REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 2014/04972

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

In the matter between:

OOSTHUIZEN WILLEM WOUTER Plaintiff

And

ROAD ACCIDENT FUND Defendant

J U D G M E N T

WENTZEL AJ:

1. This is a claim for future loss of earnings and earning capacity against the Road Accident Fund as a result of injuries sustained by the plaintiff in a road accident that occurred on 24 May 2012.

2. The merits were conceded and all the plaintiff's other heads of damages were settled. The plaintiff's injuries were admitted. These are detailed in the orthopaedic surgeon, Dr. Read's, the neurosurgeon, Dr. Marus' and the neuropsychologist, Mr. Ormond-Brown's reports as follows:

2.1. Skull lacerations

2.2. Degloving injury to his right hand with traumatic amputation of his finger of the 4th digit, partial amputation of the second digit and a fracture of the third digit of his right hand, which was his dominant hand.

2.3. Mild traumatic brain injury with signs of mild brain dysfunction in the form of short term memory loss.

3. The latter mild brain injury was only detected when the plaintiff was assessed by the neuropsychologist, which prompted the industrial psychologist, Mr. De Vlamingh, to prepare an addendum to his report and revise his assessment of the plaintiff's loss of earnings.

4. No evidence was led by either party and, save for the report of the industrial psychologist in relation to future loss of earnings, the plaintiff's expert reports were admitted, but not the truth of the facts reported to the experts by the plaintiff. However, Mr. Adams, who appeared for the defendant, proceeded on the basis that even if the facts reported were true, on the plaintiff's own version, he had not in fact, and would not in future, suffer a loss of earnings or earning capacity.

5. Ms. Letzler, who appeared for the plaintiff, relied upon the higher post morbid contingencies recommended be applied by the industrial psychologist, Mr. de Vlamingh in the addendum to his report .She urged me to bear in mind that contingencies were applied not only where a loss of

earnings was a probability, but merely if they were a possibility. In this respect she referred me to the matters of Erdmann v SANTAM Insurance Co Ltd 1985 3 SA 402 (C) 404-405 and Burns v National Employers General Insurance Co Ltd 1988 3 SA 355 (C) 365.

6. The industrial psychologist had initially concluded in his report that :

> *"Before the accident, Mr. Oosthuizen was physically fully able to fulfill all the typing and writing requirements needed for a successful professional career in the legal world of work. He was able to succeed in private practice and also within the corporate sector with no restrictions to his abilities. Following the accident, he is no longer able to use his right hand for writing or typing purposes and remains in this regard according to Dr. Read considerably disabled with no chance of fully regaining the use of his right hand. However, he is fortunate to have been employed by Nedbank in a senior managerial capacity, where his disability appears not to hamper his work performance or his career and earnings prospects. He should therefore still be able to achieve his pre-morbid career and earnings potential as described in paragraph 4.1.3 and may not suffer any loss of earnings as long as he retains his current employment at Nedbank.*
>
> *However, if he should lose his current employment for whatever reason and return to private practice, or need to compete in the open labour market, he will be at a distinct disadvantage because of his right hand disability. He may struggle to find alternative employment in the corporate sector because of his disability or if he decides to return to private practice he may need a permanent additional administration support person to assist him with typing and note taking.*
>
> *The writer is therefore of the opinion that the Court should consider applying a moderately higher post-morbid contingency deduction as compensation for the risk of future loss of*

earnings, given Mr. Oosthuizen's vulnerability outside of his present accommodating employment at Nedbank. Mr. Oosthuizen's current management is very accommodating and appreciative of his abilities despite his disability, but the writer has often noted how a change in management can negatively affect a vulnerable employee like Mr. Oosthuizen.

Dr. Read also states that Mr. Oosthuizen's "will require a total of eight to twelve weeks off work to attend to the treatment recommended in the body of this report". The writer is of the opinion that although Mr. Oosthuizen's employer will in all probability provide paid sick leave, he may have exhausted his sick leave and is likely to suffer a loss of earnings if he is unable to work for such a lengthy period of time. Normal sick leave allocation is 30 days per 3 year cycle."

7. However, after having sight of the neuropsychologist's report, this was revised in an addendum dated 14 May 2015 as follows:

"Mr. Roper found through his assessments that Mr. Oosthuizen has developed short-term memory problems post-accident as he has become very forgetful. According to the Mr. Oosthuizen he has experienced difficulties remembering mutual decision which were made with colleagues and struggles to recall previous discussions. Upon being appointed to the position of Head of the Legal Services within the Health division, he struggled to absorb the necessary information and ultimately took longer than expected to "get up to speed with the new position". Mr. Roper confirms that these memory problems are consistent with those identified on the various tests. He concludes by adding that although these difficulties may be stable, they could impose a ceiling on further advancements in the workplace and that his chances of promotion have been reduced by the sustained brain injury.

In the writer's original report it noted that although Mr. Oosthuizen has clearly been negatively affected by the permanent physical damage to his right hand, it is postulated that he will still achieve his pre-morbid career and earnings potential and may not suffer any loss of earnings should be retain his current employment at Nedbank. The writer however highlighted the possible scenario that should Mr. Oosthuizen lose his currently employment for whatever reason and return to private practice or need to compete in the open labour market, he will be at a distinct disadvantage because of right had disability.

The writer accepts the new medical information at hand and is of the opinion that it serves to corroborate and further strengthens the writer's conclusion as outlined in his original report. Mr. Oosthuizen's subtle short term memory problems will add to his vulnerability in the open labour market should he lose his employment for any reason in the future. In addition, this may lead to difficulties in his current position and certainly increase the risk of poor performance assessments and perhaps even termination of service.

The writer is therefore now of the opinion that his risk of losing his employment at Nedbank is bigger than expected and that a significantly higher post-morbid contingency deduction should be applied considering his diagnosed physical and cognitive vulnerability."

8. This was on the basis of the findings of the neuropsychologist that:

"He has developed a memory problem post-accident. His long-term memory for events and facts learnt before the accident is still intact but his short-term memory is compromised and he has become very forgetful. In the workplace he forgets mutual decisions that have been made. Later he will have no recall of a discussion that he has had with colleagues. He moved into a different department after the accident and he took

much longer than expected to master the large volume of information that he was expected to remember. He noted that he is able to rely on old memories to a significant degree in his new position.

He was off work for four weeks after the accident while he convalesced. On his return to work he struggled to cope because of his injured right hand. After some months he decided that he needed to change and he applied for, and was appointed into, the position of Head: Legal Services in the Wealth Division. This was a horizontal move in the hierarchy at the bank."

9. On this basis, it was argued that the plaintiff's memory problems, which resulted in him forgetting to execute instructions, reduced his productivity and efficiency. Despite the difficulties being admittedly subtle, it was argued that they are likely to impose a ceiling on further advancement in the workplace and that his chances of promotion had been reduced by the brain injury. It was argued further, that his hand injury had negatively impacted on the plaintiff's productivity.

10. It was argued that, *in lieu* of loss of earning capacity, the Court should apply a contingency differential of 20% to the plaintiff's actuarially calculated earnings premised on a reduced premorbid deduction of 5 %, as opposed to 10%, according to the formula prescribed in Goodall v President Insurance Company Limited 1978(1) SA 389 because the plaintiff's employment was stable, but a higher post morbid deduction of 25 % as opposed to the 15% deduction which had been recommended prior to knowledge of the plaintiff's brain injury.

11. This was in fact higher than the amount claimed as per the actuarial report of Munro Forensic Actuaries tendered where calculations were based upon a 15% differential giving a loss of earnings claim of R2 710 145

12. Mr. Adams challenged these findings on the following basis:

12.1. Firstly, at the time of the accident, the plaintiff had established himself at Nedbank, where he was employed as the Head of Legal: Business Banking earning a salary of approximately R 1 050 000 per annum. The company was loyal to him and there was little risk of his losing his employment with Nedbank as a result of the injuries suffered by him.

12.2. Second, the plaintiff had not suffered any loss as a result of his injuries and was actually promoted in March 2014 after the accident to Head of Legal: Wealth and his salary increased to approximately R 1 400 000 per annum in which capacity he has continued to function .

12.3. Third, on the plaintiff's own version, he has not suffered a loss. In this respect, reliance was placed on his industrial psychologist, David de Vlamingh's report dated 22 April 2015. In particular reference was made to the following statements in the report :

12.3.1. *"Mr. Oosthuizen's work history is comprised of sedentary type, professional legal work mainly in the Financial Sector. Prior to the accident, Mr. Oosthuizen was employed as the Head of Legal for Business Banking for approximately four and a half years. He mentions that in this capacity his duties included inter alia being responsible for the legal risk in the business banking division, whilst managing all company lawyers nationwide".*

12.3.2 "Mr. Oosthuizen states that he enjoyed his work and was looking to further his career in his field in the foreseeable future. Following the accident, Mr. Oosthuizen convalesced for approximately one month before returning to his

pre-morbid capacity in July 2012. Mr. Oosthuizen has since been promoted to the Head of Legal for Nedbank's Wealth division in March 2014, a capacity he continues to function in to date".

12.3.2. *"Mr. Gavin Payne, previous Head of Risk for the business Banking unit within Nedbank, states that Mr. Oosthuizen was a good performer who excelled in his role and responsibilities. Mr. Payne notes that he was a focused, driven employee who was an expert in his field. He further mentions that since being involved in the accident Mr. Oosthuizen has been promoted to his current position despite the injuries he suffered. He concluded by adding that Mr. Oosthuizen's future promotional opportunities would not be affected by the injuries he sustained".*

12.3.3. *"Mr Bertus Janse Van Rensburg, Head of Risk for Wealth within Nedbank, states that Mr. Oosthuizen is a fantastic employee whose "performance has not slowed down in the slightest" since being involved in the accident. Mr. Janse Van Rensburg mentions that he personally promoted Mr. Oosthuizen after the accident as his pre- and post-accident work performance was of an excellent standard. He confirmed that Mr. Oosthuizen was not in any danger of losing his employment due to the nature of the injuries. Mr. Janse Van Rensburg echoed Mr. Payne's sentiment that Mr. Oosthuizen's future promotional prospects would not be hindered by the injuries he sustained in the accident."*

12.4. Finally, the occupational therapist Ms. J Baker stated with regard to his residual work capacity:

"The client's reported vocational history indicates that his most recent occupations are within occupations involving his skill in law and may be considered skilled occupations and of a sedentary physical demand level. At the time of the accident, the client was working as a Legal advisor for Nedbank. The description of his work as obtained from the Dictionary of Occupational Titles (DOT), confirms the rating of his work at a sedentary physical demand level.

The client demonstrated the ability to fully meet the sedentary, light, medium and aspects of the heavy physical demand work up to 24.3kg. The client demonstrated that he has the physical reserves to perform work as a Legal advisor, albeit his right hand limitations. He has adopted adapted methods for writing and typing. He has good sitting and standing tolerance.

From the client's demonstrated ability and findings from the specialist reports, I am of the opinion that the client demonstrated the ability to continue performing work as a Legal advisor. Due to the level of his education and expertise he has been stationed in a managerial position where he has access to resources and can make provision for accommodations that enable him to continue working. The accommodations he has implemented for himself, allow him to perform his work tasks, despite his residual right hand pain and limitations."

13. In the circumstances, Mr. Adams argued that there was no loss of earnings as a result of the plaintiff's memory loss and at best, he suffered a loss of productivity due to the injury to his right hand which would result in a differential of no more than 3 %.

14. Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies, and are usually provided

for by deducting a stated percentage of the amount or specific claims. (De Jongh v Gunter 1975(4) SA 78 (W) 80F).

15. Contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. (Erdmann v SANTAM Insurance Co Ltd 1985 3 SA 402 (C) 404-405; Burns v National Employers General Insurance Co Ltd 1988 3 SA 355 (C) 365).

16. In a wide sense contingencies are described as "*the hazards that normally beset the lives and circumstances of ordinary people*". (AA Mutual Insurance Association Ltd v Van Jaarsveld 1974 4 SA 729 (A); Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980 3 SA 105 (A); Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 117). Contingencies have also been described as "*unforeseen circumstances of life*". (De Jongh v Gunther 1975 (4) SA 78 (W) 80F).

17. The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812; De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D; Goodall v President 1978(1) SA 389 (W) 393; Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114-115A-D).

18. Contingencies are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff (Goodal v President Insurance Co Ltd 1978 1 SA 389 (W) 393; Rij NO v Employers' Liability Assurance 1964 (4) SA 737 (W); Sigournay v Gillbanks 1960 2 SA 552 (A) 569; Smith v SA Eagle Insurance Co Ltd 1986 2 SA 314 (SE) 319).

19. Often, what is described as a "*sliding scale*" is used, under which it is allocated a "1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age". (Goodall v

President Insurance Company Limited 1978(1) SA 398(W) and Road Accident Fund v Guedes 2006(5) SA 583(A) 588D-C. Likewise, see Nonwali v Road Accident Fund (771/2004) [2009] ZAECMHC 5 (21 May 2009) (para 23))

20. Colman J provided a useful exposition Burger v Union National South British Insurance Co *1975 (4) SA 72 (W) 75* of the approach to be adopted by the Court:

> "*A related aspect of the technique of assessing damages is this one; it is recognized as proper, in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said on a preponderance of probability that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 percent change that an injury to the leg will lead to amputation, that possibility is not ignored because 30 percent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."*

21. But the difficulty with this approach was appreciated by Margo J in Goodwill v President Insurance Co Ltd 1978(1) SA 389 W at 392H:

> "*In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office".*

22. The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 113H-114E , where the Court stated :

> *"Any enquiry into damages for loss of earning capacity is of its nature speculative*
>
> *.....*
>
> *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. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.*
>
> *.....*
>
> *In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess' it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."*

23. But the Court emphasised that provision for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair. This will depend upon the underlying assumptions made which are not the domain of the actuary. (Shield Insurance Co Ltd v Hall 1976 4 SA 431 (A) 444; Pringle v Administrator, Tvl 1990 2 SA 379 (W) 397-398).

24. The Appellate Division has stressed in Legal Insurance Company Ltd v Botes 1963(1) SA 608(A) 614F-G that:

> "*In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations".*

25. Bearing the approach of our courts in mind, the Court is faced with attributing a percentage loss to premorbid and post morbid earnings.

26. In this respect guidance can be found in the matter of Goodall v President Insurance 1978 1 SA 389W where a 10% contingency was applied to compensate the plaintiff for the fact that but for the accident, he would have been promoted.

27. It is, however, difficult for me to apply such contingency differential in this matter when faced with the objective evidence to the contrary that since the accident, the plaintiff was in fact promoted. The plaintiff insists that this was a lateral change in his position and did not constitute a promotion but this flies in the face of the statement by Mr. Bertus Janse van Rensburg, Head of Risk for Wealth within Nedbank who says he personally promoted the plaintiff. The objective fact is that his injuries have not precluded his being promoted.

28. However, the Court needs to be mindful of the difficulties which the plaintiff states he experiences both with regard to the amputation of the fingers of his right hand and his short term memory loss. These difficulties, although not necessarily impinging the plaintiff's promotion prospects, may well impinge upon his productivity and earning capacity.

29. This raises the difficulty alluded to in the matter of [2011] ZAGPJHC 242 by Bizos AJ that such a claim is best quantified under general damages rather than under a claim for loss of earnings. The further difficulty that arises in this matter with such approach is that general damages in the amount of R 400 000 has been agreed and settled and it is not clear whether the Court would be empowered to make an additional award under this head.

30. In addition, a percentage loss in productivity does not necessarily translate into an equivalent contingency spread. (Union and National Insurance Co v Coetzee 1970(1) SA295; Redman v RAF 2003(2) SA @ [11] SCA.)

31. Bearing this in mind, I am inclined to agree that the plaintiff has suffered a loss of productivity and will need to make adaptions for his short term memory loss and the fact that he has lost fingers on his dominant hand. I think that a loss of promotional prospects are remote particularly as his employers have stated that his performance has not slowed down in the slightest since being involved in the accident and that both his pre and post accident performance was of an excellent standard and that his promotional prospects have not been hindered by the injuries sustained by him in the accident. On the contrary, he has been promoted despite his injuries and shortcomings. I am, however, mindful that in applying an appropriate contingency to the plaintiff's post-morbid earnings, a loss of promotional prospects need not be established as a probability, but merely as a possibility.

32. Ms. Letzler wished me to discount this evidence as it was unlikely that his employers, who were loyal and accommodating, would state otherwise. But I cannot accept that this is the case. The managers interviewed by, who they must have known, was an industrial psychologist to support the plaintiff's case against the RAF, would have been equally motivated to highlight any difficulties they may have noted with the plaintiff's post accident performance. In addition, it was this very fact that the plaintiff's employees were sympathetic to him and he was a long term highly regarded employee that she sought to discount the usual premorbid contingencies applied to his earnings. The plaintiff cannot have it both ways and thus the fact that the plaintiff's employment was secure, would equally be applicable to the contingency deduction for both his pre morbid and post morbid earnings and thus there would be no differential arising herefrom.

33. However, I am mindful that there is a remote chance that the plaintiff may not experience as sympathetic and loyal employers in the remote possibility that he were to lose his position at Nedbank. I have no doubt, however, that the plaintiff's skills and capabilities would hold him in good stead with any future employer.

34. I am also mindful that Nugent JA has warned *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) where Nugent JA said the following:-

> "The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other Courts have considered to be appropriate but they have no higher value than that....
>
> The dangers of relying excessively on earlier awards are well illustrated by comparing the award in [May v Union Government 1954 (3) SA 120 (N)] to the award that was made in Maphalala v Minister of Law and Order [unreported WLD of 10 February 1995] "....

Whether the award in May was excessive, or the award in Maphalala was niggardly, is beside the point. I use them only to illustrate that the gross disparity of the facts in each case is not reflected in the respective awards, and neither is in those circumstances a safe guide to what is appropriate."

35. Having regard to the aforegoing, and because I am may not be empowered to increase the general damages award which has been settled, I believe that a reduced 5% pre-morbid contingency be applied to take into account of the plaintiff's secure work environment and a 20 % post-morbid contingency be applied to cater for his loss of productivity which I have equally reduced by 5% as his employment prospects have in fact remained secure . In the circumstances I find that a 10 % differential be applied to actuarially calculate the plaintiff's loss of earnings. This has been actuarially determined to be R 1 860 090. The RAF amendment Act has capped the loss at R 1 822 600.

36. I accordingly make an Order as follows:

36.1. That the defendant make payment to the plaintiff in the amount of R 2 422 241,43 being in respect of

36.1.1. R 1 822 600 for loss of earnings.

36.1.2. General damages in the settled amount of R 400 000

36.1.3. Past medical expenses in the settled amount of R 199 641.43

36.2. Interest on the aforesaid amount at the legally prescribed rate from a date 14 days after the date of judgment to date of payment.

36.3. It is recorded that the defendant undertakes in terms of section 17(4) of the RAF Act 56 of 1996 to furnish the plaintiff with 100% of the cost of any future accommodation of the plaintiff in a hospital or nursing home as well as the treatment of or rendering of a service to him or supplying goods due to injuries sustained in the collision and the *sequlae* thereof after such costs have been incurred and upon proof thereof.

36.4. That the defendant is ordered to pay the plaintiff's costs of suit including the qualifying fees of the plaintiff's experts.

WENTZEL A J

ACTING JUDGE OF THE HIGH COURT

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