



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

25/5/2016

Case No: 22610/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

DATE

SIGNATURE

In the matter between:

Colin Sibusiso Nkosi

Plaintiff

And

The Road Accident Fund

Defendant

Draft – JUDGMENT

Maumela J.

1. The plaintiff, a male who is 25 years of age instituted an action against the defendant. The merits were settled. The parties

agreed that general damages shall be referred to a tribunal. Future medical expenses are not in dispute in that the defendant tendered a certificate concerning them in terms of section 17 (4) (a) of the Road Accident Fund Act 1996: (Act 56 of 1996) 'The Act'. Plaintiff accepted same.

2. There was consensus about the fact that no issue arises on past loss of earnings. This is because plaintiff is still attending school. He could therefore not suffered loss of earnings. There remains a dispute about plaintiff's future loss of earnings.

BACKGROUND.

3. The cause of action arose out of a motor vehicle collision which took place on the 1st of May 2009 along the N11, leading from Ermelo to Hendrina. Plaintiff was a passenger in a vehicle registered DBN 814 MP. It was driven by one Shobe, who is the 2nd insured driver. The other vehicle involved in the collision was registered DRW 212 MP. It was driven by A. Mdluli, the 1st insured driver.
4. As a result of the accident, the plaintiff sustained the following injuries:
 - 4.1. Fracture of both femurs, and
 - 4.2. Fracture to the tibia.
5. Plaintiff was admitted at Midmed Hospital where he received emergency treatment. He was hospitalized further for some time. Examination of the plaintiff revealed that he shall require further hospital and medical treatment, thereby incurring further expenses. However in the light of the section 17 (4) (a)

certificate signed, the further expenses are covered and they are no longer a subject of contention. Examination of the plaintiff also revealed that as a result of the accident, plaintiff experienced emotional trauma and shock; much as he shall continue to do so in future. The plaintiff has also been permanently disabled.

6. Past medical expenses are conceded. It is conceded that plaintiff suffered serious injury as contemplated in section 17 (1) (a) of the Act. The merits were admitted. Liability lay on the first insured driver. It is not necessary to outline the manner in which the accident happened and to determine whose fault it was.

THE ISSUE.

7. The court is to determine whether the plaintiff is entitled to claim on the basis of loss of future earnings. For that purpose the court has to take into consideration that the accident in issue did not render the plaintiff to be completely disabled. It has to be taken into consideration that the plaintiff can still do work, albeit with pain and subject to the limitations brought about by his permanent disability.
8. Were the court to find that the accident indeed brought about limitations to the capacity of the plaintiff to earn in future, he will have to be compensated for the difference between what he would have been able to realise had he not been involved in an accident, and what he is capable of earning after the accident.

9. While the defence did take issue with some of the aspects in the reports, it admitted all of them at the start of the proceedings. The admission of the reports suggests that the contents thereof are admitted. It is not necessary to reflect the contents of the said reports in detail, but it is necessary to mention a few aspects in them.

THE EVIDENCE.

10. The defendant admitted reports compiled upon the examination of the plaintiff. The reports were compiled by:
- 4.1. Dr. Ben Moodie, (an Industrial Psychologist).
 - 4.2. An actuarial report by Johan Potgieter, and
 - 4.3. A medico-legal report by Dr J. Pretorius.
11. Dr. Moodie the Industrial Psychologist stated in his report that the plaintiff suffered among others, fractures of both femurs, as well as a fracture of his left Tibia. His left leg ended up shorter than the right one. This affected his gait in a manner irreversible. It was found that the plaintiff suffers pain in both hips. He has an asymmetrical posture which causes pelvic obliquity, therefore causing a tilt towards the left leg, which grew shorter.
12. The plaintiff also suffers pain on the left hip whenever he sits for a long time. Back flexion causes him pain. Upon squatting, he experiences pain at both shins and knees. He experiences pain on both legs whenever he stands for more than 30 minutes. He suffers the same pain when he walks over long distances. He experiences the same pain when he climbs

stairs. He cannot go down on his haunches.

13. Dr. Moodie found that even before the accident the plaintiff struggled with pre-existing learning difficulties. He is of the view that the plaintiff would remain unemployed for the initial 18 to 24 months. He can later earn a salary of an unskilled worker at a scale between R6 400-00 and R 16,400-00, which can be the one as much as R 47,300-00 per annum. He views that if the plaintiff gains skills, he could earn about R 47,300-00 R 120,000-00 per annum up to the age of 40 to 45.
14. He states that the plaintiff can also earn a salary in the informal labour market in an unskilled capacity, where he would equally be unemployed for the initial 18 to 24 months. He could later obtain a job where he made before to work as a general labour; for example as a shelf packer. Due to the physical demand of such work he would have to retire at the age of about 60 to 65.
15. It was found that the plaintiff did not acquire any additional educational difficulties as a result of the accident. It was also reported that prior to the accident, pre-existing educational difficulties were attendant to his person. It was found that physical, he can endure light to low range medium work. In that way, his occupational choices are now limited. He can no longer cope optimally with manual work because of his gait problems. He can also not continue with ambulatory work where he is supposed to walk or stand for more than 15% of the working day.

16. Dr Moodie views that in the midst of the scarcity of jobs prevailing, it is highly probable that the plaintiff will find it extremely difficult to secure employment. Dr moodie views that the lack of job opportunities might compel plaintiff to seek employment of a heavier duty in nature. In such an event, plaintiff will not last long in such employment due to the physical demands that come with it, especially now that he has limitations due to the accident.
17. Mr. Johan Potgieter placed the value of the plaintiff's loss of capacity to earn at an amount of about R 694,773-00. His calculation is based on the assessment by the industrial psychologist. He attributed the loss of capacity to earn on the part of the plaintiff to the accident he was involved in.
18. **The defendant did not advance any evidence which challenges** the plaintiff's evidence regarding allegations by the plaintiff concerning the latter's reduced capacity to earn.
19. The plaintiff is a scholar. He was 22 years of age when the incident happened. While the accident left him permanently disabled, examinations revealed that it did not affect his educational capability in any way. All it did was to limit his physical agility, thereby narrowing the scope or range with in which the plaintiff can physically cope with ease as an employee.
20. More particularly to this case, the plaintiff alleges that he has experienced loss of earnings and will in future continue to experience loss of earnings and earning ability. The parties

are in agreement that because the plaintiff is still attending school, he cannot claim on the basis of past loss of earnings. However the plaintiff seeks compensation for future loss of earnings. He contends that the injuries sustained limit his ability to earn, much as they shall continue to do so on an increasing basis in the future.

21. Dr. J.J.L Heymans indicated that the plaintiff complained of pain and discomfort in both his legs. He stated that with the recommended treatment, and with time, the plaintiff's symptoms shall clear progressively, so much so that he will be able to finish his school career. He views that the plaintiff's employability and its lifespan are not adversely affected.
22. Ms Van der Walt , who is an Occupational Therapist, stated that whereas plaintiff did not sustain head injuries, she cannot explain why he presented with increased educational difficulties after the accident. She views that the plaintiff shall in all probability only be able to obtain employment in a semi-skilled or unskilled capacity.
23. At the time of the accident the plaintiff was doing Grade 10. He has since failed that grade a number of times, so much so that he is repeating it for the fifth time. Reports show that the plaintiff also suffered emotional strain as a consequence of the accident he was involved in. This may have contributed to the reduction on his capacity to maintain the same educational standard he was capable of before the accident.

24. Wilma Van Der Walt found that the plaintiff's endurance for stooping and bending is affected. A test known as VCWS 9 was conducted on the plaintiff and it was found that he struggles to endure stooping. Stooping causes which causes him pain on the left hip.
25. The VCWS 201 test also revealed that Plaintiff suffers pain on the hip when balancing on either of his legs, waking on his toes, walking backwards, squatting, kneeling, crouching, stooping and crawling. It also revealed that plaintiff cannot squat without pain. He walks with a limp and his walking pace has been adversely affected. His blood pressure remains high even after sitting down for more than 30 minutes.
26. Wilma Van Der Walt views that plaintiff shall not be able to continue with ambulatory work where he has to stand and walk for more than 15% of the work day. He will have limited capacity to cope with manual work, due to the problem of his gait. He will have to take certain protective measures in order to manage or to cope with several physical activities relevant for the sustenance of his life and for performing work.
27. For purposes of loss of earning potential the plaintiff claims an amount of R 1,109,825-00. This amount is contested by the defendant. The court also has to take into consideration that although laden with the disability indicated above, the plaintiff can still cope with other forms of work which do not require him to have the full use of his disabled leg. He will have to adapt his situation from time to time in line with the physical

limitations the accident is brought to bear upon him.

28. However it has to be heeded that job opportunities have grown to be scarce and that situation is not about to change anytime soon. In the meantime plaintiff shall have to make a living despite the limitations that accident is brought to bear upon him.

EVALUATION.

29. The experts found that as a result of the injuries, the plaintiff has lost ability to earn. He has also lost the enjoyment of amenities of life, and he shall do so on an increasing basis in future as well.
30. From the above facts the court finds that the injuries the plaintiff sustained in the accident have brought about a limiting effect to his ability to perform the entirety of kinds of physical exercise he was capable of before the accident. As such limitations have been brought to bear upon him concerning his capacity to do all kinds of work. Plaintiff therefore has to be compensated for the difference between what he is capable of achieving by way earnings in his current state, as opposed to the reduced ability with which he shall be able to earn after the accident.
31. Having found as such the court has to determine the amount at which plaintiff has to be compensated for the loss of his capacity to earn. In order to arrive at an appropriate amount as compensation in this regard, the court has to take into regard the fact the accident has had on his capacity to earn. This has

to be contrasted with what the plaintiff is capable of now that he has been through an accident.

32. The court has determine the difference between what the plaintiff was capable of before the accident, and what he is capable of now that the accident he was involved in has reduced his capacity to work and therefore his capacity to earn. It also has to be taken into regard that due to the passage of time plaintiff's capacity to earn would any case get a reduced due to ageing.

33. In the case of Southern Insurance Association Ltd v Bailey NO¹, the following was held: *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. 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 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*

¹. 1984 (1) SA 98 (A) at 99B-E

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for this reason adopt a non-possumus attitude and make no award. In a case where the Court has before it material on which actuarial calculations can usefully be made the first approach does not offer 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 feeling' as to what is fair and reasonable is nothing more than a blind guess. It is true that, in the case of a young child, the assessment of damage for loss of earnings is speculative in the extreme. Nevertheless, even in such a case, it is not wrong in principle to make an assessment on the basis of actuarial calculations."

34. To arrive at a fair amount as compensation the court has to take into consideration the jurisprudential trend adopted and maintained by courts over time. In that regard the court has to reflect on decisions by courts weight regards circumstances that compare similarly to that of the plaintiff.
35. Reflecting on the case cited under paragraph 33 above it becomes clear that there is no specific method applicable to cases of this nature. The individual circumstances of each case shall have to hold sway in the determination of compensation that can be regarded as appropriate. Plaintiff should therefore not be compensated as if he would have maintained the same standard of capability throughout his life without changes.

36. In the unreported matter of *Riana Deysel v Road Accident Fund*², the court stated as follows: *"Earning capacity is part of the person's patrimony but this capacity can only be proven to have been lowered and the damages of this quantified by proving an actual loss of income. However when both of these losses have been shown to exist, the claim for one is also the claim for the other and they appear to be interchangeable."*
37. This is where a judgment by Kubushi AJ comes into focus where in the case of *Mvundle v RAF*, the honourable Judge stated: *"It is trite that damages for loss of income can be granted when a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his/her patrimony if there was a possibility that he/her could lose his/her current job and/or be limited in the number or quality of his/her choices should he/she decide to find another employment. See the Road Accident Fund v Delpoort*³.*"*
38. The plaintiff became permanently disabled as a result of the accident. It is therefore indisputable that his capacity to do work has been reduced by the accident in which he got involved. That brings with it limitations to his capacity to earn.
39. It is trite that for purposes of an exercise of this nature where the court is to determine an amount to be awarded as

² . Case No 2483/90, South Gauteng High Court , Johannesburg (24 June 2011).

³ . 2005 (1) All SA 468 (SCA).

compensation for loss of future earnings it is unavoidable to go speculative and two factor into the equation aspects that have not been a subject of an objective test based on tried and tested incidents that have taken place in reality. The court has to project into the future and engage in the form of guesswork in order to attain an idea about what the future possibly wants for the plaintiff at hand from time to time.

40. In the case of *Burger v Union National South British Insurance Company*⁴ Coleman J stated: *“A relevant aspect of the technique of assessing damage is this one; it is recognised 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 to have been proved, on a ponderous of probability, that they will occur or arise, justice may require that what is called a contingency allowance being made for the possibility of that kind.”*

41. The general depreciation in the value of the currency and the obtaining consumer price index (CPI), should also guide in order to avoid undesirable results. In the case of *Van Vuuren*⁵ the plaintiff sustained soft tissue injury on the neck and back. Immediately after the collision she was unable to move. She could not lift her head or back. She suffered acute pain for 2 to 3 days after the collision. Thereafter she suffered severe pain. She wore a neck collar for two weeks and received physiotherapy. Simple tasks like holding the cup and entering the pin on a prepaid meter became difficult. The fingers were

⁴. 1975 (4) 72 (TPD).

⁵. 2010 (6C3) QOD 542 (GSJ).

sensitive and had no strength. She suffered from constant pain in her neck which radiated into her shoulders and into her arms. She suffered a significant loss of amenities of life. The injury resulted into her being unable to pursue, not only a baking business, but also a nursing venture. She was awarded R 120,000-00 in 2010. Currently this amount quantifies into R 133,000-00.

42. In the case of Mavimbela⁶ and administrative officer in the Department of Public Works suffered soft tissue whiplash injury to the neck and a soft tissue injury to the medial collateral ligament to the left knee. Prior to the collision the plaintiff participated in soccer, cricket and played pool. His leg became troublesome and he was no longer as physically active in sport as he was before the collision. He experienced pain in the neck when he turned. 50% probability of surgical intervention in the form of a knee replacement was indicated he was awarded R 175,000-00 in 2010.
43. In De Bruin v Road Accident Fund⁷ a 26-year-old tyre builder suffered moderately severe whiplash injury to cervical spine and injury to lower back. No direct trauma to the physical and lumbar discs, facet joints of vertebrae where indicated. Consequently no degenerative changes in the cervical and/or lumbar- sacral were expected. Further treatment would be conservative. Symptoms of pain would persist. The plaintiff was obliged to give up heavy manual work as a tyre builder and obtain alternative employment as a sales representative.

⁶. 2011 (6C3) QOD (GNP).

⁷. 2011(6C5) QOD 1 (ECM).

He experienced pain and stiffness in lower back after long hours of driving. He was unable to resume previous sporting activities which he pursued at club level. He was awarded R 70,000-00 in 2010.

44. In *De Bruin v Road Accident Fund*⁸ an 18-year-old counter salesman sustained multiple injuries including soft tissue injury of the neck and back, shattered teeth and displaced jaw, lacerations to the forehead, and fracture of the left wrist and hand. He was awarded R 90,000-00 in 2011.

45. In the case of *Masilo Dorothy Motlalepule v Road Accident Fund*⁹, the court stated: *"The mere fact of physical disability does not necessarily reduce the estate or patrimony of the injured person. Put differently, it does not follow from of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity."* This view was further endorsed in the case of *Krugell v Shield Versekeringsmaatskapy Bpk*¹⁰ where the court stated: *"Die bloote feit dat 'n besondere betrekking verloor is of 'n besondere rigting vir 'n eiser geslote is, beteken nog nie noodwendig dat sy vermoë om te verdien daardeur geheel of gedeeltelik vernietig is nie. Dit hang van die omstandighede af."*

46. In this case the court is to be employed a slightly different method because the plaintiff being a scholar, is not earning at the current moment, and therefore the aspect of past loss of

⁸ . 2011(6D5) QOD 1 (ECM), page 5.

⁹ . Unreported judgement by Makgoka J.

¹⁰ . 1982 (4) SA 95 (T), at page 99E.

earning does not apply to him.

47. The court finds that that the plaintiff is made a successful case for an order to satisfy his claim for loss of capacity to earn. The court makes the following order:

ORDER.

1. Plaintiff's claim for loss of future earnings is granted.
2. The defendant is ordered to pay to the plaintiff an amount of ~~R 150,000-00~~ R320000-00
3. The defendant shall pay the costs.

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T.A. Maumela

Judge of the High Court of South Africa.