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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

CASE NO: 12784/13

In the matter between:

JOHN BESTER

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

1. In this action the plaintiff claims damages arising from injuries sustained by him in a collision which occurred on 7 March 2009. At the time of the collision,

the plaintiff **was a** driver of a motor vehicle, bearing registration letters and numbers [...].

2. In terms of the particulars of claim, at paragraph 5 thereof, the plaintiff alleges to have sustained the following injuries:

- 2.1 shock
- 2.2 soft tissue injury to the cervical spine
- 2.3 soft tissue injury to the lumbar spine

3. Furthermore, at paragraph 6 thereof the plaintiff alleges as follows:

"The sequelae of plaintiff's injuries sustained in the said collision resulted in a serious long-term impairment or loss of a body function and more particularly as follows:

- 3.1 he endured shock, pain, suffering and discomfort and will continue to endure further pain suffering and discomfort in future;
- 3.2 he incurred medical expenses and further similar expenses will be incurred in the future;
- 3.3 by reason of the said injuries the plaintiff has sustained functional impairment and in particular regarding the functional movements and requirements of his pre-traumatic occupation;
- 3.4 by reason of the said injuries the plaintiff has suffered a loss of income , alternatively a reduction of earning capacity in the past and will continue to suffer same in the future;
- 3.5 he sustained bodily and facial disfigurement;
- 3.6 he has permanently loss amenities of life;
- 3.7 he has sustained a psychological fall-out."

4. At the commencement of the proceedings and at the request of the parties, the court was requested to record the following:

- 4.1 that the issue of liability has become settled on the basis that the defendant shall pay 100% of the plaintiff's agreed or proven damages.
- 4.2 the defendant shall provide the plaintiff with an unlimited undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act No: 56 of 1996 (as amended) ("the Act").

The issue of liability and the plaintiff's head of damages in respect of medical expenses was settled and previously made an order of court on 7 August 2014.

5. The defendant also informed the court that all the plaintiff's expert reports can be accepted as correct and that same can be admitted into evidence. I will make reference to such reports in due course.
6. The following expert reports of the plaintiff were admitted by the defendant and handed into record by agreement with the defendant:
 - 6.1 Dr Van Castricum, Orthopaedic Surgeon¹
 - 6.2 RAF 4 Form and Narrative Test Report completed by Dr Wentzel, General Medical Practitioner²
 - 6.3 Ms C. Bell Occupational Therapist³
 - 6.4 Dr. W.J. Coetzer, Industrial Psychologist⁴
 - 6.5 Arch Actuarial Consultants⁵
7. At the outset it should be mentioned that the defendant elected not to conduct any medico-legal examinations by any expert, nor to file any Rule 36 (9) Expert Notices. As such no rebuttal expert evidence has been presented on behalf of the defendant to rebut the findings, comments and or opinions expressed by the plaintiffs expert witnesses.

DISPUTED ISSUES

8. This court was called upon to determine the extent of the plaintiffs future loss of earning capacity alternatively, reduction of earning capacity suffered as a result of the motor vehicle collision. In this regard the plaintiffs claim was for amount of R 250 000.00.

ONUS

¹ Exhibit A p 93-98 & Addendum Report Index p 194-195

² Index p 39-49

³ Exhibit B p 114-130 & Addendum Report 198-201

⁴ Exhibit C p 133-149 & Addendum Report p 204-215

⁵ Exhibit DP 220-226

9. In order to assess whether the plaintiff will be entitled to compensation for loss of earnings and or earning capacity, the plaintiff bears the onus of proving that he has in fact suffered such a loss of earnings and or earning capacity. In this regard, the plaintiff must place before this court sufficient evidence to enable the court to qualify his loss. The expression earning capacity means the earnings that the claimant is most likely to generate by using his/her capacity to work.⁶
10. In the decision of *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) Chetty J referred to the principles relating to loss of earnings and earning capacity as follows:
' person's a/l-round capacity to earn money consists, inter alia, of an individual's talent, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of patrimonial loss.... ..At the same time the evidence may establish that an injury may in fact have no applicable effect an earning capacity, in which event the damage under this head will be nil.'
11. It therefore, follows that where a claimant's earning capacity has been impaired or compromised, such incapacity constitutes a loss. If such loss diminishes the claimant's patrimony, the latter is entitled to be compensated to the extent that his or her patrimony has been so diminished.
12. In the unreported decision of *Deyssel v RAF ZAGJHC* 242 delivered on 24 June 2011 Bizos AJ at paragraph 18 stated that earning capacity refers to"
 the part of a person's patrimony, but this capacity can only be proven to

⁶ South African Actuarial Journal author RJ Koch, SAAJ (2011) p 111-33 para 9.

have been lowered and the damages for this quantified by proving an actual loss of income."

13. At paragraph 21 of the same judgment, Bizos AJ expressed himself as follows:

"that a causal link has to be established between the damage suffered (in casu the loss of earning capacity) and the diminution of the claimants estate before such damage can said to be compensable. This is true even though earning capacity on its own is seen as part of one's patrimony. In the same way that a person's home forms part of their patrimony and damage to this part of their patrimony has to be proved by showing actual monetary loss caused by such damage- and actual monetary loss must be suffered (i.e. loss of income before one's earning capacity can be said to have been damaged for purposes of a patrimonial claim under delict. This is in essence, the difference between patrimonial and non-patrimonial loss."

EVIDENCE

14. The defendant admitted that the plaintiff, Mr John Bester was born on 10 June 1958 and as at date of the injury that he was 51 years and 9 months old. Furthermore, that at the time of the collision the plaintiff was a qualified welder with his highest qualification being that of a Grade 12 and that at the time of the collision that he was employed practicing his trade as a welder. Post collision that he remains employed albeit that he now experiences constant pain. As at date of trial he remains with approximately 4 years left to retirement age.
15. **Dr H.S Wentzel (General Practitioner)** completed the RAF4 Form.⁷ On 13 September 2011, he examined the plaintiff for a second occasion and recorded that as a result of the collision that the plaintiff sustained a flexion extension injury to his neck and lower back. These injuries at the time were treated with analgesics, anti-inflammatory drugs and physiotherapy. As at date of examination Mr. Bester still complains of severe discomfort in the areas of the previous injuries with reduced mobility in actions of daily living. Since the

plaintiff as a welder is employed in a strenuous working environment, impairment of his core functions impacts negatively on his capacity to retain gainful employment. As such the doctor opined that these impairments combine to a significant impairment of employability and loss of quality of life.

16. **Dr O.Q.S.van Castricum, (the Orthopaedic Surgeon)** examined the plaintiff on 3 July 2012.⁸ During this examination Mr. Bester complained of constant mechanical lower back ache, which symptoms are increased whenever he is required to lift heavy objects. Since he is a welder this is a daily occurrence. The surgeon further recorded that the plaintiff also experiences pain whenever he is required to walk long distances or when he has to stand still for too long a period. Mr. Bester further complained that he from time to time has a painful neck which pain gets exacerbated with flexion or driving for long distances. In addition to this he also experiences periods of cervical occipital neck pain. The surgeon further recorded, that Mr Bester reported to him that since the collision, that he now requires help in handling heavy objects such as metal beams. He also experiences discomfort in bending positions when he has to weld and that as a result thereof he had to change his working environment by lifting his work table so that he can stand erect.
17. As a result of the accident, Mr Bester has been unable to participate in playing social soccer, an activity he used to participate in prior to the collision. As to the plaintiffs incapacity, the surgeon concluded that Mr Bester has continuous discomfort with spells of periodic painful episodes. Dr van Castricum further opined that the plaintiff in all probability will require surgical intervention in future as he presented with a strong probability of spinal injury especially soft tissue injury such as ligamentous and intervertebral disc pathology.
18. When Dr van Castricum again examined the plaintiff on 31 January 2019, the plaintiff complained that the lumbar, back ache and cervical ache has increased more regularly for which he used analgesics and injections to alleviate the pain. The plaintiff still reported that he now experiences trouble sleeping and that he expressed the opinion that he cannot perform his work anymore and feels that he should rather retire. Furthermore, as he has taken

⁷ Index p 48-49

up part time employment as a driver at a liquor store, where he also is required to load and unload heavy objects this further causes him discomfort.

19. On 5 February 2016 the plaintiff was examined by **Ms C. Bell the Occupational Therapists.**⁹ During her examination the plaintiff spontaneously reported to be suffering from headaches, neck pain and stiffness, lumbar pain and pain in his buttocks. Mr Bester also reported to experience pain in his knees and feet when standing, to be suffering from cramps in his lower legs, and an inability to lift and handle heavy objects. On her medical prognosis she opined that Mr Bester as far as his lower limbs are concerned, exhibits a good range of motion in the legs, but that when standing that he complains of altered sensation in the knees. As to his neck, Mr Bester has limited movement, because of pain and stiffness. The therapist also recorded in her report that the plaintiff has impaired extension of the spine and prefers to maintain a flexed position to prevent pain into the buttocks. She also recorded that the plaintiff is unable to place his chin on his chest. As to his physical abilities, the therapist recorded that the plaintiff is able to lift heavy objects and carry at least 5 kg as he has an assistant who does most of the lifting and carrying. She also recorded that Mr Bester is able to stoop and pick up from the floor and that he can maintain the bent forward position for 15 minutes before he has to stand erect and rest his back. She further opines that the plaintiff's physical endurance has been affected by his pain levels and what could be his first signs of radiculopathy into his legs.
20. In her report Ms Bell further recorded that the plaintiff when experiencing pain tries to limit the medication he takes and at work he says that he has to grin and bear the pain which he tolerates for the good of his family. She also recorded that the plaintiff albeit the pain which he experiences expressed an opinion to rather choose to work in order to retain his self-image and to be useful to his family. As to his work ability, that he understands his limitations and tries hard to compensate where necessary. This is the reason why following the collision, he now has an assistant at work who helps him with lifting and carrying heavy loads.

⁸ Exhibit A p 91

⁹ Exhibit B p 112

21. On 3 January 2019, Ms Bell prepared an addendum report¹⁰ where she opined that the plaintiff's abilities have deteriorated with the aging process and she was of the opinion that the time has now arrived for the plaintiff to consider retirement on ill health grounds and that appropriate financial recompense be afforded to him for the period up to 65 years.
22. The plaintiff was also examined by **Dr Coetzer, an Industrial Psychologist**.¹¹ As to the plaintiff's career history, the writer recorded that the plaintiff following completion of Grade 12 commenced his employment as a labourer and later as a Welder, but that Mr Bester has been unable to provide him with any proof of his trade. The collision occurred on a Saturday and that the plaintiff returned to work the following Monday as he works on a "no-work, no-pay" principle. The writer further recorded in his report that Mr Bester was unable to provide him with contact details of his employer in order for him to obtain collateral information about his work performance and promotional possibilities. As the plaintiff has been a Welder for 20 years, and given his age, pre-accident it is highly unlikely that he would have opted for an alternative career. The plaintiff was unable to provide Dr Coetzer with any proof of his income and in the absence thereof, and given his level of education in all probability Dr Coetzer expressed the opinion that the plaintiff would probably have earned remuneration associated with earnings of semi-skilled workers and that he would have received inflationary adjustments until normal retirement age 65.
23. His post-accident career path, Dr Coetzer took into account the plaintiff's residual physical capacity as well as his emotional, cognitive and psychological functioning. In his report Dr Coetzer opined that the plaintiff has been compromised by the sequelae of the injuries which he sustained in the collision, which has rendered him a more vulnerable participant in the open labour market. He postulated that Mr Bester may continue in his current position of that of a welder but not without pain and the necessary adaptations until retirement age. Should the plaintiff however be required to retire earlier to retirement age, he would be rendered unemployable resulting in a total loss of income and that this fact should be taken into consideration when determining

¹⁰ Supplementary Index p 199

¹¹ Exhibit C

a contingency.

24. Dr Coetzer prepared his addendum report¹² on 2 February 2019 and therein, he concluded that the plaintiff has been left compromised by the sequelae of the injuries sustained in the collision under review. Albeit that the plaintiff returned to his same position post-accident that he is now more reliant on his assistant to help him with picking up heavy objects and performing tasks that he finds difficult to do.
25. In addition to the above reports, the plaintiff also submitted into evidence the actuarial report compiled by **Arch Actuarial Consulting**.¹³ In the said report, the actuary applied a 5 % contingency deduction to the plaintiff's pre-morbid earnings, and a 35 % contingency deductions to the plaintiff s post-morbid earnings. As such the actuary concluded the plaintiff suffered a loss of earning capacity of R 198 197.
26. As previously mentioned, no rebuttal evidence was presented by the defendant and as such the evidence of the plaintiff remains uncontroverted.
27. Counsel appearing on behalf of the defendant, conceded that the plaintiffs earning capacity has been diminished by the accident in question and that the plaintiff should be compensated by the amount which the Defendant is offering. As to the contingencies that this court should take into account counsel had submitted that as the plaintiff was able to return to the same employer post- accident and as he has been working for the same employer for the past ten years to date, even his condition has deteriorated, his employer has been sympathetic by employing an assistant for him. It is on this basis that counsel had argued that it is highly unlikely that the plaintiff will be retrenched or fired from work by such a sympathetic employer.
28. This submission made by counsel for the defendant is in total contraction with the expert opinions expressed by the expert evidence presented on behalf of the plaintiff. All the experts expressed the opinion that the plaintiff cannot perform his work anymore and that he should rather retire. That by the plaintiff continuing to work that this is taking its toll on his person and also puts at risk the safety of his assistant. Furthermore, that the only reason as to why the

¹² Supplementary Index p 202

¹³ Exhibit D

plaintiff remains employed is that he is the sole breadwinner and that if he was not working it will result in a financial distress and burden for his family. It is for this reason that counsel for the plaintiff had submitted that the plaintiff in all likelihood would face early retirement for which he should be compensated.

29. Counsel on either side also extensively referred this court to comparable awards with reference to the appropriate contingency adjustments to be applied to the plaintiff's future post-traumatic earnings.
30. The exercise for determining the appropriate contingency deduction however falls squarely within the subjective discretion of the court as to what will be reasonable and fair to both parties.
31. Having regard to the decision of Goodall v President Insurance 1978 (1) SA 389 (VV) and the sliding scale method laid down in this decision, I am of the opinion that the percentages contingency deductions as alluded to in the report presented by the actuary mentioned above, would be both fair and equitable and will serve to balance the interest of both parties.

ORDER

32. In the result the following order is made:
 - 32.1 The merits have been settled 100% in favour of the plaintiff.
 - 32.2 The defendant shall pay the plaintiff the sum of R 198 197 (One Hundred and Ninety-Eight Thousand One Hundred Ninety-Seven Rand) in respect of his loss of earnings by way of a lump sum payment on or before 30 SEPTEMBER 2019, which payment will be effected by way of electronic transfer to the plaintiff's correspondent attorneys of record trust account the details of which are set out hereunder.
 - 32.3 The plaintiff's correspondent attorneys trust banking account details are as follows:

Bank:	FNB
Account Holder:	Rooth and Wessels Inc.
Branch code:	251445
Account Number:	5142 4676 282
Reference Number:	W243/ 830635.

- 32.4 The Defendant will not be liable for any interest on this payment on condition that payment be made timeously. In the event of the Defendant not making the capital amount payment timeously the defendant will pay interest at the prevailing statutory rate of interest per annum in the amount then outstanding as provided for in Section 17(3)(a) of the Road Accident Fund Act, Act 56 of 1996 (as amended).
- 32.5 The defendant shall pay the taxed or agreed party and party costs of both the plaintiff's instructing attorney of record as well as the plaintiff's correspondent attorney of record on the High Court Scale.
- 32.6 The defendant shall pay the plaintiff's counsel's High Court Scale.
- 32.7 The defendant shall pay the plaintiff's taxed or agreed costs as between party and party of the plaintiff's experts reports and addendum reports of the expert witnesses listed herein below as follows:
- 32.7.1.1 Dr H.S Wentzel (Medical Practitioner)
 - 32.7.1.2 Dr van Castricum (Orthopaedic Surgeon)
 - 32.7.1.3 C Bell (Occupational Therapist)
 - 32.7.1.4 Dr W Coetzer (Industrial Psychologist)
 - 32.7.1.5 Arch Actuarial Consultants
- 32.8 It is specifically agreed on recorded that the Taxing master shall allow the reasonable travelling costs incurred by the plaintiff in respect of the attendance of the medico legal examinations with the plaintiffs expert witnesses.
- 32.9 Payment of the taxed or agreed costs referred to in the paragraphs *supra* shall be effected within 14 (fourteen) days of the plaintiffs party and party bill of costs. The plaintiff's aforesaid taxed or agreed costs shall be effected by electronic transfer into the plaintiffs correspondent attorneys trust banking account, the details of which are set out in para 2 *supra*.
- 32.10 In the event that costs are not agreed the parties agree, as follows:
- 32.10.1.1 The plaintiff shall serve the notice of taxation on the defendant's attorneys of record and;

- 32.10.1.2 The plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs.
- 32.10.1.3 Should the plaintiff's taxed or agreed costs not be paid by the date as set out in the paragraphs supra, the Defendant will be liable for the payment of interest therein at the prescribed statutory interest rate per annum.
- 32.10.1.4 The plaintiff's attorneys of record and the plaintiff record that they have not entered into a Contingency Fee Agreement in terms of the Contingency Fee Act, Act No: 66 of 1997 as such no contingency fee percentage is applicable and or payable.

COLLIS J

**JUDGE OF THE HIGH COURT OF
SOUTH AFRICA**

Appearances:

For the Plaintiff	: Adv. P. J Du Pisanie
Attorney for the Plaintiff	: Rooth & Wessels Incorporated
For the Defendant	: Adv. T.W. Babedi
Attorney for the Defendant	: T. M. Chauke Incorporated
Dates of Hearing	: 17 April 2019
Date of Judgment	: 30 August 2019