

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

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
21/06/21	
DATE	SIGNATURE

CASE NO: 52899/2017

In the matter between:

BECKER ENGELBRECHT

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 21 JUNE 2021 AT 12H00.

Introduction:

1 The Plaintiff is Becker Engelbrecht and the Defendant is the Road Accident Fund. The Plaintiff initiated action against the Defendant for general damages, past medical expenses and loss of income and/or loss of earning capacity.

2 On 07 August 2020 merits were settled 100% in favour of the Plaintiff and the Court granted general damages in the amount of R 800 000, 00. The Defendant was also ordered to provide the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 (as amended) in respect of future medical expenses.

3 The Defendant filed no Expert Witness Reports. The Plaintiff therefore deem their Expert Reports to be admitted.

4 This Court was requested to adjudicate on past medical expenses, loss of income and / or earning capacity. The Defendant was unrepresented. The Court decided to adjudicate on the papers and neither Party addressed the Court. Judgement was reserved.

Evidence before this Court

The Plaintiff's case:

5 The Plaintiff was involved in a motor vehicle accident on the N1 North between Gariepdam and Bloemfontein on 05th of December 2015. He was 24 years old at the time. He did not suffer any past loss of income and was remunerated for the time he spent off work recuperating after the accident.

6 Plaintiff has a BCom (General) Degree and was busy with his CIMA Qualification in 2017. At the time of the accident he was employed with Advanced Works International (Pty) Ltd, a family business, as a financial clerk,

earning R 264 000 per annum. In 2017 or 2018 Plaintiff left the family business to pursue a more lucrative position with GIS SA. Dr Engelbrecht and the occupational therapist report Plaintiff started with GIS in 2017 and is a supply chain manager. The industrial psychologist reports he joined GIS in 2018 as a sourcing manager, earning R450 000,00 per annum.

7 Plaintiff incurred the following injuries in the motor vehicle accident:

- Fracture of sacrum (S1/S2)
- Fractures of pelvis
- Injury to lumbo-sacral spine L5/S1) with resultant fusion
- A coccyx injury. His coccyx was consequently removed in 2016.

8 Plaintiff's present complaints include pain in the pelvis, lower back and sacral area. Removal of the internal fixation screw from the SI joint is foreseen in 15 years from now, 8 weeks sick leave will be required. He is faced with a 20% possibility of further lumbar spine surgery in 20 years from now, in which event 3 months sick leave is foreseen.

The Expert Reports:

9 Plaintiff's legal team instructs two **Orthopaedic Surgeons**, namely Dr Peters and Dr Engelbrecht. Dr Peters rates Plaintiff's whole body impairment at 15% in January 2017 and Dr Engelbrecht rates same at 20% in January 2020. Dr Peters diagnoses severe tenderness in the lumbar, sacral spine. He also finds a decreased power and sensation at S1. Dr Engelbrecht expects Plaintiff's

physical abilities to deteriorate even with further medical treatment. Lifelong conservative treatment is foreseen.

10 The **Occupational Therapist** reports that Plaintiff's pain was far worse before he underwent the fusion to his back in 2018. He struggles to sit, stand or walk for prolonged periods of time. During assessment Plaintiff's back movements are limited and painful and she reports spasms over his lower back. Plaintiff's work speed is observed to be below open market norm on physical work samples. Plaintiff is best suited in a corporate environment. His present occupation is best suited, taken his abilities and aptitudes into consideration.

11 She reports that Plaintiff experiences discomfort after sitting for 40 minutes and has to mobilize frequently. This might affect his productivity going forward. Plaintiff's supervisor however has no complaints regarding his work performance. She remarks that Plaintiff would benefit from occupational therapy after each surgical procedure. Plaintiff is coping, and will most likely continue to cope.

12 The **Industrial Psychologist**, files a first report on 24 March 2017 and an Addendum thereto on 13 August 2020. In his first report he says that Plaintiff is best suited to his present form of employment, being that of a financial clerk or -manager. He remarks that the Plaintiff is employed in a well owned and well-established family business and his father, being his employer at the time remarks "*..Mr Engelbrecht (Plaintiff) is employed at Advanced Works International with the intention that he will take over the business one day...*"

13 In his Addendum he remarks that Plaintiff left the family business and has taken up a more lucrative position with GSI SA in 2018. He remarks that Plaintiff reports discomfort with prolonged static postures, which discomfort is understandable. He reports Plaintiff is an unequal competitor in the open labour market as a result of his having to take frequent breaks. Having regard to the reports of the other experts, he foresees the Plaintiff retiring two years before the time and taking 5 months unpaid sick leave in future. Mention was made that he was studying towards his CIMA qualification in March 2017. No further mention is made in the Addendum to the report as to whether he completed his studies.

14 **The Actuary** files two reports, marked "A" and "B" respectively. In Report "A", dated 14 June 2020 based on the Plaintiff's higher salary with GSI, a loss of earnings in amounts far higher than the first report is foreseen.

15 In Report "B" (the earlier of the two reports, dated 06 July 2017), the loss of earnings are projected at Plaintiff's salary at the date of the motor vehicle accident in 2015. Two scenarios are made out, being Plaintiff staying a financial clerk with his family's business or Plaintiff becoming a Financial Manager or Managing Director in future.

16 The difference in calculation is explained by way of using the salary that the Plaintiff was earning at date of the motor vehicle accident as opposed to the salary he earns at GIS in 2018. It is also to be noted that the actuary based his calculations in June 2020 on a salary of R540 000, 00 per annum opposed to the salary of R 450 000,00 per annum stated by the Industrial Psychologist in

September 2019.

Past medical expenses:

17 The Court was placed in possession of an affidavit by Discovery Health's Third Party Recoveries. In terms thereof the past medical expenses, covered by Discovery Health amounted to R 144 396, 62.

Issues to be decided by Court

18.1 Has the Plaintiff suffered loss of earnings and / or earning capacity as a result of the motor vehicle accident?

18.2 And if so, in what amount?

18.3 Has past medical expenses been proved to the satisfaction of the Court?

The applicable Law:

19 In **Dippenaar v Shield Insurance Company Co Ltd 1979 (2) SA 904 (A)** at **917 B – D** Rumpff JA stated:

"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the Plaintiff's estate after the commission of the delict and the value it would have had if the delict has not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the

estate...".

20 At paragraph 26 in **MT v Road Accident Fund; HM v Road Accident Fund (37986/2018) [2020] ZAGPJHC 286; [2021] 1 All SA 285 (GJ); 2021 (2) SA 618 (GJ) (16 November 2020)** Fisher J explained loss of income as follow:

"The loss falls in two types. The first is known as special damages. This is actual patrimonial loss and generally takes the form of loss suffered by having to pay for medical treatment; loss suffered due to the fact that the claimant is not able to carry out his employment obligations (past loss of earnings) and loss that is suffered as a result of the fact that the plaintiff has suffered an incapacitation which is likely to affect his ability to earn an income in the future (loss of earning capacity)..."

21 **Bee v Road Accident Fund 2018 (4) SA 366 (SCA) ; [2018] ZASCA 52** the learned Judge held that evidence must be carefully analyzed by a Judge in order to come to an appropriate factual finding in the ordinary way. All the evidence must be considered and carefully sifted, to establish what evidence is reliable, having considered the probabilities.

22 At 22 it is stated that: *"It is trite that an expert witness is required to assist the Court and not usurp the function of the Court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to Court. The Court must satisfy itself as to the correctness of the expert's reasoning....In Road Accident Appeal Tribunal & Others v Gouws & Another [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33, this Court said*

'[C]ourts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion.' (See also **Michael & Another v Linksfield Park Clinic (Pty) Ltd & Another [2002] 1 All SA 384 (A)** para 34)".

23 At 23, Rogers AJA held: *"The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militates against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the Court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the Court. (See also Jacobs v Transnet Ltd t/a Metrorail [2014] ZASCA 113; 2015 (1) SA 139 (SCA) paras 15 and 16; see also Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Fur Schadlingsbekampfung mbH 1976 (3) SA 352 (A) at 371F".*

24 Judge Fisher held at 40 in **MS v Road Accident Fund (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019)**

"The general approach is to position the plaintiff, as he is proven to have been in his uninjured state and then to apply assumptions to his state with the proven injuries and their sequela. The deficit which arises between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff in both states. The loss would then be calculated as the difference in earnings derived

between the pre-accident (or pre-morbid states it is often called) and post-accident or post-morbid state.

25 In 41 the status and use of contingencies are explained. The paragraph ends as follow:

“....This mechanism should not be understood as being prescriptive and confining of the assessment that the Court is called on to make. The Court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, intuition and general right-thinking.”

26 Van Oosten J, held in **Roe v Road Accident Fund (16157/2009) [2010] ZAGPJHC 19 (1 April 2010)** at 11:

*“The general principles applicable to the assessment of damages under this head were summarised by Van Heerden J (as she then was) in Bridgman NO v Road Accident Fund (C) Corbett & Honey The Quantum of Damages in Bodily and Fatal Injury Cases Volume V at B4-1, B4-5. Before there can be a quantification of a claim for loss of earning capacity a plaintiff must, as a first requirement, prove that “the reduction in earning capacity gives rise to pecuniary loss” (Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) 241H—242B). The general principle applicable in this regard has been succinctly stated by Chetty J in **Prinsloo v Road Accident Fund 2009(5) SA 406 (SE)** with reference to the leading cases of **Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (A) 150B-D** and **Dippenaar v Shield Insurance Co Ltd (supra) at 917B-D** as follow: “A person’s all-round capacity to earn money consists, inter alia, of an individual’s talents, 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 the patrimonial loss.At the same time the evidence might establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damages under this head would be null."

The Law applied to the evidence:

27 At the date of the accident the Plaintiff was employed as a financial clerk in a "well owned, well established family business", earning R 264 000, 00 per annum. Virtually within a year to two years of his having been so seriously injured that "*his employability will always be negatively affected by his injuries*", as stated by the experts, Plaintiff manages to obtain a more lucrative job opportunity, earning R 450 000, 00 per annum.

28 Had Plaintiff stayed on in the family business, he might have most likely taken over the business from his father at age 40, as stated to the industrial psychologist. He would have then become the managing director of the

business. Now that he has left, the possibility of his becoming a managing director at the age 40 or 45 is slimmer. Logically and especially in his circumstances, it makes no sense that Plaintiff leaves a family business with a sympathetic employer, in lieu of a better opportunity.

29 Based on the Plaintiff's higher income of R450 000,00 per annum, the actuary gets instructed to do new calculations in support of the Plaintiff's loss of future income and earning capacity. The difference in projected loss of income is millions of rands. The calculations show that Plaintiff will be earning a yearly salary of R 1 322 612, 00 per annum in 2036, when he is 45 years old and on a D4/5 Medium Package, which represents middle management level, with a B-Degree.

30 Having considered **Dippenaar** (*supra*); **MS v Road Accident Fund** (*supra*) and **Roe v Road Accident Fund** (*supra*), the Defendant is only to make good the actual damages suffered by the Plaintiff. The point of commissioning of the delict is the point of inception of damages. Plaintiff suffered no past loss of income as he was remunerated throughout and even earned a higher income than at date of the motor vehicle accident before judgement.

31 Did the Plaintiff suffer loss of future earning capacity?

The answer lies in the decided cases of **Roe v Road Accident Fund** (*supra*), and the magnitude of supporting case law stated therein. Future loss of earning capacity and future loss of income can only be calculated once proven. In this matter the Plaintiff managed to find a more lucrative job opportunity in one to two

years after the accident, earning almost 75% more than he had as financial clerk in his family's business. The Plaintiff has not discharged the onus of convincing this Court that he has suffered any present or future loss of earning capacity as a result of the injuries he sustained in the motor vehicle accident.

32 The Court however must be mindful of the future surgery for removal of the internal fixation screw in his SI joint, followed by formal anthrodesis of the SI joints, 15 years from now. Dr Engelbrecht further held that there was a 20% possibility of adjacent segment deterioration of the lumbar spine, which might necessitate further lumbar spine surgery, decompression, fusion and the insertion of instrumentation in 20 years from now. Sick leave of 8 weeks and 3 months are foreseen after each of the procedures respectively. Two years early retirement is foreseen by Dr Engelbrecht.

33 In the circumstances, the interest of justice dictates that an amount be allocated for future loss of earnings. The Court has a wide discretion to decide damages (of which loss of income forms but one category). What would be fair in the circumstances is making provision for loss of income for the period the Plaintiff would spend off work after each foreseen medical procedure in future, should they occur. Thus, I revert to the actuarial report, and the Plaintiff's projected yearly income 15 years from now. Proof of Plaintiff's present income was also requested and a present average nett salary of R 56 000, 00 per month was established.

34 The possibility of 2 years early retirement was not considered by this Court. Plaintiff's injuries are not to be left unattended and the Defendant already furnished Plaintiff with an undertaking in respect of future medical expenses in 2020. Lifelong conservative treatment was foreseen for the Plaintiff and general damages in an amount of R 800 000, 00 was most generous.

Conclusion:

35 The Court have perused the medical receipts and vouchers and is satisfied that all the expenses were incurred from date of accident and were accident related. It follows that the claim for past medical expenses has been proven.

36 No past loss of income was suffered by the Plaintiff.

37 Having considered all the evidence and the evidence on the expert witness reports in this matter, this Court has not been convinced the Plaintiff have suffered any loss of earning capacity.

38 An amount needs to be allocated for loss of future income for the periods that the Defendant would spend off work following each of the two surgeries, should they take place. It will be fair and reasonable if loss of earnings are allocated for a period of 5 months. Based on the Actuary's projected salary of R 1 322 612, 00 per annum in 2036, 15 years from now, the Court deduced that the Plaintiff's monthly salary would be an amount of R 110 217, 67. I applied a

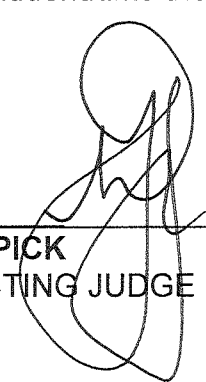
10% contingency to the figure, considering that surgery in 15 years' time is a given and there is only a 20% chance of lower back surgery 20 years from now. The Industrial Psychologist states that Plaintiff is expected to reach his career ceiling at age 45 in 2036. Should the Plaintiff take this amount and invest it until he undergoes the surgery, the amount should be sufficient to cover his foreseen loss of income.

39 Costs for expert witness reports and addendums thereto were already addressed by the Order dated 07 August 2020. Apart from a further actuary reports dated 17 July 2021, no further reports were filed by the Plaintiff. The Plaintiff also did not file Affidavits (in pursuance of the Practice Directives) confirming the experts were reserved for the day of trial. Accordingly no costs for reservation of the experts will be allocated.

Order:

- 1 The claim for past medical expenses in the amount of R 144 396,62 is granted, payable by the Defendant to Discovery Health's Third Parties Recovery Department within 120 days from date hereof;
- 2 Plaintiff's claim for past loss of income is dismissed;
- 3 Plaintiff's claim for loss of earning capacity is dismissed;

- 4 Future loss of income is awarded to the Plaintiff in the amount of R 495 980, 00;
- 5 The Defendant is ordered to pay the Plaintiff's taxed party and party High Court costs from 08/08/2020 to date of judgement. The costs so allocated shall be inclusive of the costs of advocate's preparation and the last actuary report, dated 17 July 2021. The Order shall exclude costs of the expert witnesses' reports and addendums thereto and the costs of their reservation for trial.


D PICK
 ACTING JUDGE OF THE HIGH COURT

Heard on: 10 March 2021

Judgement on: 21 June 2021

FOR THE PLAINTIFF: Advocate JF van der Merwe

082 375 4628

francois@clubadvocates.co.za

FOR THE DEFENDANT: Ms Tsholofelo Cathrine Ramatlapeng

(012) 429 8365

tsholofelor@raf.co.za