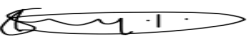




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 39667/17

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	
.....	12 APRIL 2022
SIGNATURE	DATE

JEAN-RAY PEARTON

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

JUDGMENT

LESO AJ

INTRODUCTION

- [1] Plaintiff filed a claim for damages against the defendant following a motor vehicle accident that occurred at N14 & R503 T-junction at Lichtenburg, Coligny on 19 November 2006 between the BMW bearing [...] driven by the plaintiff and the TATA bearing [...] driven by insured.
- [2] On the day of the hearing, the applicant sought an order to strike out the defendant's defense in terms of Rule 30A(1). Having granted the application, this matter proceeded without opposition by the defendant.

ISSUES IN DISPUTE

Merits

- [3] During the hearing, the merits were not in dispute because on 12 May 2020 this issue was settled on the basis that the defendant is 50% liable for the plaintiff's agreed or proven damages.

Quantum

- [4] The matter was before the court to determine the following claims:
- 4.1 The non-pecuniary loss(general damages) wherein the plaintiff claimed the amount of R375 000.00;
 - 4.2 Past and future loss of earnings and earning capacity at the amount of R6 224 045.33; and
 - 4.3 Past medical expenses in the amount of R19 357.55 as per the heads of argument. This amount is however different from the amount reflected in the vouchers submitted by the plaintiff as well as the amount on the draft order which was later presented after the hearing.

BACKGROUND

[5] The plaintiff's counsel moved a motion that the respective experts' evidence be admitted as evidence in the absence of the oral evidence. Having heard the submissions by the plaintiff's counsel and having analysed the plaintiff's documentary evidence which is used in support of the plaintiff's respective claims including the counsel's heads of arguments, I made the ex tempore judgment as follows:

5.1 The plaintiff is allowed to proceed on documentary evidence in terms of Rule 38(2).

5.2 The defendant is liable for the past hospital and medical expenses in the amount of R 66 828.34. This amount was granted without deducting apportioned amount.

5.3 Defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for the payment of 50% of future accommodation in a hospital or nursing home and future medical treatment or rendering of services or supplying of goods as a result of the injuries sustained by the plaintiff in the motor vehicle accident which occurred on 19 November 2016.

[6] Having heard the submissions of the plaintiff's counsel and having perused the documentary evidence in support of the plaintiff's claim for general damages and loss of earnings. My initial impression was that the plaintiff had not established a case for the above damages. Consequently, I reserved judgment in order to properly analysed the plaintiff's evidence as well as the counsel's submissions.

[7] Subsequent to the hearing on 16 November 2021, the plaintiff's counsel, Adv Mullin SC submitted a letter on 17 November wherein he addressed the court on his submission regarding the plaintiff's claim for general damages. In his letter the counsel said the following *"...the purpose of my call was to inform you as soon as I could that I accept that I was wrong in suggesting that you can make an award for general damages, and I accept that you were wholly correct in that regard. I have taken the liberty of enclosing a revised draft order*

in this regard, which (a) provides in paragraph 1 for your ex tempore orders of yesterday, (b) in paragraph 4.2, takes out the costs of the RAF4 form, and (c) in paragraph 8, makes provision for general damages to be postponed pending resolution of the Regulation 3 process.” Without stating the counsel’s latter submission in verbatim, a noteworthy feature of the letter is the inscription at the bottom, which confirms the counsel agrees that the general damages claim cannot be heard until the plaintiff complies with the relevant statutory requirements. Consequently, the court will make an order to postpone General damages sine die.

EVIDENCE ON LOSS OF INCOME AND EARNING CAPACITY

- [8] The plaintiff’s counsel elected to rely on the stated case and the strength of the experts’ reports as a result, no witnesses were called to testify. The counsel confirmed that the plaintiff does not intend to proceed with the claim for past loss on income. The plaintiff’s attorneys have prepared a schedule of loss and appendices that deals with this particular claim. For the purpose of this damages, the reports which are relevant to assist in determining the plaintiff’s claim are as follows:

- 8.1 Dr. LF Oelofse, Orthopaedic Surgeon;
- 8.2 Mrs. G Basson, Occupational Therapist;
- 8.3 B.A. Donaldson, Industrial Psychologist;
- 8.4 Messrs GRS Actuarial Consulting, Actuaries.

- [9] The plaintiff was 25 years old, employed as a junior Associate at Gildenhuis Malatji Incorporated at the time of the accident. Before me is a collateral affidavit deposed by Greyling Erasmus, a financial director and an attorney at Gildenhuis Malatji Inc. The deponent states that the plaintiff was reporting to him when he was appointed to the position of candidate attorney in 2014. Erasmus states that pre-accident the plaintiff was energetic with abundant enthusiasm and he use to call him a Duracell bunny because he was able to

outwork and outlast other employees from the first day of his employment at the firm.

- [10] The Orthopaedic Surgeon, Dr. Oelofse assessed the plaintiff and confirmed that the plaintiff suffered cervical spine and lumbar spine injuries. The expert reported that the plaintiff complained of a pain in his lower neck and lower back, which according to the expert were exacerbated by driving long distances and lifting objects. The experts recommended that the plaintiff should receive treatment with Analgesics and Anti-Inflammatory Drugs, Physiotherapy, Occupational Therapy and Psychological support. He states that if the above treatment is effective, pain relief provision should be made for one of the suggested treatments every two years. Dr. Oelofse reports that the plaintiff has a high probability to require future cervical surgery and with successful treatment, the plaintiff's productivity will improve regardless of the treatment rendered however he will always have a permanent deficit which makes him an unfair competitor in the open labour market.
- [11] Dr. Oelofse reports that the plaintiff would have been able to work until the normal retirement age of 65 to 70 and beyond but for the accident. He states that the plaintiff is already showing radiological signs of post-traumatic spondylosis on multiple levels, even if he is accommodated in a permanent light-duty and sedentary environment, provision must be made for earlier retirement at 55 years old(10-15 years earlier) alternatively, he must not be allowed to do physical labour. The expert indicates that his opinion is based on the fact that the plaintiff experiences chronic pain, serious injury to the cervical and lumbar spine, inability to maintain responsibilities even in the light-duty and spine-friendly working environment, and inability to adapt to reduced working capacity and he will need future medical treatment. e concludes by stating that the accident and the accompanying orthopedic injuries will not have a detrimental effect on the plaintiff's life expectancy.
- [12] The Occupational Therapist, Dr. Basson reports that the plaintiff had already started to work on his urgent matters on his computer when he was at the hospital. The expert reports that the plaintiff works from 9h00 to 19H00 or

20H00, sometimes he works until 24H00 or 01H00 Monday to Friday. It is reported that the plaintiff works on Saturdays and Sundays to catch up on his work because he is slow to complete his job task because he needs to take a lot of breaks to manage his pain. Dr. Basson indicates that the physical demand of the plaintiff's job involves traveling to the different accident scenes to do the inspection, prolonged periods of sitting and standing, lifting and carrying heavy files and documents, sustained concentration and negotiation skills, accuracy, excellent reasoning, climbing steps and walking, good interpersonal skills, planning and good judgment skills. The experts report that the plaintiff struggles to concentrate for a prolonged period compared to pre-accident.

[13] Dr. Basson reports that the plaintiff is assisted by a clerk and a secretary to prepare and carry the files, to load the files in the motor vehicle. He has his workstation and a supportive chair with wheels. The expert reports that the plaintiff makes mistakes that he did not make prior to the accident, he forgets the court dates but his secretary reminds him that he is constantly tired and he sometimes sleeps on his desk. He reports that the plaintiff is unable to sit for long periods or drive for long-distance and his working hours are limited because he is unable to sit and work on a computer for long periods. The expert opines that provision must be made for early retirement at the age of 55 years old.

[14] The Industrial Psychologist, Barbra Donaldson conducted an intellectual ability test on the plaintiff and reports that during the test the plaintiff worked very fast, he completed all tests except STE, he remained courteous and cooperative throughout and he never complained of pain, discomfort or fatigue. The plaintiff's salary is summarised by the Industrial Psychologist as follows:

Tax Year	Gross Income
2016	R298 472
2017	R473 158
2018	R632 576

2019	R745 810
2020	R964 200
2021	R843 895

[15] The Industrial Psychologist comments as follows *“it has been considered prudent to accept for the purposes of this report whether or not Mr Pearson has been injured in the accident under review, he would probably only have been promoted to the level of NPD at the end of 2021 and to the level of PD by the end of 2023”*. The expert reports that Erasmus was unable to comment on whether the plaintiff stood a realistic chance of promotion to the level of Non-Profit Director earlier than 2021. The expert postulates that the plaintiff will lose a year earning as a Profit Director because it will probably take him 3 years to gain his promotion”. Having read the affidavit of Erasmus I note that this statement is untrue because Erasmus did comment on the issue of the plaintiff’s promotion by stating that the plaintiff would probably only be promoted to the level of NPD at the end of 2021 starting in 2022 wherein he will earn annual costs to company salary. The witness states that the benefits on the NPD position include the 13th cheque between R1 145 000 and R1 183 00 per annum and the current target fee from R2,5 Million to R2,8 Million per annum and a further 15th bonus for exceptional performance given to legal practitioners who have been exceeded their fee target by at least 25% which the plaintiff has received in the past.

[16] The Industrial Psychologist reports that the plaintiff will probably burn out much earlier because he is not willing to place himself in a vocational situation and he is likely to continue pushing himself as hard as he can to continue to prove his worth. The expert projects that the plaintiff will retire 10 to 15 years early. The experts report the following: *“if Mr. Pearson reaches a point in his life wherein his desires notwithstanding, he is forced to slow down and work fewer hours, then it is improbable that Mr. Pearson could continue as either NPD or PD instead he would probably return as Senior Associate. Mr. Pearson must absent himself from work in order to attend to the treatment modalities which have been recommended for him.*

- [17] Greyling Erasmus deposed an affidavit in November 2021 which to a great extent highlights the plaintiff's earning capacity. Erasmus indicates that when the plaintiff returned to work at the beginning of December 2016 he was given leeway to work only insofar as his pain and stamina allowed. I have reconciled this statement with the Occupational Therapist's report that the plaintiff works 10 to 11 hours a day including weekends, sometimes he will work until midmornings. Erasmus states that the plaintiff was promoted to a position of a junior associate in 2017 and in January 2019 he was appointed Senior Associate. He states that from 1 January 2022 the plaintiff will be appointed a Non-Profit sharing Director.
- [18] Erasmus states the following in his affidavit *"I unequivocally record that Mr. Pearton is still as of today an exceptional attorney and forthwith acknowledge that affording Mr. Pearton leeway in respect of his working hours and in respect of his irritability. His fee performance is exceptional. He works long hours to maintain the same level of efficacy. It should be noted that Mr. Pearson has continuously received favourable performance appraisals and he has generally been promoted as fast as is accepted/acceptable in GM Inc. From 1 January 2022 plaintiff will practice as a non-profit sharing director, despite the obvious effects of the accident"*.
- [19] Erasmus states that the various experts including the Industrial Psychologist asked him to comment on whether the plaintiff would have but for the accident under review stood a realistic chance of promotion to the level of non-profit director earlier than 2021. He maintains that conservatively speaking the plaintiff would probably only be promoted to the level of Non-Profit sharing Director at the end of 2021 starting in 2022 despite the injuries. Erasmus states that there are five levels of positions in GMI and the plaintiff will be occupying the fourth level in the promotion level(NPD) in 2021 however at the time he was deposing the affidavit the plaintiff was the highest-earning Senior Associate due to continued fee performance on a year to year basis. He adds by stating that performance is the main driving factor when it comes to appointments.

- [20] Erasmus states that the plaintiff's energy has decreased for the last three years and his memory seems to be affected because he is forgetful and he is always in pain. Erasmus opines that it seems reasonable to accept that the plaintiff would probably have continued to deliver work at a "fast track" level and earned a commensurate level of performance bonuses and dividends until retirement".

ANALYSIS

- [21] The burden is on the plaintiff to prove loss of earnings and earning capacity on a balance of probabilities. I will grant the relief sought by the plaintiff only when I am satisfied that the plaintiff has successfully discharged the onus of proof. I have analysed all the documentary evidence the plaintiff has submitted including the collateral affidavit of the plaintiff and the plaintiff's senior Greyling Erasmus.
- [22] From the overall evidence which I have summarized above, what turns out to be of consideration is only two issues, firstly whether the plaintiff would probably delay for two to three years. Secondly, whether the plaintiff will probably be able to work and earn an income until the age of 55 instead of working until the age of 65 to 70.
- [23] The report of the Occupational Therapist and the Industrial Psychologist was not satisfactory in as far as their opinions on the working capabilities of the plaintiff is concerned. I note the comments by the Occupational Therapist that the plaintiff does not have the physical capacity to return to his pre-accident ability to cope with the demands of his job and he will not be able to continue with the current workload for an unlimited period of time due to the injuries sustained in the accident. Dr Oelfse opines that the plaintiff has a permanent deficit which makes him an unfair competitor in the open labour market.

- [24] The above expert's opinions and comments are problematic because firstly, both experts reported that the plaintiff was already working during his admission to the hospital and he continued working 10 to 11 hours a day, on weekends and on some days he will work until mid-morning despite the sequelae of the accident. The expert already commented on the interventions that the employer took to mitigate the issue of performance by allocating an assistant and a clerk to the plaintiff while Erasmus has confirmed that the plaintiff is currently performing well and his fee performance is exceptional. He states that the plaintiff has continuously received favourable performance appraisals and he has been promoted as fast as is accepted/acceptable at GMI. Frankly, the evidence before me does not support the expert's opinion that the plaintiff does not have the physical capacity to cope with the work demands as a Senior Associate, a Non-Profit Director and a Profit Director.
- [25] The Industrial Psychologist conjecture that the plaintiff will lose income because his working hours will be reduced is not plausible because the plaintiff is already working more than eight hours a day, seven days a week and is entitled to sick leave which is paid by his employer. I do not agree with the expert's opinions that the undetermined reduced hours of work and undergoing medical treatment twice a year can result in the loss of income.
- [26] The plaintiff's promotion was confirmed to be after two years, as per the policy of the Firm. Therefore the postulations by the Industrial Psychologist that the plaintiff will probably suffer loss from the end of 2021 to 2023 are not based on facts.
- [27] My approach to the opinions and remarks by the Industrial and Occupational psychologists is guided by the principles laid down in the case of *Michael & another v Linksfield Park Clinic (Pty) Ltd & another*¹. In this case, the court found that the facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. The court went on to further say that, for an opinion to be underpinned by proper reasoning it must be based on correct facts because incorrect facts militate

¹ [2002] 1 All SA 384 (A) para 34

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.

- [28] The case of *Glenn Marc Bee v The Road Accident Fund*² also forms the basis of my rejection of the expert's opinions. Here the court said 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 the court. The court must satisfy itself as to the correctness of the expert's reasoning". The plaintiff's reports as discussed above are not helpful because of the above contradictions and inconsistencies regarding the capabilities of the plaintiff to earn an income.
- [29] I now turn to consider whether the plaintiff has discharged his burden of proof. To a great extent, Erasmus's affidavit indicates the earning potential and capacity of the plaintiff despite the sequelae of the accident. The crux of the plaintiff's claim for loss of income and earning capacity lies in the delay of two to three years of promotions and the early retirement due to the sequelae of the accident. The evidence before me indicates that the sequelae of the accident have not deterred the plaintiff from earning an income including the performance bonuses. The injuries have not deterred the plaintiff's employer from considering the plaintiff for promotions.
- [30] The plaintiff found himself a sympathetic employer who acknowledges his shortcomings by providing human resources and other working tools and giving him leeway to work only insofar as his pain and stamina allowed. The technological advancement in the court processes will minimize traveling to court and the physical carrying of the files. I find that the plaintiff's current working environment qualifies as sedentary, accommodative and sustainable to the plaintiff's current medical conditions as stipulated in the occupational report. Based on the above, there is no basis on which the plaintiff can claim that he will not be in a position to work beyond the age of 55.

² [2018] ZASCA 52 (29 March 2018)

[31] On earning capacity I am relying on the case of *Rudman v Road Accident Fund*³, wherein the evidence establishes beyond question that Rudman's injuries have given rise to severe permanent disability. The claims for past loss of earnings and loss of earning capacity arose from the physical handicaps from which he suffers. He has severe restriction of movement caused by the injuries to his ankles, and muscular weakness of the right hand and arm. The parties accept that he will never again function as a professional hunter and that he is physically unable to do the maintenance work which he formerly did on the farms. The court said that the plaintiff ought to prove that the patrimony of his estate has been diminished or compromised as a result of the sequelae of the accident. The court dismissed the claim for loss of earnings and earning capacity because the Judge found that the plaintiff failed to prove that his patrimony was diminished due to any loss of earning capacity, past or future resulting from his injuries. Similarly, the plaintiff's patrimony has not been negatively affected by the accident.

CONCLUSION

[32] The plaintiff failed to make out a case for past and future loss of income and earning capacity. The evidence before me does not support the plaintiff's claim that his promotion will delay for three years nor does it support the claim that the plaintiff will retire early. It is important to note that the final analysis of an award for damages cannot be based upon speculation. The basis for the award must be supported by evidence.

[35] My final analysis of the evidence confirms my initial conviction that the plaintiff has no case for loss of earnings or loss of earning capacity, therefore the plaintiff's claim must fail.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

1] Defendant's defense is struck-out.

³ [2002] ZASCA at para 129

- 2] Judgment is granted in respect of Past Hospital and Medical Expenses in the amount of R33 414.17 (THIRTY-THREE THOUSAND FOUR HUNDRED AND FOURTEEN RAND AND SEVENTEEN CENTS).
- 3] Defendant shall furnish Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, limited to 50 %, for payment of the future accommodation of Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods to him resulting from the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on 19 November 2016.

4

HAVING RESERVED JUDGMENT ON THE BALANCE OF THE CLAIM AS PER PARAGRAPH 1.4 ABOVE, AN ORDER IS NOW MADE AS OUTLINED IN PARAGRAPHS 3 TO 8 BELOW.

- 4.1 The plaintiff's claim for loss of earnings and earning capacity is dismissed.
- 4.2 The award for past medical expenses shall be paid into the above-mentioned trust account of Gildenhuys Malatji Incorporated within 180 (One Hundred and Eighty) days from the date of this order.

5

- 5.1 Should Defendant fail to make payment of the capital amount within 180 (One Hundred and Eighty) days from the date hereof, Defendant will be liable for interest on the amount due to Plaintiff at the applicable rate per *annum*, from the 1st (First) day from the date of this order to the date of final payment, which will include the interest due and payable.
- 5.2 The defendant is ordered to pay all Plaintiff's taxed or agreed costs of suit, on the High Court scale up to date hereof, which costs include (but not be limited to) the costs of traveling, accommodation and attending to the examinations and the costs incurred in obtaining the medico-legal-, and actuarial reports,

addendum reports, and any joint minutes/reports.

- 5.3 The costs of two counsel and attorneys inclusive, but not limited to, the drafting of heads of argument, schedule of loss and of their day fees for the trial which commenced on 16 November 2021;
- 5.4 All the costs associated with the Pre-Trial Conferences in preparation for the Judicial Case Management Meetings, the attendances of attorneys to the Judicial Case Management Meetings which includes the appointment of counsel;
- 5.5 The costs of the preparation of trial bundles and the uploading of same onto the CaseLines system as per the Practise Directive and as agreed upon in the Pre-Trial Minutes;
- 5.6 The costs of the attendance and waiting for the allocation of the electronic hearing for both attorneys and counsel, the preparation for Trial and for the Pre-Trial Conference as well as the service of the various discovered documents in terms of the provisions of Rule 35(9);
- 5.7 All the costs associated with the evaluation and attendances to all the plaintiff's medico-legal appointments inclusive of travel time and expenses as well as accommodation costs;

6

Should the Defendant fail to pay the Plaintiff's party & party costs as taxed or agreed with 180 (One Hundred and Eighty) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at the applicable rate per *annum*, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

7

The defendant shall pay the agreed or taxed party & party costs, within the period of 180 (One Hundred and Eighty) days from taxation along with all interest incurred,

into the trust account of the Plaintiff's Attorneys of Record, Messrs Gildenhuis Malatji Inc, ABSA Bank, Brooklyn Branch, Account Number 4044086147, Branch Code 335345 under Reference: G ERASMUS/mc/01796933.

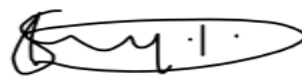
There is no contingency agreement applicable to this matter.

8

No award is made in respect of general damages, which is postponed sine die pending resolution of the question of serious injury in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008.

Counsel obo Plaintiff: Adv JF Mullins SC (082 928 0718)
Adv. L. Coetzee (083 324 9540)
Gildenhuis Malatji Inc.

Obo Defendant: Unrepresented



JT LESO
Acting Judge of the High Court

Date of Hearing: 20 November 2021

Judgment Delivered: 12 April 2022

For the Plaintiff: Mullins SC

Attorney: HW THERON INC
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For the Defendant: Unrepresented