REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: 66248/2012

Not reportable

Not of interest to other Judges

In the matter between:

6/12/2016

BENJAMIN PETRUS MALAN Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MAKGOKA, J:

[1] This judgment has taken inordinately long to deliver. The delay occurred under the following circumstances. During the second term of this year I was assigned to the western circuit court in Potchefstroom. I was assigned this matter on my return from circuit court on 31 May 2016. On 1 June 2016 I was appointed acting judge of appeal in the Supreme Court of Appeal. I had to clear my chamber for the acting judge who would occupy it during my absence. This file should have been among the documents I removed from chambers to my residence. For some reason the judgment was not recorded by my registrar in the list of reserved judgments. As a result, the file 'fell through the cracks'. It was only during the weekend of 27 August 2016 that I happened to go through some documents that it came to my attention. I regret the delay and offer my sincere apologies to the parties.

[2] This is an action for damages in terms of the Road Accident Fund Act 56 of 1996, as amended (the Act). That followed a motor vehicle collision on 30 June 2009. The plaintiff, then 33 years old, was a driver of a motor vehicle which collided with another. The plaintiff sustained the following injuries: soft-tissue injury to the left shoulder; soft-tissue injury to the lunar spine; head injury with frontal impact; and moderate traumatic brain injury. He was treated at a private hospital and discharged the same day. He was later treated by a general medical practitioner and a pharmacist, which treatment consisted mainly of injections for the back and shoulder pain. He was employed as a second-hand car sales representative at the time of the accident. He was off from work for only three days following the accident. He resumed his duties and continued working for three years until he resigned.

[3] His current complaints include, among others, pain to the left shoulder, which prevents him sleeping on the left side; inability to properly use the left-arm; pain in the lower back; short-memory; severe headaches; shoulder and back pain; loss of balance; intermittent and short episodes of vertigo; sleep disturbances; low energy levels and fatigue; speech difficulties; disorganisation; and moodiness.

[4] The defendant has conceded full liability for the plaintiff's proven damages. With regard to future medical expenses in respect of treatment and accommodation, the defendant has agreed to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Act. Accordingly, the only issue for determination is the plaintiff's claim for loss of earning capacity.

[5] There was no oral evidence by or on behalf of either party. The parties, by agreement, stated a case in terms of rule 33 of the Uniform Rules of Court, and handed up a document which sets out the common cause issues; the plaintiff's personal particulars and employment history; excerpts from hospital and medical reports, as well as the medico-legal reports of the following experts on behalf of the plaintiff: Dr Volkersz (orthopaedic surgeon); Dr. Wilson (radiologist); Dr. Edeling (neurosurgeon) Dr. DA Shevel (psychiatrist) Mr. Reynolds (clinical psychologist); Mr. Gouws (speech/language pathologist and audiologist); Ms. Cumming (occupational therapist); and Ms Vermaak (industrial psychologist).

[6] Rule 33(1) of the Uniform Rules of Court provides that the parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the Court. Rule 33(2) on the other hand, reads as follows:

'Such a statement, shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such a statement shall be divided into consecutively numbered paragraphs and shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions...'

[7] The plaintiff completed grade 10 in 1994. He subsequently obtained a number of certificate qualifications. He was first employed as an apprentice mechanic in 1995. Three years later, in 1998, he was employed as a cash in-transit security officer by a security company. He left a year later in 1999 to work as a mechanic. In 2000 he left and was employed as a safety officer. A year later, in 2001 he joined another company, also as a security officer. In 2002 he left and secured a job as used vehicle salesman. This is where he was employed when the accident occurred on 30 June 2009. He was responsible for the following tasks: presenting vehicles to potential clients; accompanying potential clients on test drives; completing the licensing and registration of each vehicle sold; compiling invoices; and signing contracts.

[8] He continued in this job after the accident and resigned in November 2012 to work as a self-employed 'freelance vehicle dealer'. He stated to the experts who examined him that the reason for leaving was 'memory and concentration difficulties.' In the twelve months preceding the collision the plaintiff earned an income of approximately R15 000 – R30 000 per month, the income varying due to earning commission on vehicle sales. The plaintiff currently works as a freelance car salesman, sourcing vehicles over the internet and providing such information to dealerships. The plaintiff earns a marginal commission from the dealerships for vehicles purchased on the basis of the information he provided. According to the industrial psychologist, Ms Derryn Brümmer, the plaintiff's position is considered to have the requirements which fall within the light physical demand.

[9] The plaintiff informed the occupational therapist, Ms Kelly Cumming, that he did not experience any physical limitations in relation to his work after the accident. In her report, Ms Cumming stated:

'Mr Malan states that post-accident he did not experience physical limitations impending on his work ability; however he is of the opinion that his memory and concentration deficits resulted in careless mistakes being made at work. He thus resigned from the company towards the latter part of 2012.'

Further in the report, it is remarked that:

'He (the plaintiff) states that if he were to return to his previous occupation within a dealership, he would experience concentration and memory deficits. He states that he would then be at risk of forgetting to complete administrative tasks such as licensing, registration, signing of contracts and compilation of invoices.'

[10] The legal representatives of the parties also handed up a document titled 'Loss of Earnings Calculator', in which the plaintiff's pre- and post- morbid earnings are set out in scenarios 1 and 2, with certain contingencies applied to those earnings. In scenario 1, the total loss of earnings is calculated at R1 201 095.85 after a 25% contingency was applied to the post-morbid earnings. In scenario 2, a 30% contingency was applied to arrive at a figure of R1 475 935.80.

[11] Mr Uys, on behalf of the plaintiff, conveyed to me that the contingencies had not been agreed upon and were subject to adjustment by the court. Mr Uys readily accepted that the link between the collision and the behaviourial patterns exhibited by the plaintiff post collision is not that strong. He however, urged me to have regard to the views expressed by the plaintiff's wife and the report of the neurosurgeon, Dr Edeling. He submitted that given the unpredictable nature of the vehicle sales environment, contingencies could be adjusted higher than usual. Counsel for the defendant, Mr *Ngoetjana*, placed on record the defendant's acceptance of the reports of the plaintiff's experts, and also that the plaintiff had resigned from his work as a vehicle sales person due to the accident. He submitted that if the court adopted scenario 1, a further 10% deduction should be applied, while a 15% should be applied in the event the court prefers scenario 2.

[12] It is trite that the plaintiff bears the onus of proving on a balance of probabilities that any pathology emanating from the accident explains his current complaints which disables him from continuing with his job as a car sales representative, as he was able to do pre-morbidly. The court must determine first, whether the injury has translated into diminution in earning capacity, and second, the extent of such diminution. In the process of such determination, it must be established with some certainty, among others, what impact the accident had on the plaintiff in carrying out his duties as a car sales representative; the future opportunities the plaintiff was likely to be presented with, but for the accident; if plaintiff, post-accident, was employed sympathetically; and whether the plaintiff received any warnings for lack of application or performance.

[13] These are all very important and pertinent considerations in determining whether, in fact, the plaintiff has suffered diminution in his earning capacity as a result of the accident. It is important to emphasise that the mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity. See *Union and National Insurance Co. Ltd v Coetzee* 1970 (1) SA 295 (A) at 300A; *Santam Versekerings Maatskapy Bpk v Byleveldt* 1973 (2) SA 146 (A); *Dippenaar v Shield Incurance Co Ltd* 1979 (2) SA 904 (A).

[14] As was explained in *Aaron's Whale Rock Trust v Murray & Roberts Ltd and Another* 1992 (1) SA652 (C) at 655I-656E:

'The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss. That this is so appears from the well-known passage from the judgment of Stratford J in *Hersman v Shapiro* & Co 1926 TPD 367 at 379, quoted with approval by Diemont JA in *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 970E, viz:

> "Monetary damage having being suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case w.here evidence is

available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance."

[15] The upshot of the above authorities is that it is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of loss could have been made. Thus where evidence is available to a plaintiff to place before the Court to assist it in quantifying damages, and this is not produced, so that it is impossible for the Court to do so, the plaintiff must fail. See *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118E; *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 630.

[16] In the present case, the plaintiff says that he resigned from his previous job as a car sales representative because of memory and concentration problems. All I have about this is the plaintiff's mere say-so. I take no issue with the reports by the experts regarding his cognitive abilities after the accident. The main question is how the accident affected his ability to do the job he did before the accident. I cannot simply rely on his mere *ipse dixit,* when there should be objective information from his previous employer to confirm this. There has to be collateral information from the former employer as to the plaintiff's performance of his duties pre- and post-morbid. What is more, the plaintiff does not give specific incidents to support the assertion that he had memory and concentration difficulties. It is a customary and acceptable practice in matters such as the present one, to include collateral information from the employer or former employer, in the report of the industrial psychologist.

[17] There is no indication in the present case that an attempt was made to contact the plaintiff's former employer to obtain such collateral information. There is no explanation why this was not done. The role played by collateral information from an employer or former employer should never be undermined.[1] Employer collateral

[1] See for example *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ) paras 51 -55 where employer collateral information was very helpful in assisting the Court to make a determination whether the plaintiff indeed had suffered loss of earning capacity.

information is particularly relevant in the present case for the mere fact that physically, the plaintiff does not appear to have any difficulty in coping with the demands of his job, post the accident. I have pointed out earlier that the nature of the plaintiff's job fell within the light physical demand. I have diligently perused all the expert reports and bundles of documents on file for any information about the views of the plaintiff's former employer as to the plaintiff's work performance after the accident. I have found none. There is not even any indication of the employer's certificate which is normally obtained from the employer after termination of employment of an employee.

[18] It does not assist the plaintiff that there are reports by experts attesting to his loss of cognitive abilities. This is so because even the expert reports were largely compiled on the basis of the information provided by him. I have, in para 9 above, referred to such example, where it is clear that the conclusions reached by the occupational therapist, was largely based on the plaintiff's own opinion of his condition. It is therefore clear that if, for example, collateral information comes to light that the plaintiff had in fact coped well in his job, post-morbid, and had actually been earmarked for promotion, the assumptions postulated by the industrial psychologist would no doubt, alter significantly. It is trite that in order to test the opinion of experts, the facts upon which they draw their conclusions must be considered. If the facts are incorrect, which is part of the judicial function to determine, then *a fortiori* the opinion is flawed. See *Ndlovu v RAF* 2014 (1) SA 415 (GSJ) para 35. See also *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) paras 34 to 40 as to the proper approach a court should adopt in evaluating the expert evidence.

[19] It is irrelevant that the parties have agreed to state a case in terms of rule 33 of the Uniform Rules of Court. The defendant can only admit that the plaintiff resigned from his employment. What it cannot tenably agree to, without proof, is the reason for the resignation. This court is called upon to authorize payment of over R1 million of public funds in favour of the plaintiff. For that reason, I must be satisfied about the basis on which such compensation is premised. The court is not a rubberstamp for agreements reached between attorneys. It has a duty, especially

when public funds are implicated, to make sure that compensation is due, fair and adequate.

[20] In *Minister of Police v Mboweni & Another* 2014 (6) SA 256 (SCA) para 8, the Supreme Court of Appeal cautioned against deciding a stated case on inadequate facts. Wallis JA stated:

'It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane & Others v D' Ambrosi,* where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline the request. The proceedings in *Bane v D' Ambrosi* were only saved because the parties agreed that in any event the evidence that was excluded by the judge's ruling should be led, with the result that the record was complete and this court could then rectify the consequences of the error in deciding the special case.'

(footnote omitted)

[21] Under normal circumstances I would consider granting absolution from the instance. However, as the parties had agreed to state a case on the agreed facts, and where both parties were remiss in the inadequacy that I have pointed out, I am of the view that the matter should be postponed *sine die* to allow the plaintiff to obtain a report from his former employer as to his performance of his duties post-morbid. All the expert reports are before court, from which it can be deduced that the accident had resulted in a number of psychological and cognitive *sequelae*. If these had resulted in diminution of his earning capacity, he must be properly and adequately compensated. It is in the interest of justice that all the evidence be laid before court to assist in the assessment of the plaintiff's damages. I assume that the plaintiff's former employer can readily avail the plaintiff's performance history and records. If there are difficulties in that regard, the plaintiff can report to the court of those.

[22] I am of the view that, rule 33(5) of the Uniform Rules of Court, is suitable for the present situation. It provides, among others, that the court may give any direction with regard to the hearing of any other issue in the proceedings which may be

necessary for the final disposal thereof. At any rate, in terms of s 173 of the Constitution, this court has the power to regulate its procedure, in the interests of justice.

[23] In the result I make the following order:

1. The matter is postponed *sine die*;

2. In terms of rule 33(5) of the Uniform Rules of Court, the plaintiff is directed to file a report compiled by his former employer, detailing:

   (a) the plaintiff's performance of his duties between 30 June 2009 and November 2012 when he resigned from the employ of the company;

   (b) Whether the plaintiff had received any warnings (verbal or written) in respect of his work performance;

   (c) The reason for the plaintiff's resignation, as well as all documentation pertaining to the plaintiff's resignation, including the plaintiff's resignation letter.

3. The plaintiff is given leave, on obtaining the information referred to above, to supplement any of the expert reports already filed;

4. Once the above have been achieved, the plaintiff may enrol the matter for the determination of quantum, in liaison with the office of the Presiding Judge.

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TM Makgoka
Judge of the High Court

31 August 2016

Appearances:

For the Plaintiff:	Mr P.J. Uys
Instructed by:	Yvonne Kruger Inc., Johannesburg
	Scholtz Attorneys, Pretoria
For the Defendant:	Adv. M.E Ngoetjana
Instructed by:	Mathipane Tsebane Attorneys, Johannesburg
	Macintosh Cross & Farquharsen, Pretoria