintiff is substantially successful and costs must follow the results.

[48] In the result the following order is made;

1. The Defendant is ordered to pay to the Plaintiff a sum of R928 371.00 for and respect of general damages and pass loss of earnings incurred as a result of the motor vehicle accident which took place on the 15th of June 2017 and at Amalinda East London.

2. The Defendant is ordered to pay interests on the above sum at the prescribed rate after fourteen days from the date of this order to the date of payment.

3. The Defendant shall furnish the Plaintiff with an undertaking in terms of section 17(4) of Act 56 of 1996, to pay all the costs of future accommodation of the Plaintiff, in a hospital or nursing home or treatment of or rendering of a service to him or supply of goods to him arising out of the injuries sustained by him in a motor vehicle accident, after such costs have been incurred.

_____

B Maswazi

Judge of the High Court (acting)

For the Plaintiff: Adv Skoti

Instructed by: **CINGA NOHAJI INC**

29 Gladstone Street

1 floor, Offices 7-8

CENTRAL SQUARE BUILDING

East LONDON

For Defendant: No appearance

Date heard: 23 November 2020 and judgment delivered on the 8th of December 2020