IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

03/05/2016
Case Number: 5146/2012
Not reportable
Not of interest to other judges
Revised.

In the matter between:

CHARL FRANCOIS HUGO PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDENT

Coram: HUGHES J

HUGHES J

[1] On 2 August 2008 the plaintiff, CHARL FRANCOIS HUGO, was involved in motor vehicle collision and as a result of the aforesaid collision he sustained various bodily injuries. The defendant, the ROAD ACCIDENT FUND, conceded liability in *toto,* tendered to compensate the plaintiff in full for his proven damages.

[2] The following heads of damages has already been settled, on 14 October 2014,

between the parties as is set out below:

(a) General damages at R400 000.00

(b) Interim payment of Past Medical and Hospital Expenses at R71 780.59

(c) Future Medical expenses an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act).

[3] The only issue to be determined by this court is the issue of the plaintiff's past and future loss of earnings and/or earning capacity. The parties confirmed that remaining claim for past hospital and medical expenses was in the process of being settled and I needed not adjudicate this issue.

[4] In course of this trial all of the plaintiff's expert's reports as well as those reports of the defendant's expert's and the joint minutes compiled by the corresponding experts were admitted as evidence by the parties. There was a supplementary joint minute filed by the Industrial Psychologists and the actuarial calculation, from the actuary of the plaintiff, is produced along the lines of this supplementary joint minute of the Industrial Psychologist.

[5] The only two witnesses who testified were, Ms Samantha Behrmann (Behrmann), an Industrial Psychologist for the plaintiff and Ms Rosinah Motau (Motau), the Industrial Psychologist for the defendant. Their testimony centred on the plaintiff's pre-morbid career path or progression and the earnings he would have attained.

[6] All that is captured in the expert reports and joint minutes of Behrmann and Motau are common cause, but for, the value of the plaintiff's uninjured earnings and the contingency deduction to be applied there to. A determination is required of the latter which is not common.

[7] It is prudent for a brief background to be set out. The plaintiff was 29 years of age when he was involved in the collision in 2008. In 1999 he registered for a BCom (Commercial Accounting) at Stellenbosch University which was conferred upon him on

March 2006 having completed the degree in 2005. During the course of his studies he took a gap year from 2003 to 2004 as he travelled abroad. He states that he intended to register for his MBA a year or two after the year of the collision. His intended career path, as stated by the plaintiff, having attained his MBA, was that of a Director or Shareholder of a medium size company.

[8] At the time of the collision in 2008, he was employed at New Reclamation Group as a Branch Accountant earning an annual salary of R281 063.00. He only returned to work in 2010 and was then retrenched. In January 2011 he was employed as a Financial Manager at Shastean Investments earning a salary of R30 000. 00 per month. He resigned in October of the same year as his position became redundant. Fortunately, in November 2011 he gained employment at Stuttafords as an Assistant Financial Manager earning R35 000.00 per month but resigned in September 2013. At Home Mark, he commenced in September 2013 and remained there until August 2014. He worked as a Financial Manager and earned R44 000.00 per month. At the time of the trial, 2015, the plaintiff was employed by Lyndvaal as a Financial Manager and was earning R475 212.00 per annum.

[9] All the expert's opinion that the plaintiff has a residual capacity to remain gainfully employed at a senior level in the Financial Management field, however, in competing in the open labour market he has been compromised as he is more vulnerable as he has experienced a mild loss of work capacity. This is as a result of the degree of cognitive efficiency he has lost that is due to the *sequela* of the injuries he sustained.

[10] Adv. Ferreira for the plaintiff argues that the plaintiff, but for the collision, would have obtained his MBA in 2009 when he was 30 years old. He would have commenced on lower quartile of level D5 of the Paterson Grade by 2010 with his income evenly rising in real terms until he reached his career ceiling at age 45, earning at the lower level of E1.

[11] On the other hand Adv. Coetzee argued for the defendant that at best the plaintiff would have commenced in 2010 on the median of D1 Paterson Grade level and progressed with uniform real term increases to the lower D2 level by the time he reached age 45 with inflationary increases thereafter till retirement age 65. This scenario excludes the possibility of the plaintiff attaining a MBA.

[12] Behrmann and Motau agreed that the age of retirement would be 65 years in both the 'but for' the collision and 'having regard' to the collision scenarios.

[13] A further factor to take into consideration is the fact that this collision took place after the 1 August 2008 and in terms of the Act a maximum loss allowance per annum is R160 000.00 which value is applied to the net loss. This is in respect to general contingencies being applied to the calculation of the accrued and prospective loss amounts.

[14] The two hypotheses above differ on one aspect only and this is whether the plaintiff would have attained his MBA.

[15] The evidence of the plaintiff was that he wished to first attain sufficient work experience to 'maximise' his MBA studies. This was why he had planned to register a year or two after 2008. This would give him at least 4 to 5 years work experience towards his MBA on my calculations.

[16] Behrmann testified that the issue of the plaintiff wanting to pursue a MBA came to the fore when the he was interviewed on 19 August 2014. She conceded, in cross-examination, that she did not have the plaintiff's degree certificate when she interviewed him to verify that he had indeed been conferred with the degree he said he had. She further conceded that she did not even verify with the institution that plaintiff was in fact conferred with a degree. What she did confirm that for the plaintiff's attain his aspirations in obtaining a MBA, regard had to be had of his result of his BCom. These results she never had sight of and she conceded that this would play a vital role in him being admitted to do the MBA. She emphasised that it was on the plaintiff's submissions to her that she came up with the notion that he would have attained a MBA. Lastly on this aspect she conceded that she did not do any investigations on whether the plaintiff would have qualified to be admitted for the MBA program with just a BCom degree, the results of which she was not aware of, and the requirement for such a degree she had not research.

[17] Motau interviewed the plaintiff on 1 September 2014 and her evidence is that she

was not told by the plaintiff of his aspiration to do a MBA.

[18] In her evidence in chief she testified that she did do follow up interviews with his past employer that the plaintiff had advised her of and she verified that he had obtained a matric with exemption certificate and B Com Acc. degree.

[19] When she enquired from the plaintiff of what his future aspiration were he responded that he wanted to be on a board or start his own business. As regards his aspiration before he pursued his BCom degree he told her that he wanted to complete his degree, do his article and qualify as a CA, maybe his Masters and at some point he wanted to be a Doctor.

[20] In cross-examination she made the concession that the plaintiff could have attained a post- graduate diploma and that the knowledge of the plaintiff aspiring to do a MBA prior to the collision should be taken into account with the application of a higher contingency to cater for the uncertainty element.

[21] What ultimately comes to the fore, in my mind, from the testimony of both Behrmann and Motau, is that they agree that the plaintiff's aspiration to do his MBA should be taken into account. Motau qualifies this by stating that a higher than normal contingency be applied to cater for uncertainties.

[22] I find difficulty in accepting both experts notion that I should take into account the aspirations of the plaintiff to do his MBA as he stated for the reasons that follow. Firstly, Behrmann conceded that she did not investigate whether the plaintiff, by way of the marks that he attained in his BCom, would have qualified to be admitted to do his MBA. Secondly, she also did not investigate what the requirements were in the plaintiff's circumstances to be admitted to do a MBA. She conceded that she relied solely on the plaintiff's say so to conclude that he would have registered for his MBA when he said he would. Motau's evidence is that he could have done a post graduate degree. She also stated that in addition to the BCom a post graduate qualification was required together with three to four years work experience.

[23] Now in light of the above evidence I concur with Adv. Coetzee argument that the

plaintiff, by way of expert evidence, has failed to discharge the onus to demonstrate that the plaintiff would have registered for his MBA as he said he would and attained the said qualification.

[24] I am guided by that said in *S v The State (423/11 [2011] ZASCA 214 (29 November 2011) at [19]* where **Harms AP** makes reference to the principles that guide a court in admitting the opinions of experts:

> "[19] This approach is fatally flawed. Courts have to decide whether or not they believe witnesses. They cannot be led by opinion evidence on this point. The glib evidence was simply inadmissible opinion. It should suffice to refer again to *Holtzhauzen v Roodt* and to quote from another judgment by Satchwell J, namely *S v Engelbrecht* 2005 (2) SACR 41(W) at para 26, where the learned judge said this:
>
> 'Courts frequently turn to persons with expertise and skill for assistance. The relevant principles applicable to the admissibility of opinion evidence by experts, including psychologists and social workers, have been set out in numerous authorities. Firstly, the matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge. Secondly, the witness must be a person with experience or skill to render him or her an expert in a particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the Court. Fourth, the expertise of any witness should not be elevated to such heights that the Court's own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others. Sixth, the opinion of such a witness must not usurp the function of the Court.'
>
> The evidence of Mrs Haycock did not satisfy requirements four, five or six."

[25] I conclude that the experts on this MBA aspect did not provide this court with assistance as their conclusion was not based on proven facts as they had not investigated and/or researched whether the plaintiff, aside from his say so, would have firstly qualified to register and complete the MBA program.

[26] I am aware that sight must not be lost of my responsibilities in drawing inferences

from the proven facts before me, and in this instances both experts have not furnished evidence in order for me to test the accuracy and the objectivity of their conclusion with regard to the issue of the plaintiff having attained a MBA. I therefore find that the evidence of both experts did not satisfy requirements five and six mentioned in *S v The State* supra.

[27] In the result I am of the view that basis of the calculation without attaining an MBA, as submitted by Adv. Coetzee, is applicable in these circumstances.

[28] From the joint minutes of Behrmann and Motau they agree on the calculation of the plaintiff's future earnings having regard to the collision as totalling an amount of R8 510 534.00, as calculated in the actual report of Ivan Kramer cc. I see no need to venture into this terrain as it falls into that which common cause with the parties.

[29] Turning to the issue of contingencies I take heed of what was stated in *Southern Insurance Association v Bailey NO 1984(1) 98 AD* about the two approaches that can be used to ascertain future loss of earnings are discussed on *page 113* where the following is said by **Nicholas JA:**

> "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 guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the 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."

Continues on page *114C-D* to state:

> "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 "informal guess" it has

the advantage of a logical basis". In addition refer to *Smit NO v The Road Accident Fund, The Quantum of Damages, Corbett and Honey, Volume 5, B4-251.*

Robert J Kock in his book *"The Quantum Year book"* states that there are no fixed rules as regards general contingencies and one of his helpful guidelines is that of the sliding scale contingency theory:

"Sliding scale: % % *per year to retirement age, i.e. 25% for a child, 20% for* a *youth and 10% in middle age".*

[30] In the circumstances of I am of the view that normal contingencies of 5% on accrued and 10% on prospective values of income be applied, as is set out in the actuarial calculation of Ivan Kramer cc dated 13 October 2015 handed up as exhibit 'D'. These contingencies will be applied to the 'but for the collision' scenario taking into account the facts of this case mentioned in relation to the plaintiff's progress in his career prior to the collision.

[31] As there is consensus with regards to the 'having regard to the collision' scenario I will apply the mathematical contingency as suggested in Ivan Kramer cc dated 13 October 2015 of 30%. It was correctly in my view pointed out by the two industrial psychologist, that the plaintiff is a more vulnerable employee, has suffered from a decree in productivity, is on an unequal footing as a competitor on the open labour market and as a result his career progress opportunities are thus restricted.

[32] In the result, as illustrated by way of the actuarial calculation mentioned supra, I am of the view that the amount due to the plaintiff is that which set out under the header 'LIMIT APPLIED Basis 02 level' totalling an amount of R2 563 781.00 which takes into account the contingency deduction mentioned above.

[33] The net loss of earnings due to the plaintiff totals R2 563 781.00.

[34] The order granted is in terms of the order attached marked X, duly incorporated into the judgment, with the insertion of the amount of R2 563 781.00.

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W. Hughes
Judge High Court Gauteng, Pretoria

Delivered: 3 May 2016

For plaintiff: Adv E J Ferreira Instructed by: Ian Levitt Attorneys For Defendant: Adv L Coetzee
Instructed by: Maponya Incorporated

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 5146/2012

In the matter between:

CHARL F HUGO Plaintiff

and

ROAD ACCIDENT FUND Defendant

~~DRAFT~~ ORDER

HAVING HEARD COUNSEL FOR THE PARTIES IT IS ORDERED THAT:

1. The Defendant shall pay the capital amount of R2 563 871.00 in settlement of Plaintiff's claim for loss of earnings:

NAME OF ACCOUNT: **Ian Levitt Attorneys**
BANK: **ABSA**
BRANCH: […]
ACCOUNT NO: […]
BRANCH CODE: 630 805

2. Interest on the capital amount of R 2 563 781.00 at the rate of 9% per annum calculated from fourteen (14) days from date hereof to date of final payment, both days inclusive.

3. The Defendant shall pay the Plaintiff's taxed or agreed costs on the High Court party and party scale to date, the costs on trial of counsel on 12, 13 and 20 October 2015, including Counsel's consultations with experts, drafting of written heads of argument and the preparation, reservation and qualifying fees of the following experts together with their consultations with Counsel, if any, and as determined by the taxing master, namely:

3.1. Dr G Read, orhtopaedic surgeon;

3.2. Dr Basil Braude, psychiatrist;

3.3. Dr P Miller, neurosurgeon;

3.4. E Bloye, clinical psychologist;

3.5. Catherine Rice, occupational therapist;

3.6. S Behrmann, industrial psychologist;

3.7. Ivan Kramer, Actuary.

4. In the event that costs are not agreed, the parties agree as follows:

4.1. The Plaintiffs shall serve a notice of taxation on the Defendant's attorneys

of record; and

4.2. The Plaintiffs shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs.

BY THE COURT

REGISTRAR