IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no. 34116/2016

15/9/2016

DELETE WHICHEVER IS NOT APPLICABLE
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GAUTENG DIVISION, PRETORIA

IN THE MATTER BETWEEN:

ADV JOHAN MALHERBE KILIAN N.O **Plaintiff**

In his capacity as curator ad litem to

JANSEN VAN RENSBURG: ANDRE ABRAHAM PETRUS LE GRANGE

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

LEGODI J;

HEARD ON: 7 September 2016

JUDGMENT HANDED DOWN ON: 15 September 2016

[1] 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 estimate, which is often a very rough estimate, of the present value of 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 of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.[1]

[2] It is manifest that either approach involves guesswork to a greater or lesser extent.[2] When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can, on the material available , even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss.[3]

[3] In the 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 "*informed guess*", it was the advantage of an attempt to ascertain the value of what was lost on a logical basis, whereas the trial Judge's "*gut feeling*" as to what is fair and reasonable is nothing more than a blind guess.[4]

[4] This case is about damages for loss of earnings capacity placed before me as a stated case, the question 'to be decided being to determine the patient's loss of income,

[1] Southern Insurance Association LTD v Bailey NO 1984 (1) SA 98 (A) at 113 G-I
[2] Southern Insurance Association LTD supra at 114
[3] Anthony and Another v Cape Town Municipality 1967 (4) SA 445 A at 451 B-C
[4] Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920; Southern Insurance Association LTD supra at 114

with specific regard to the contingency to be applied within the parameter of the parties submissions.'

[5] A stated case is a formal written statement of the facts in the case, which is submitted to the court by the parties jointly so that a decision may be rendered without a trial. This is what has happened in the present case, the parties having agreed to tender no evidence.

[6] I must however emphasis that because of the speculative nature of the enquiry, when parties elect to approach the court on a stated case and lump sum of money is claimed, in the present case, R6 653 636.00 from the public coffers, it is incumbent on the parties to place before the court sufficient evidence in the form of admissions and other admitted information, that will enable the court, to give fair and reasonable estimate, rough as it might be of the present and or future loss.

[7] The extent of the contingency deductions, as is what this court is been called upon to determine, has to be determined on guesswork, and blindly plunge into the unknown, more so if parties elected to tender no evidence. The nature of the enquiry is mathematical calculation which ideally must be based on assumption resting on evidence that is helpful to the court.

[8] A young boy who was born on 18 February1997 and named Andre Abraham Petrus Le Grange Jansen van Rensburg and who is represented in these proceedings by Advocate Johan Malherbe Killian NO who is acting in his capacity as curator ad litem, was involved in a motor vehicle accident on 28 April 2011 at the T-junction between Esterhuizen Street and R546 road between Standerton and Evander. He was at the time, a passenger in a motor vehicle bearing registration letters and number […] FS, which collided with another vehicle.

[9] As a result of the collision, he suffered serious head injuries and had collapsed left long, which resulted in a post-traumatic organic brain syndrome and chronic headaches, the residual neurological sequelae of his brain, which is said to have stabilised and became permanent. His injuries are also said to have resulted in vertigo, photosensitivity, a disfiguring tracheostomy scar, and depression and that the sequelae of his injuries have resulted in permanent losses of learning capacity, employment capacity, amenties, independency and enjoyment of life.

[10] The effects of these injuries as set out above, are reflected in joint minutes by neurologists Drs AB Maswi and HJ Edeling. In paragraphs 4,5 6 and 7 of the stated case, the following are recorded:

> *"4. As a result of the accident, the patient did not complete school and is unemployed.*
>
> *5. But for the accident the patient would have completed his grade 12 in 2014, thereafter the patient would have studied further and obtained a qualification as an engineer to wit a BTech degree in 2018.*
>
> *6. After having obtained a degree, the patient would have earned R6500.00 per month from January 2019 to September 2019. From 1 October 2019 the patient would have progressed to the lower quarter of Patterson B4 earning R206 000.00 per annum. At age 42.5 the patient would have reached his career plateau earning R701 500.00 per annum (straight line increase having been implied).*
>
> *7. Thereafter the Patient would have received inflationary increases until retirement at age 65."*

[11] To the stated case document, an actuarial report by Algorithm is attached. Basic II of the report deals with calculation based on the attainment of BTech degree. What is quoted in paragraph 10 above is distilled from the aforesaid paragraph 4.1 of the report which deals with general contingency and of relevance, is stated:

> *"It is general practice to adjust the result of the computation of loss of income with general contingency deductions. The deductions for general contingency deductions typically make allowance for items such as:*

(1) Loss of earnings due to illness;

(2) Saving in relation to travel to and from work;

(3) Risk of future retrenchment and resultant unemployment.

We have been instructed to make the following deductions for general contingencies."

[12] Algorithm Consultants and Associates were instructed to make 25% deductions general contingency for future loss regarding uninjured earnings. Future loss value of income uninjured, is calculated as R 9 630 797.00 to which 25% in the amount of R2 407 745.00 is deducted leaving a balance of R7 223 234.00, less application of the limit and the total future loss is calculated as R 6 953 636.00.

[13] It is the extent of the contingency deduction based on value of income uninjured, which is the subject of a dispute in these proceedings, the allegation on behalf of the injured being that 20% deductions (uninjured) should apply, whilst on behalf of the defendant is contended that 50% contingency deductions should apply.

Loss of earnings due to illness.

[14] As indicated in the quotation in paragraph 11 of this judgment, in making allowance for general contingency deductions, a number of factors must be taken into account. One of these factors is 'loss of earnings due to illness'. In the course of the oral submissions, Counsel for the plaintiff avoided any attempt to bring to the attention of this court, any medical and or other expert reports.

[15] What this court was provided with is a document: 'Pre-Trial Minutes", which contains pre-trial minutes of 12 June 2014, 18 September 2015 and 5 July 2016, joint minutes of neuro-surgeons, occupational therapists industrial and educational

psychologists. In paragraph 1.1 of the neuro-surgeons' joint minutes, a statement is made as follows:

> "*We have found no evidence of any pre-existing neuro-logical pathological conditions*."

15.1 The statement is made without giving more details about what is meant by pre-existing neurological pathological condition as a disability insofar as it might be relevant to loss of earnings due to illness, bearing in mind that the plaintiff for the present case, relies on admissions made in a stated case and the only reference made thereto is the actuarial report.

15.2 In my view, without the benefit of complete reports by both neuro-surgeons, it would be difficult to go about the guesswork exercise. Some information is required to avoid totally blind plunging into the unknown. In order to make fair and reasonable estimate of an amount based on contingency deductions, one needs to be provided with facts for making calculations on the basis of assumptions. For example, apart from non-existence of neurological pathological condition of disability, what about genetical conditions and other conditions unrelated to the existence of neurological pathological condition or disability that could have occasioned "loss of earnings due to illness.

[16] One does not to have to leave things for chance in dealing with litigation especially in the present case where an large sum of money in damages is claimed. General contingency deductions at 20% as it is now claimed by the plaintiff, ought to be supported by reliable evidence, speculative as it might be. On 5 September 2016, that is, during the course of the hearing, I requested the parties to obtain actuarial calculations based on 20%, 30%, 40% and 50% deductions. What the plaintiff is now

claiming comes to a figure of R7 182 301.00, that is, based on 20% contingency deductions. This claim should be seen in the context of what is cumulatively placed before me, which in my view, lacks the information necessary to make factual assumptions, loss of earnings capacity due to illness, being one of the assumptions to support 20% or 25% contingency deductions. I now turn to the other factor to be considered.

Savings in relation to travel to and from work.

[17] Information around this aspect is also scanty and unhelpful. It is not clear what factors are to be considered regarding deductions which 'typically make allowance for items such as, 'savings in relation to travel to and from work', identified in paragraph 4.1 of the actuarial report as item (2) and quoted in paragraph 11 above.

[18] In my view, a short-cut was taken in seeking to conclude on this matter. Resorting to stated case, and thus excused every possible witness, was a risk which the plaintiff should have contemplated. For example, where the injured could possibly have worked had it not have been for the accident and what would have been the nature of travel to and from work should have been explained or investigated. Inasmuch as the loss of work capacity is based on uncertainties, assumptions and guesswork, every reasonable and fair eventuality ought to be investigated based on the material or information available.

[19] The 25 % contingency deductions applied by the actuaries was not of their own accord. They were instructed by the plaintiff's attorneys to work on 25% contingency deductions. That being so, their mandate was to do simple mathematical calculations, without regard to factual assumptions based on evidence. It is not quite clear why would the plaintiff now want to argue the loss of earnings to be quantified on a 20% contingency deductions. I am however not satisfied that the plaintiff has placed

sufficient evidence or material to justify either 25% or 20% contingency deductions based on consideration of "savings in relation to travel to and from work." I now turn to the last factor to be considered as postulated by the actuaries on behalf of the plaintiff in their report.

Risk of factual retrenchment and resultant unemployment.

[20] Perhaps, it does not start with retrenchment and then the resultant unemployment as this gives the impression that every person who has completed a BTech degree will find employment. The rate of employment is shocking in South Africa especially with regard to the young qualified generation. This aspect is not dealt with in a more comprehensive manner in the joint minutes of the industrial psychologists. In paragraph 3 of their joint minutes they state of relevance, as follows:

> "*Andre would probably have taken six months to a year to secure full time employment after three years of full-time studies. During this period of time he would have functioned in contract positive earnings within the basic salary of the A1 on the Paterson derived grading scale. Andre would then have entered the open labour marked in a position within the Patterson C3/C$ levels. For the purposes of quantification Andre' would have progressed in a straight line reaching the C3/C4 levels by the age of 40 to 45 years. This would have been his ceiling until retirement." (My emphasis).*

[21] It is not clear where and in which country the injured would possibly have worked, had it not have been for the accident and what are the possibilities of remaining unemployed for a longer period or not employed at all.

[22] Employment for the young generation in this county is a worrying factor. The difficulty in the present case is that, because of the short-cut taken by the parties, no facts were placed before this court to show the demand or otherwise of those who have

completed or are still to complete BTech degree. It is said, the injured would have been an engineer with BTech degree had it not have been for the accident. Engineer in what, is a factor that should have been revealed insofar as it might have been relevant to assessing the probabilities of employment or remaining unemployed upon completion of a BTech degree in 2018.

[23] That being so, the plaintiff is, in my view, to be blamed for not providing sufficient information regarding what the actuaries refer to as one of the items in paragraph 4.1 of their report and quoted in paragraph 11 of this judgment. The admitted earnings of R 6 500.00 from January to September 2019, R206 000.00 per annum from 1 October 2019, and progression to the lower quartile of Patterson B4, and reaching career plateau earnings of R701 500,00 per annum and straight line increases having been applied at the age of 42,5, are all speculations which require more than just admissions contained in a stated case document. Twenty percent contingency deductions to be applied as a general contingency deductions, has to be based on some information favourable to the conclusion. The plaintiff has failed to provide evidence or material in this regard.

[24] Similarly, the defendant has not been helpful in the contention that 50% contingency deductions have to be applied. For this consideration, I was urged to have regard to the fact that the injured was 14 years old at the time of the accident, he was still attending school doing grade 9, that he managed to proceed to grade 10 but never succeeded to go further in his studies due to the injuries, and that he sustained serious injuries which render him completely unemployment in the future. All of this, are admitted facts and in my view, their motivation for the contingency deductions of 50% without more, plunges one into the unknown with both eyes covered.

[25] I was however referred to some literatures on general contingency and in particular dealing with “the unemployed victim” wherein the following is stated:

"*The actuarial calculations will usually be based on the earnings in the last known occupation. Deductions can be as high as 50% (see AA Mutaul v Magula 1978 (1) SA 805(A), but 35%, and even less can be justified depending on employment history and occupation. In Gwatula v RAF 2013 (SGH unreported 25.9.2013 case 41896\2009) 30% was deducted*."[5]

[26] In the same book cited in footnote 5, Robert Koch dealing with "General Contingency" states:

"…The deduction is the prerogative of the court. However, most matters do not go to court, so, the relevant deductions become a matter for negotiations. Even when matters do go to court, some judges seek advice from the expert witnesses as regards the appropriate deduction to make. General contingencies cover a wide range of consideration which vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce ect. There are no fixed rules as regards general contingencies…"

[27] Determination of contingency deductions should never be allowed to be used as chess-board because of its uncertainties, assumptions and guesswork. Anything to this effect will amount to an abuse. Moving from 25% contingency deductions to 20% and pulling out a red card for deductions based on 50% contingency, is almost like moving from one spot to another on a chess-board without more information, and this has to be discouraged especially when an attempt is made to lay down fixed rules by way of stated cases as is the case in the present proceedings.

[28] This court was confined to the stated case and joint minutes of experts as outlined in paragraph 15 of this judgment, thus making it difficult for this court to cover a

[5] Robert Koch, the Quntum Gearbook 2016 at 124

wide range considerations, which as we know vary from case to case. It was concerning for this court to hear a submission by counsel on behalf of the plaintiff stating that reports should not be made available to the court as there are disagreements in the reports and that witnesses have been excused due to the signing of stated case document.

[29] Having considered all the facts placed before me I am of the view that 35% contingency deductions should be appropriate which amount is computed by the actuary as being the sum of R6 260 136.00 on Basis II.

[30] Consequently a judgment is hereby granted in the sum of R 6 260 136.00 including terms of the order hereto marked “A”

M F LEGODI

JUDGE OF THE HIGH COURT

For the Plaintiffs: Adv JJ Combrink

Instructed by: Erasmus De Klerk Incorporated

For the Defendants Adv F Matika

Instructed by: Mothle Jooma Sabdia Inc