IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

CBBhoola

_____ 1st September 2021

SIGNATURE **DATE**

CASE NO. 57193/16

MOKGWADI NEO DAN **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT

BHOOLA AJ

INTRODUCTION

[1] The plaintiff, Mr Neo Dan Mokgwadi , in his capacity as a passenger, sued the defendant in terms of the *Road Accident Fund Act 56 of 1996 (Act*), for damages sustained by him arising from a motor vehicle collision which occurred on the 8th October 2010 between Zebediela and Lebowakgomo, next to Big Boy scrapyard in the Limpopo.

[2] A pre-trial conference was held on the 16th February 2017, where the parties agreed that the merits and quantum were to be separated. The parties also agreed, that the plaintiff's version was that the plaintiff was a passenger on the day of the collision in motor vehicle number DFP 282 N and that the defendant's version was as contained in the Official Accident Report.

[3] On the 31st May 2021, the matter came before me, and there was no appearance on behalf of the defendant. The defendant, was initially represented, however the defendant terminated its mandate with their panel of attorneys due to a policy decision for the defendant to deal with the claims and litigation arising therefrom internally without the assistance of the panel of attorneys. The defendants attorney filed a formal notice of withdrawal of attorneys of record on the 29th June 2020.

[4] From the order granted on the 7th of June 2018, it can be inferred that the defendant conceded 100% liability in favour of the plaintiff's proven or agreed quantum in that the plaintiff was a passenger in the said collision. This was subsequently accepted by the plaintiff. Additionally, the issue of general damages were settled in an amount of R350 000.00 (three hundred and fifty thousand rands) and past medical expenses was settled in the amount of R17 398,97 (seventeen thousand three hundred and ninety eight rand and ninety seven cents). The defendant also offered an unlimited undertaking to the plaintiff, for future medical and hospital expenses as encapsulated in section 17(4)(a) of the Act. The issue relating to the loss of earnings, was postponed *sine die.*

[5] There are no joint minutes filed by any of the experts in this matter and neither was there any compliance with the Practice Directives issued by the Judge Present of Gauteng relating to “Y” matters.

[6] On the trial date, the plaintiff requested to discharge the onus by way of affidavit in support of his claim in accordance with Rule 39(1) and Rule 38(2) of the Uniform Rules. In the light of Covid- 19 protocols and the issued Directives by this Honourable Court I ordered that plaintiff may procced by way of affidavits as requested. There was no representation or evidence presented by the defendant.[1]

PLAINTIFF’S EVIDENCE

[7] The plaintiff was born on […….]. He is accordingly 25 years of age and was 14 years of age at the time of the motor collision. He is pursuing a career in Mechanical Engineering (N5).

[8] The plaintiff served its RAF – 1 form on the defendant on the 21st of July 2015. According to the aforesaid claim form, the plaintiff indicated in paragraph 3 that the collision occurred on the 8th October 2018, he was a passenger and was wearing a seatbelt at the time of the motor collision and was unemployed. According to paragraph 4 of the claim form, the plaintiff received emergency medical treatment, was in ICU and in hospital care. The medical report under the same paragraph reveals that the plaintiff sustained a head injury but no lacoromy or abrasions. The hospital records as well as the statutory section 19(f) affidavit in terms of the Act, were also provided which is consistent with the RAF-1 form.

[9] Dr Segwapa, the neuro surgeon interviewed the plaintiff on 20th July 2016 and completed the RAF 4 form indicating that the plaintiff qualified for “*serious injury*” by virtue of severe long-term mental or severe long term behavioural disturbance or disorder.

[1] *Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) PER Plasket AJA (Ponnan JA, Wallis JA, Willis JA, and Makgoka AJA concurring), para 26 (page 60 G-H:*

[10] The plaintiff subsequently issued summons on the 21st July 2016 and pleaded that as a result of the collision the he sustained severe bodily injuries, which was a head injury and claimed R 2000 000.00 (two million rand) in respect of loss of income.

[11] The summons was served on the defendant on the 21st July 2016 and the defendant served its notice of intention to defend on the plaintiff on the 24th August 2016 . The defendant served its plea dated the 20th October and served it on the plaintiff on 21st October 2016. The defendant also raised two special pleas relating to the claim for general damages.

[12] There was no replication filed by the plaintiff. The matter was enrolled to proceed on the 31st of May 2021. The plaintiff requested to testify by way of affidavit in support of his claim under Rule 39(1) and 38(2) of the Uniform Rules. The acceptance of evidence in this manner is congruent with an approach to balance the disposal of cases against minimizing the danger of spreading Coronavirus (Covid-19). I accordingly granted an order for the matter to proceed by way of affidavits. There was no representation or evidence presented by the defendant and I ordered that the matter proceeded by way of default in terms of Uniform Rule 39(1).

[13] The plaintiff in his argument relies pre - dominantly on the affidavits of the following expert witnesses to prove his case: the Neurosurgeon - Dr. Segwapa , the Occupational Therapist - Ms Tsineng, the Clinical Psychologist - Dr Mphuthi and the industrial psychologist and the actuary's, Dr. Wim Loot.

ISSUE

[14] The issue for determination is whether the plaintiff discharged the onus on a preponderance of probabilities and adduced sufficient evidence to enable the court to assess and quantify the loss of earnings or earning capacity.

LAW

[15] In assessing delictual damages, It is incumbent on the plaintiff to prove that the injuries were sustained in the accident and that the injuries had certain effects on the person of the plaintiff. Once these facts are established, the plaintiff is saddled with the onus of proving loss on a preponderance of probabilities, including proving uncertain future loss. The assessment of quantum does not require proof of facts but an acceptance of proved facts in that causation inquiry[2].

[16] In arriving at the future loss there is generally a four stage enquiry. The first stage is the merits enquiry (which has been conceded). The second stage is the first causation Inquiry stage, focusing on whether the plaintiff pleaded the injuries in the accident. This is followed by the third stage known as the second causation inquiry focusing on how the proven injuries have affected the plaintiff. Lastly, the quantum determination stage which emphasises how should the plaintiff be remunerated for the effects of such inquiries on the plaintiff.

[17] In alluding to the aforesaid principle in paragraph one above, the learned Judge in *Prinsloo v Road Accident Fund*[3] quotes extracts from *locus classicus* on the subject matter: Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 2 SA 146 (A) where the following was said at 150A-D:

'In 'n saak soos die ondei:hawige word daar namens die benadeelde skadevergoeding geeis en skade beteken die verskil tussen die vermoensposisie van die benadeelde voor die onregmatige daad en daarna. Kyk, bv, Union Government v Warneke 191 1 AD 657 op bl 665 . . . Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoensvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien.

[2] *Fisher J in MS and Road Accident Fund.*
[3] *2009 5 SA 406 (SECLD) at 409C-41A*

[18] The principle was repeated in *Dippenaar v Shield Insurance*[4] where the following was said at 917A-D:

'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 had 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.'

[19] The difficulty in quantifying the monetary value of loss in claims of this nature is . aptly stated in *Terblanche v Minister of Safety and Security*[5] *and at paragraph* at paragraph [14] where the judge stated:

'The difficulty with claims of this nature is generally not so much the recognition that earning capacity constitutes an asset in a person's estate, but rather the quantification of the monetary value of the loss of earning capacity by a trial court. Each case naturally depends on its own facts and circumstances, as well as the evidence before the trial court concerned.'

[20] [26] In *Southern Insurance Association v Bailey NO*[6] the court referred with approval to the case *of Hersman v Shapiro and Company*[7] *at 379* per Stratford J where the following was said:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

"*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,*

[4] *Co Ltd 1979 2 SA 904 (A)*
[5] *Another 2016 (2) SA 109 (SCA)*
[6] *1984 1 SA 98."Bailey"*
[7] *1926 TPD 367.*

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."

[21] In the case of *Mlotshwa v Road Accident Fund* [8] Pietersen AJ (as he then was) referred to the *Hersman*[9] case at page 379, which was omitted in Bailey's[10] case which provided

" ...It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it."

[22] On the contrary, in *Lazarus v Rand Steam Laundries*[11] at page 53 paragraphs B-F Bressler AJ, concurring with De Villiers J, elaborated on the duty of the appellant to prove damages:

" ... We were urged, on the authority of Turkstra Ltd V Richards, 1926 T.P.D. 276, to find that, as there was an admission of damage, the Court should not be deterred by reason of the difficulty of computing an exact figure from making an award of damages ... In Turkstra v Richards there was an actual valuation, 'an estimate of some sort', in the language of Stradford, J.(as he then was) ... It does not seem to me that Turkstra v Richards, supra, meant that, given one or two facts, including that of damages, a judicial officer should then be required to grope at large in order to come to the assistance of a litigant, especially one whose case has been presented in such a vague way. It seems to me that the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative assessment, a state of affairs which would result in injustice to one of the parties .. ."

[23] Ultimately, the award for future loss of income must be based on good medical evidence and corroborating facts. There must be some reasonable basis for arriving at a particular figure. In the event of a mathematical approach, one has to first work out what the third party's earnings would have been but-for the accident

[8] *(9269/2014) [2017] ZAGPPHC 109 (29 March 2017*
[9] *Ibid See Footnote 7*
[10] *Ibid See Footnote 6*
[11] *(1946) (Pty) Ltd 1952 (3) SA 49 (T)*

(that is, if the accident had not occurred), and secondly, one has to calculate what the plaintiff's earnings are now that the collision has occurred (having regard to the accident) and the difference between these two amounts will then represent the loss.[12]

APPLICATION OF LAW TO FACTS

Plaintiffs Submissions

[24] Plaintiff's counsel requested the court, to grant an order for loss of earnings in accordance with his heads of arguments, in the amount of R7 675 829.00 (seven million, six hundred and seventy five rand thousand rand and eight hundred and twenty rands).

Evaluation

[25] After scrutiny of this matter, I was somewhat startled as to how the matter was prosecuted. The need for proper judicial oversight and scrutiny cannot be ignored.

[26] On a perusal of the evidence before me, I was somewhat astonished in the manner in which this matter came before me since there was flagrant disregard with the Practice Directives issued by the Judge President in this Division as well as the Uniform Rules of Court.

[27] The particulars of claim in this matter indicates that the said motor collision occurred on the 8th November 2016. All other reports and founding documentation refer to the collision occurring on the 8th October 2016. Plaintiff in his particulars of claim claims an amount of R2 000 000.00 (two million rand for loss of earnings and yet argues before me for an amount of R7 675 829.00 (seven million, six hundred and seventy five rand thousand rand and eight hundred and twenty rands for this head of damages. The latter amount argued for by far exceeds the total amount of R4 000 000.00 (four million rand that was claimed in the plaintiff's summons. The

[12] Potchefstroom Electronic Law Journal (PELJ) *On-line version ISSN 1727-3781, PER vol.18 n.7 Potchefstroom 2015*

amount was argued for without any amendment being effected to the summons in terms of Rule 28 of the Uniform Rules.

[28] Further perusal of the documents, revealed that there was simply no evidence before me by the plaintiff, other than the plaintiff's section 19(f) statutory affidavit which was At the plaintiff request, evidence was led by way of affidavits. There was no affidavit submitted by the plaintiff to put plaintiff's case before the court. I simply did not have plaintiff's evidence before me. In determining this head of damages it was imperative that the plaintiff's evidence is before me and cannot only be determined by way of expert evidence. Essentially all I have before me is hearsay evidence. Even if I could determine the matter only on the strength of expert testimony it is not without problems.

[29] To make matters worse, plaintiff's discovery affidavit was neither signed by the plaintiff and nor was it commissioned. If the discovery affidavit was commissioned then I could have applied my mind to this matter. Other than the pleadings and notices, , the other documents "allegedly" discovered by the plaintiff are the formal documents which relates to the lodgment of the claim. These documents comprises of the RAF-1 form, Consent form, Special power of Attorney, Identity document of plaintiff, accident report, hospital records and claimant's statutory affidavit as is required in terms of section 19(f) of the Act. Furthermore, I was startled, to note that this statutory affidavit was not properly commissioned. The plaintiff signed the affidavit on the 16th July 2015, the commissioner of Oaths commissioned the affidavit on the 17th July 2015 and the date stamp of the Commissioner of Oaths was amended to read the 16th July 2016 with no initials next to the amendment.

[30] When I consider the plaintiff's expert witnesses affidavits in support of plaintiff's claim these are my findings:

30.1 The neurosurgeon, Dr. Segwapa, who interviewed the plaintiff on the 9th April 1996, provides a report that is unsigned and undated. Furthermore, the affidavit was signed by the Dr Segwapa, as a deponent on the 28th May 2021 but commissioned by the Commissioner of Oaths on the 31st

May 2021. This is irregular in terms of the Regulations governing the *Justice of the Peace and Commissioners of Oaths Act 16 of 1963.*

30.2 The Occupational Therapist, Dr Molefe, who interviewed the plaintiff on the 18th April 2018, provided a report which was signed but undated. There was no affidavit filed by this witnesses, presumably because the plaintiff was not intent on requiring his evidence for this leg of damages.

30.3 Dr Mphuthi, clinical psychologist, who does not provide a date when he assessed the plaintiff, signed the affidavit on the 27th May 2021 but only the affidavit was only commissioned on the 31st May 2021. This too is irregular commissioning of affidavits.

30.4 The Occupational Therapist, Dr Tladi, examined the plaintiff on the 3rd October 2017 and signed the report, however, there was no affidavit by the witness. This doctor completed the report, filled in the RAF – 4 form, but deferred to the neurosurgeon for the finding. It is presumed that this evidence was not required for this head of damage.

30.5. The plaintiff's occupational therapist, Ms Tsineng, provided an affidavit which was properly signed and commissioned on 31st May 2021.

30.6 Dr Mosadi, the neurosurgeon, who examined the plaintiff on 3rd October 2017, completed the RAF – 4 form and signed his report. However, there was no affidavit provided by the doctor. . It is presumed that this evidence was not required for this head of damage.

30.7 The industrial psychologist, Dr Ntsieni, who assessed the plaintiff on 18th April 2018 signed the report. However, there is no affidavit by the witness. This witness is a key witness with regard to a finding of loss of earnings or earnings capacity.

30.8 The actuarial report filed by Wim Loots, dated 13th May 2018 was signed and his affidavit was attested to on the 27th May 2021. The actuarial

calculations in his report was done as at 7th June 2018 in spite of the trial date being 31st May 2021. Essentially this is a stale report.

[31] This type of litigation is unacceptable and goes to the core of professionalism that is required in litigation, let alone litigation in the High Courts.

[32] I am rather astonished in the manner in which RAF matters are treated. It is not expected of judicial offices to become "rubber stamps" and endorse whatever is placed before the Courts. This is simply unacceptable.

[33] Furthermore, the lackadaisical manner in which affidavits are commissioned is astounding and embarrassing especially if such affidavits are commissioned by officers of the legal profession (and in this case it was). There is simply no excuse for the deponent to sign the affidavit on one date and the commissioner of oaths to sign on another date, when commissioning of affidavits. This type of practice clearly brings the profession into disrepute and must be reported to the relevant regulatory bodies.

[34] Courts should be alert to the lack of circumspection in RAF matters generally. Judicial officers are urged to exercise greater caution when conducting judicial oversight and must not merely be rubber stamps for the asking. If due process is not complied with by officials of the Court, they should be called upon to explain the lack of compliance of the Rules of Court and Practice Directives and courts should not be hesitant to impose harsh cost orders, including costs *de bonis propriis.*[13]

[35] Ultimately, this is a waste of public funds not only for the payment of the plaintiff's claims but also for the payment of costs of all expert witnesses; whose expertise is required at astronomical costs and the costs of legal representatives.

[36] Similar issues regarding the onus of proof by the plaintiff was discussed in Similar issues were discussed in *Mlotshwa v Road Accident Fund*[14] and *Jerome Alphonsus Du Plessis and Road Accident Fund*[15] were Petersen JA (as he then

[13] MS v Road Accident Fund at paragraph {78}
[14] (9269/2014) [2017] ZAGPPHC 109 (29 March 2017)
[15] Ibid see footnote 17

was quoted an unreported appeal in the *Gauteng Local Division of Boy Petrus Modise v Passenger Rail Agency of South Africa, case number A5023/2013 (11 June 2014) at paragraph* [10] against the dismissal of a claim for loss of earnings and future loss of earnings, Wright J held:

'This is an unfortunate case. One suspects that the plaintiff did suffer a past loss of earnings and will suffer future loss of earnings. However, I may not allow a suspicion nor my sympathy for the plaintiff, to translate into a basis for awarding damages where the evidence does not allow this. The variables in the equation are simply too many.'[16]

RULING

[37] I am satisfied, that there is no proper evidence before me and I do not believe that the plaintiff has proven this head of damages for loss of income and earning capacity on a preponderance of probabilities.

ORDER

[38] In a result, I make the following order:

[38.1] Absolution from the instance is granted .

[38.2] The plaintiff's legal representatives are not permitted to recover any costs in the matter from any person or entity, save in relation to any previous orders of this court as costs.

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C. B. Bhoola

[16] Jerome Alphonsus Du Plessis and Road Accident Fund unreported Case 913/18 Gauteng Division, Pretoria

Acting Judge of the
High Court of South Africa
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judges whose names is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 01 September 2021.

APPEARANCES:

For the plaintiff:	Advocate Phiri
Instructed by :	Tshabangu Attorneys