IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: 11976/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

5/3/2014
DATE SIGNATURE

In the matter between:

ROAD ACCIDENT FUND **APPLICANT/DEFENDANT**

and

JAN BENJAMIN DE BRUYN **RESPONDENT/PLAINTIFF**

CORAM EBERSOHN AJ
DATE HEARD 30 January 2014
DATE JUDGMENT HANDED DOWN: 7 March 2014

JUDGMENT

EBERSOHN AJ

[1] The parties are referred to as in convention.

[2] The plaintiff sued the defendant, the Road Accident Fund.

[3] The matter proceeded to trial and the court was eventually advised that the merits were settled, the evidence of one witness of the plaintiff, one Kobus Prinsloo, was then heard about the quantum and the court was requested to stand the matter down until the next day as the parties were negotiating a settlement of the quantum and would be preparing a deed of settlement. This was done. The counsel of the defendant advised the court that he would not appear the next day as he was involved in another matter the next day and that the deed of settlement would be brought to the court by his instructing attorney. The parties indicated that they abided in their arguments already delivered.

[4] The next day the plaintiff's counsel and his instructing attorney and the defendant's attorney came to the chambers and informed the court that the draft settlement was finalised and the only item the court had to adjudicate and which they could not agree on, was a calculation of the plaintiff's loss of future income and the court was requested to determine it. The court specifically enquired from the plaintiff's counsel and the defendant's attorney whether they had anything to address the court on with regard to the future loss of income and they stated explicitly that they had nothing to say and left everything in the court's hands and the court had to make its own assessment thereof. By this time the court had studied the

report of Munro Consulting Actuaries, the medical reports which the defendant did not dispute especially the reports by the orthopaedic surgeons and the report and evidence of Kobus Prinsloo and his evidence in court the previous day which were also not disputed.

[5] The legal representatives then left. The court did its own calculations and concluded that the report by Mr. Prinsloo, which was not disputed or attacked in any manner by the defendant's legal representatives was to be accepted and the court then finalised the draft order by calculating the court's own assessment:

a) The point of departure of the calculation was by calculating, on the one hand, the plaintiff's future uninjured income, and on the other hand the plaintiff's assumed future injured income. The assumptions and figures utilised in the calculation appear from paragraphs 4.1 and 4.2 of the actuarial report (bundle C, p 131). No contingencies were taken into account in the gross calculation (bundle C, par 4.3, p 131). The assumptions and figures in respect of uninjured income and injured income are the same, except that in the latter instance it was assumed that the plaintiff would reach his career ceiling 6 months later and would retire 5 years early (bundle C, par 3.2 p 131 and paras 4.1 and 4.2 p 131). The result of the calculation

yielded the capital value of the plaintiff's loss of income. Without taking the RAF Amendment Act CAP into account this loss of income amounted to R442 300,00 as set out in paragraph 4.2 of the actuarial report (bundle C, par 4.5, p 131). Taking into account the RAF Amendment Act CAP the capital value of loss of income was reduced to R304 400,00 (bundle C, par 4.7, p 132). These calculations do not take into account any contingency adjustments in respect of uninjured or injured income. The capital value of future sick leave was also actuarially computed and the results are reflected in paragraph 4.8 of the actuarial report (bundle C, p 132). The total value of lost income in respect of future sick leave amounted to R296 400,00 without any contingency in respect thereof being applied. The correctness of the contents of the actuarial report was admitted by the defendant. Similarly this report constitutes acceptable credible evidence which was clearly and rightfully so accepted by the court.

With regard to the application of contingency adjustments the actuarial report expressly states the following:

"ADJUSTMENT FOR CONTINGENCIES

It is normal practice for the Court to decide on a deduction to be made from the gross losses of income on account of contingencies. Any such deduction must depend on the particular facts and circumstances of every individual case and are matters for the Court to decide." (Bundle C, p 134, section H)

b) The actuarial report also deals (for illustrative purposes) with the effect of a range of contingency adjustments being applied to the gross capitalised future loss of income (bundle C, pp 135-136). It is common cause that the cap introduced by the RAF Amendment Act is applicable to the calculations. The court accepted the plaintiff's argument that the uninjured income should be reduced by a contingency deduction of 10%, and the injured income by a contingency deduction of 60%. This yielded a nett future loss of R3 594 400,00 to which was added the amount of R266 760,00 (being the nett value of the loss in respect of future sick leave after deduction of a 10% contingency), which finally resulted in a total award in respect of loss of earning capacity amounting to R3 861160,00. The aforesaid contingency adjustments, namely 10% in respect of uninjured earnings and 60% in respect of injured

earnings, were based on the uncontroverted evidence of Mr. Prinsloo. His evidence which is relevant to the determination of appropriate contingencies appears at pp 12-25 of the transcript of the proceedings and is conveniently summarised in his report (bundle C, pp 118-119). In this regard it should be mentioned that the plaintiff, at the time of the trial, was still functioning in his pre-accident occupation and his future earnings (i.e. injured earnings) postulate that he will continue earning on this basis (i.e. at the levels also assumed in the absence of any injury) until age 60. In view of the uncontested medical evidence, especially that of the orthopaedic surgeons, it is clear that the plaintiff will not be able to sustain the postulated levels of earnings going forward. Accordingly the court took into consideration that the plaintiff is at dire risk of the postulated future earnings (i.e. injured earnings) not materialising over the remainder of his career and hence this risk is adequately reflected in the 60% contingency deduction which the court found. It is common cause that in determining the contingencies to be applied in this case to the actuarial calculations the trial court exercised a discretion. The discretion so exercised was a discretion in the narrow sense (as opposed to a discretion loosely so called). In this event the power to interfere on

appeal is limited to cases in which it is found that the court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the court of first instance exercised the power capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.

cf: Bookworks (Pty) Ltd v Greater Johannesburg TM Council 1999 (4) SA 799 WLD at 804-806 especially 805J-806A.

The nature of this discretion was also dealt with by the Supreme Court of Appeal in Naylor and Another v Jansen 2007 (1) SA 16 (SCA) in the context of costs orders. At 24C-D Cloete JA said:

> 'Put differently, an appeal Court will interfere with the exercise of such a discretion only where it is shown that
>
> '... the lower Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a 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'."

c) In Naylor the court also observed that the exercise of a narrow discretion necessarily involves a choice between permissible alternatives, and, accordingly, different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts. (At 25F-G). *In casu* none of the grounds relied upon by the defendant in the application for leave to appeal disclose a basis upon which it can be contended that the court in exercising its discretion concerning contingencies did not act judicially.

[6] The legal representatives of the parties returned and the court handed down the draft order completed by the court and made it an order of court. All the parties including the defendant's attorney seemed to be satisfied with the order and left.

[7] An application for leave to appeal was thereafter filed one day late by the defendant's attorney. This point was not taken by the plaintiff's legal representatives and the failure was condoned. The grounds contained therein read as follows (quoted verbatim):

"1. The learned judge erred in finding that the Applicant is entitled to an order in terms of the above summary court order granted on the 30/1/14 before him in chambers as prepared and presented in a draft format by the plaintiff's counsel.

2. The learned judge failed to apply his mind to the main issue in contention which was loss of earning capacity of the Plaintiff in the matter.

3. The learned judge failed to apply his mind to the evidence of the Plaintiff's own expert witness Kobus Prinsloo (industrial psychologist) who testified that the Plaintiff has residual work capacity and is not completely unemployable. It is common cause that Kobus Prinsloo deferred to the synopsis of other experts which are Dr. N.J. de Graad, Dr. J.J. du Plesis, Dr. J.D. Erlank, Dr. H.B. Enslin, and Anneke Greef.

4. The learned judge failed to apply allowable and reasonable contingencies relating to the amount of R2 500 000,00 on their particulars of claim as an estimated sum and indicated that additional documents will be furnished in due course and same was not furnished to the defendant or the court.

5. The learned judge erred in ignoring the evidence of the Plaintiff's expert witness industrial psychologist Kobus Prinslo who testified on both post-morbid and past morbid employability profile the Plaintiff (sic). His main evidence and report assessment concluded a "mild (minimal career impediment"). The post-mobid asessment of employability (to gain employment and sustain employment was placed by Kobus Prinsloo at the scale between 51-75% and rated

as gppd.

6. The learned judge failed to apply his mind and the law regarding the RAF Amendment Act cap on the loss of earning capacity of the Plaintiff. The capital value of loss of income (including the RAF Amendment Act Cap was R304 400. The capital value of future sick leave amounted to the total of R296 400. (sic)

7. The law is trite when dealing with contingencies. It is common cause that the court to decide on a deduction to be made from the gross losses of income on account of contingencies. Any deduction must depend on the particular facts and circumstances of each individual case and are matters for the court to decide.

8. The learned Judge erred in allowing the inherent power of the court to be usrurped by the Paintiff's legal counsel who presented a draft order an order of court without applying his mind to the particular facts and circumstances of the matter and as such setting a bad precedent in law."

[8] The application for leave to appeal was argued on the 30th January 2014. The defendant's counsel dealt cursorily with the grounds of appeal. The plaintiff's counsel then dealt with the alleged grounds of appeal and strongly attacked them dealing with the false allegations regarding the court. The defendant's

counsel then got up and asked the court to protect him. The court pointed out that he is a counsel and must protect himself. It must be mentioned that the plaintiff's counsel in a calm manner dealt with the false and untrue grounds which were derogatory and contemptuous of the court and defamatory of him and which he described as "drivel". As the plaintiff's counsel continued to analyse the grounds of appeal and the lack of merit in them the defendant's counsel again got up and demanded that the court protects him. The court indicated that he must protect himself as there was nothing before the court to protect him against and the court asked him to sit down. He then stated that he was withdrawing from the case and leaving the court room as the court was not protecting him. His attorney, who throughout all the proceedings, including the day on which the order was made by the court, acted impeccably, held onto his robe and urgently spoke to him asking him not to leave. The court also asked him not to leave. He then sat down again and the plaintiff's counsel then finished his argument. The defendant's counsel then addressed the court and requested leave to file heads of argument which request the court readily granted. He filed long heads of argument but the heads of argument did not really address the grounds of appeal and the substance of the argument raised on behalf of the plaintiff when the application for leave to appeal was argued on Thursday 30 January 2014. The

heads also did not mention nor motivate why the scandalous allegations were inserted in the application for leave to appeal. The supplementary heads of argument filed by the plaintiff's counsel merely attempted to capture, in succinct form, the thrust of the argument previously presented

[[9] To sum up regarding the grounds of appeal:

AD FIRST GROUND OF APPEAL:

a) There is no merit in this ground which is formulated in an excessively wide fashion. Bearing in mind that the only issue before the trial court was the determination of the plaintiff's loss of earning capacity, the only part of the court order which can conceivably be justifiable questioned is paragraph 1 thereof, and in particular the globular amount of R4 349 459,20, and then only in so far as this amount contains, as one of its components, the amount awarded in respect of the plaintiff's loss of earning capacity, which component is, in turn, constituted and computed as is set out in paragraph [5] *supra*. Had the defendant's attorney called for reasons the court would have furnished the reasons and the defendant need not have speculated.

b) There is no merit in this ground.

AD SECOND GROUND:

There is no merit in this ground whatsoever in view of the fact that it lacks any particularity and is couched in such wide terms as to render it meaningless.

AD THIRD GROUND:

a) The formulation of this ground presupposes that the trial court found, or that it is implicit in the court's order, that the plaintiff has no residual work capacity and is completely unemployable. No such finding was made by the court nor was it implicit in the order of the court. In fact exactly the opposite is true. Implicit in the amount awarded in respect of the plaintiff's loss of earning capacity is that he has a residual capacity to earn 40% of the calculated injured income in future. This follows logically from the fact that a contingency deduction of 60% was applied in respect of future injured income as calculated by the actuary and approved by the court in granting the order reflecting the award for damages. It never was the plaintiff's case that he is totally unemployable, and none of the expert reports contain any suggestion to this effect, least of all the evidence of Mr. Kobus Prinsloo.

b) According there is no merit whatsoever in this ground.

AD FOURTH GROUND.

a) This ground fails to indicate what an allowable or reasonable contingency to be applied to the amount of loss of earning capacity would be. The bald complaint in this regard is meaningless in the absence of any such an indication. When the draft order with the several possibilities was handed to the court in chambers, there was no address nor comment from the defendant's legal representative who left everything in the court's hands.

b) The second assertion contained in this ground, namely that the particulars of claim only disclosed a claim amounting to R2 500 000,00 as an estimated sum and the incorrect assertion that no underlying documentation was furnished to the defendant or the court is also meaningless in the context of the case. The report of the plaintiff's industrial psychologist, Mr. Prinsloo, and the subsequent actuarial report clearly indicated to the defendant what the potential value of the plainiff's claim for loss of earning capacity amounted to and at no relevant stage did the defendant object thereto on the basis that the value of the claim exceeded the amount set out in the particulars of claim nor did the defendant insist on an amendment in this regard. Furthermore, the evidence

of Mr. Prinsloo in respect of the approach to the quantification of this head of damages and the underlying facts, opinions and assumptions employed in the actuarial calculation, which were squarely based upon the evidence of Mr. Prinsloo, were not questioned at all during the course of the trial. At the end of the trial the only dispute between the parties was what the extent of appropriate adjustments to the actuarial results would be. It was also noted by the court that the defendant clearly accepted Mr. Prinsloo's evidence that on a higher contingency deduction from the plaintiff's calculated injured income, on the grounds advanced by him, was warranted.

c) This ground is accordingly devoid of any merit.

AD FIFTH GROUND:

a) Mr. Prinsloo's report concerning the assessment of severity of career impediments and the post-morbid assessment on employability as is set out on p. 118 Section C of the Court bundle must be read subject to this *viva voce* evidence in this regard. This evidence appears at pp 24-25 of the transcript and culminated in Mr. Prinsloo expressing the opinion that a significantly higher post-morbid contingency should be applied to the future injured earnings in view of the factors, mentioned

in the report, which would negatively affect the plaintiff's future earning capacity. On this basis the contingency which was indeed applied to the injured earnings is justified on the evidence of Mr. Prinsloo and accordingly it cannot be said that the court ignored material evidence in coming to its conclusion concerning contingencies.

b) There is no merit in this ground.

AD SIXTH GROUND:

a) In the context of the order ultimately made by the court this ground is not only meaningless but is simply incorrect on the evidence.

b) The results of the calculations which were accepted by the court are based foursquare on the application of the RAF Amended Act CAP. To the legal representatives of the defendant that much must be patently clear from the figures constituting the amount awarded in respect of the plaintiff's loss of earning capacity, read with the actuarial report itself. It is equally clear that the defendant now simply, and most conveniently, ignores the evidence of Mr. Prinsloo, which the defendant did not dispute in court, that a significantly higher post-morbid contingency is justified.

c) There is no merit in this ground either.

AD SEVENTH GROUND:

As formulated this so-called ground is in reality no ground whatsoever. It is, in fact, merely a recital of trite principles and does not warrant further consideration.

AD EIGHTH GROUND:

This so-called ground is a completely unnecessary outrage. Not only is it openly contemptuous of this court but also defamatory of plaintiff's counsel. These baseless allegations are deserving of censure by this court by way of a punitive costs order being granted against the defendant and the matter will be referred to the Law Society of the Northern Provinces and the Pretoria Bar Council to take the necessary steps against the counsel and attorney.

[12] Accordingly the application for leave to appeal must fail.

[13] The plaintiff's counsel also argued that punitive costs should be awarded in respect of the application for leave to appeal in view of:

a) the fact that the defendant seeks leave to appeal against the whole order granted by the trial court in circumstances where only one head of damages was in issue and the remaining heads of damages were settled;

b) the defendant merely filed a notice of application for leave to appeal and failed to thereafter prosecute or advance the application diligently or at all;

c) the defendant did not apply for reasons from the court for its order;

d) the defendant has failed to provide the plaintiff with an undertaking in respect of future medical costs and to pay the agreed amount in respect of past medical expenses and general damages (amounting to R488 299,20) to the plaintiff despite the fact that same were settled before the trial commenced and are patently unappeallable.

(See the remarks made by Goldstone J (as he then was) in Protea Assurance Co Ltd v Januszkiewicz 1989 (4) SA 292 WLD at 298D-299B).

[14] The following order is made:

"1. The application for leave to appeal is dismissed with costs on the attorney and own client scale which costs will include the costs of senior counsel, several sets of heads of argument by the counsel and paying for a record of the proceedings.

2. The Registrar is requested to refer this judgment and the following documents to the Law Society of the Northern Provinces and The Pretoria Bar Council: the summons and particulars of claim, the plea, the expert report of Kobus Prinsloo, the report by the orthopaedic surgeons, the record of the proceedings in court, the actuarial report of Munro Consulting Actuaries, the court order of 30/1/2014, the application for leave to appeal and the heads of the defendant's counsel dated 5/2/2014, to be able to determine at whose behest it was decided to lodge the scandalous attack on the court and the plaintiff's counsel and to take adequate remedying steps."

P.Z. EBERSOHN.

ACTING JUDGE OF THE HIGH COURT

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