

/LVS
**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DATE: ~~12 November 2014~~

CASE NO: ~~16219/2012~~

27400/12

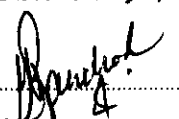
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- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

11/12/2014

DATE


SIGNATURE

In the matter between:

B GROENEWALD

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

RANCHOD J:

[1] This is a personal injury claim in which only certain amounts of the quantum of the plaintiff's claim are in dispute; the defendant having conceded the merits in full.

[2] General damages of R500 000 have been agreed between the parties. The defendant has agreed to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for future medical expenses.

[3] The only issue in dispute is the extent of the loss of earnings (both past and future) suffered by the plaintiff.

[4] The plaintiff obtained several expert reports – as did the defendant. I was advised that they could all be accepted as correct and take cognisance of them as well as of the joint minutes of those experts who have provided them.

[5] Only plaintiff's industrial psychologist, Dr Willie Pretorius testified in the trial. In essence, there appears to be a difference in interpretation by the parties of the joint minute prepared by the plaintiff and defendant's industrial psychologist. But more of this later.

[6] The plaintiff sustained injuries in a motorvehicle collision which occurred on 18 April 2008. In the particulars of claim it is stated that he suffered the following injuries:

- 6.1 Lacerations on the right side of the forehead and temporal area, left arm laceration and head injury;
- 6.2 Left knee compound patella fracture;
- 6.3 Injury to right ankle ligaments.

[7] Plaintiff was the driver of his own vehicle when the collision occurred between his vehicle and another vehicle driven by an unknown person but registered in the name of one P.S le Roux.

[8] The plaintiff is presently 39 years old. He was employed as a trained refractory engineer on contract at the time of the accident. The contract expired at the end of 2008. He is expected to retire at age 65.

[9] I do not intend to go into any detail about the various medico-legal reports obtained by both plaintiff and defendant but will confine myself to the actuarial reports of Human and Morris for plaintiff and True South for defendant. Their respective reports are based on the joint minutes of the industrial psychologists, Dr Pretorius and Mr Jooste for the plaintiff, and Mr Oosthuizen for the defendant. Defendant's counsel sought to dispute only the actuarial findings of plaintiff's actuaries on the basis that plaintiff has suffered a 10% loss of work capacity and, accordingly, he should be awarded 10% of the actuarial amount. No proper basis was laid for the submission. It seems to

me this submission is based on the orthopaedic surgeon, Dr Engelbrecht's view that a permanent loss of work capacity of at least 10% should be awarded to the plaintiff.

[10] Dr Pretorius explained that work capacity impacts on a person's earning capacity. Work capacity depends on the nature and extent of the physical injury, the functional ability to do certain things or not whereas earnings are job specific. An example to illustrate the point is where a person has a whole person impairment of 10% (a decrease in ability to work) because he cannot use his left hand anymore. If he was earning income as a piano player then his loss of earning capacity is great because the use of both hands are required to play the piano. Where the person uses only his right hand to earn an income then he would conceivably suffer no loss of earning capacity even though his left hand is injured. Hence, a 10% loss of work capacity, e.g., does not without more translate into a 10% loss of income. Dr Pretorius said the plaintiff has suffered a loss of earning capacity. To determine the extent of the loss one looks at the pre-morbid earnings as compared to post-morbid.

[11] The respective industrial psychologists differ with regard to the impact the accident has had on the future earning capacity of the plaintiff. This difference is noted in the results of the actuarial calculations.

[12] The plaintiff's contract of employment was due to end shortly after the accident. There is no evidence that he would have immediately procured a renewal of the contract or obtained another similar job as soon as his contract expired. When he did get some short-term employment after the accident he initially earned more than he did before the accident. In my view a higher than normal contingency deduction should be applied for past loss of earnings. As has been stated in *Shield Insurance Co. Ltd v Booysen* at 965G¹, the determination of what allowance should be made for contingencies involves by its very nature a process of subjective estimation rather than objective calculation.

¹ *Shield Insurance Co. Ltd v Booysen* 1979(3) SA 953(A) at 965G.

[13] As far as future loss of earnings is concerned, defendant's counsel's submission, in essence, was that plaintiff's loss of earning capacity did not translate into loss of income hence he should be awarded a higher amount for general damages to compensate for the loss of earning capacity. An amount of 10 per cent of the calculated loss of income would be adequate said counsel. In support of this submission I was referred to *Deyssel v Road Accident Fund*² where Bizoz AJ dealt at length with the issues of loss of earning capacity and loss of earnings. In my view, that case can be distinguished from the one before me. There the court accepted that the plaintiff had suffered whole person impairment (which would increase with age) but, on the facts, found that it had not resulted in a loss of earning capacity and went on to find that she did not prove that she suffered future loss of income.

[14] In the present case the industrial psychologists for the plaintiff and defendant respectively are in agreement that plaintiff will suffer loss of future income. Although plaintiff earned more post-morbid for a few months compared to his pre-morbid income as a security officer he could not maintain it. The expert view is that he would not have been able to continue working as a security officer due to the nature of the work. In his current employment as a driver he earns less than what he earned at the time of the accident. In the circumstances, defendant's counsel's submission that a 10 per cent of earning capacity should be included in general damages cannot be accepted. There is no basis for this submission in the face of even the defendant's own experts. Having said that, I am of the view that general damages of R500 000 is rather high but since it has been agreed between the parties I will not dwell on it any further.

[15] Plaintiff's counsel submitted that a higher post-morbid contingency for future loss of income should be applied and suggested 40 to 30 per cent. In my view taking all relevant factors into account a post-morbid contingency deduction of 25% and pre-morbid 15% would be appropriate. For past loss of

² *Deyssel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011).

income 15% would be appropriate for both the injured and uninjured scenarios. I apply this higher percentage because plaintiff was not in a long term permanent job. His contract was due to expire about eight months after he was injured. Even though he returned to work six weeks after he was injured, his contract was nevertheless not renewed at the end of 2008. It would therefore seem he could have remained unemployed for some periods of time or while he trained for another occupation. It is also to be noted that plaintiff was unable to provide proof of actual income in his current employment in the form of payslips nor for the time when he was injured. The calculations were then based on the tax certificate for the tax year ending February 2009. However, the difficulty with that was that while plaintiff's experts assumed he earned R15 000 per month defendant's experts assumed that plaintiff earned R10 000 per month and overtime of about R5 000 per month. It appears that the latter is correct. This impacts on actual income to the extent that overtime earnings are volatile and are not guaranteed.

[16] Mr Loots of True South Actuaries provided two scenarios – one based on the assumption of plaintiff's industrial psychologists and another on defendant's industrial psychologist. Mr Loots calculated plaintiff's loss of income as follows based on defendant's expert;

- Past loss	R419 222
- Future loss	R2 349 231
<u>Total</u>	<u>R2 768 453</u>

He calculated the loss, based on plaintiff's expert, as follows

-Past loss	R646 755
-Future loss	R2 512 698
<u>Total</u>	<u>R3 159 453</u>

In both instances the contingency deductions were left for the court to determine the appropriate amounts.

[17] Human and Morris calculated plaintiff's loss as follows:

- Past loss	R364 542
- Future loss	R3 025 371
<u>Total</u>	<u>R3 389 913</u>

[18] The difference between the plaintiff's and defendant's actuaries, based on plaintiff's industrial psychologists is R230 460. The difference between plaintiff's and defendant's respective industrial psychologists is R621 460 a significant difference.

[19] In these circumstances I must do the best I can to arrive at a figure that reasonably compensates plaintiff for his patrimonial loss. I think a fair approach would be to take the average of the past and future loss as calculated by the actuaries and as based on plaintiff's and defendant's industrial psychologists and apply the appropriate contingencies. I am adopting this approach as during the trial plaintiff's counsel submitted that the respective actuaries were not far apart but this was based on a comparison of the calculations based only on the report of plaintiff's industrial psychologist i.e. R3 389 913 (plaintiff's actuaries' calculation) and R3 159 453 (defendant's actuary's calculation).

[20] Plaintiff's monetary loss is accordingly calculated as follows:

Past loss of income per plaintiff's actuaries	R364 542
[20.1] Past loss of income per defendant's actuaries	R419 222
	<u>R783 764</u>
Average	<u>R391 882</u>
Less 15% contingency deduction	R 58 782
	<u>R333 100</u>

[20.2] Future Income Pre-morbid

Per defendant's actuary	R4 190 186
Per plaintiff's actuary	<u>R4 809 426</u>

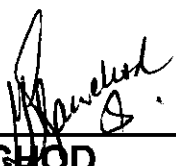
	R8 999 612	
Average	<u>R4 499 806</u>	
Less 15% contingency deduction	<u>R 674 971</u>	
	<u>R3 824 835</u>	R3 824 835
<u>[20.3] <u>Post morbid</u></u>		
Per defendant's actuary	R1 840 955	
Per plaintiff's actuary	R1 784 055	
	<u>R3 625 010</u>	
Average	<u>R1 812 505</u>	
Less 25% contingency deduction	<u>R 453 126</u>	
	<u>R1 359 379</u>	R1 359 379
		<u>R2 465 456</u>
Add past loss		R 333 100
Add general damages		R 500 000
		<u>R3 298 556</u>

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[21] Plaintiff sought a punitive costs order for the two days in court. In my view, the usual party and party order, as provided for in the draft order provided by plaintiff, should follow. The first one and a half days were wasted because a judge was not available to conduct the trial. Only Dr Pretorius testified in court.

[22] The draft order attached to this judgment and marked "X" is accordingly made an order of court.

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N. RANGHOO
JUDGE OF THE HIGH COURT
Appearances:

Counsel on behalf of Plaintiff

: Adv Nel

Instructed by

: Savage, Jooste & Adams

Counsel on behalf of Defendant

: Adv Matika

Instructed by

: Dyason Incorporated

Date heard

: 3 September 2014

Date delivered

: 1 December 2014