REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO:1963/2014

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
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……

DATE…… SIGNATURE……

In the matter between:

MANOKO WALTER SETATI: PLAINTIFF

And

THE ROAD ACCIDENT FUND: DEFENDANT

JUDGEMENT

SEMENYA J:

[1] This action arises out of a collision that occurred along Bochum-Mydarling public road on the 16 May 2013, between a donkey cart and a motor vehicle with registration numbers and letters [B...]. The plaintiff, who was a passenger on the donkey cart at the time of the collision, instituted action for damages suffered as a result of the injuries he sustained due to the collision.

[2] The issue of merits and quantum were separated. The merits were settled in that the defendant admitted 100% liability as may be proved by the plaintiff. This judgement is only on the issue of loss of earnings/earning capacity for which the plaintiff claims an amount of R2 000 000.00

[3] As at the date of the collision, the plaintiff was 31years old and self-employed as a hawker selling accessories such as hair piece walking from house to house. He also received government disability grant on occasional basis. Following the accident, the plaintiff stopped selling and did not generate any income until August 2015 when he opened a spaza shop with the assistance of two other people. His highest educational standard passed is Grade 11.

[4] Apart from earning a living as a hawker pre-accident, the plaintiff was previously employed as a brick layer between February and April 2009 where he was earning R900 per month. He left the job because the employer was not paying him on time. Between

2011 and 2012, the plaintiff worked for one Mr Thupana as a recycling man where he was earning R800.00 per month. He quit his job because his foot was giving him problems.

[5] It is common cause that the plaintiff suffered loss of income as a result of the collision. In the case of **Dieppenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A)** at par 9 it was held that:

> *"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 that estate."—See also Rudman v Road Accident Fund 2003 (2) SA 234 SCA.*

[6] I am called upon to determine the nature and extent of the loss suffered by the plaintiff on the basis of the evidence presented before me in the form of expert reports and the amount the defendant should be ordered to pay to make good the difference between the value of his estate pre and post the commission of the delict.

[7] The parties agreed that the case will be argued only on the basis of the joint minutes prepared by the following experts:

Orthopaedics Dr P T Kumbirai (Kumirai) o.b.o plaintiff and Dr W E Williams (Williams) – o.b.o the defendant;

Industrial Psychologists Moiponi Kheswa (Kheswa) o.b.o plaintiff and Nicoline Kotze (Kotze) o.b.o defendant.

Occupational therapists Ms P S Tom (Tom) o.b.o plaintiff and Ms K Montwedi (Montwedi)- o.b.o the defendant.

These reports were admitted as evidence by consent of the parties. No oral evidence was therefore heard.

[8] The injuries noted by Dr Kumburai are a fracture of the left clavicle, low back pain, injury left zygoma-opinion deferred to maxillo-facial surgeon, loss of teeth- opinion deferred to dentist, abrasions right medial malleolus, laceration dorsum left wrist and laceration right elbow.

[9] Dr Williams on the other hand recorded the following injuries: a fracture of the proximal one third of the shaft of the left clavicle, an impact injury of the left hemithorax, possibly fracture of the 2nd rib, abrasions over the superior aspect of the left shoulder, lacerations at the left wrist and right elbow, impact/straining injury of the right ankle and hind foot and straining injury of the thoracolumbar spine. In addition, Dr Williams further make note of the plaintiff's severe pre- accident deformity on his left foot. The importance of this deformity will become evident later in this judgement.

[10] Occupational psychologists agree that the plaintiff is, as a result of the injuries that he has sustained, suited for work with sedentary to light physical demands. Ms Tom opines that should it be confirmed that the plaintiff owns a spaza shop, which is considered to be light work in nature, this will in effect mean that he has retained adequate physical capacity to continue with his business. Ms Montwedi on the other hand opines that the plaintiff is a fair competitor in the open market.

[11] Industrial psychologists agree that it is difficult to postulate on the earning structure for self-employed persons such as the plaintiff in this matter. Kheswa suggests that the earnings of self-employed persons in general, should be employed for purposes of calculation of loss. She states that according to Koch (2015), these earnings will be in the range of R7 300. 00 – R18 600 - R53 500.00 per annum. She further reports that there is room for progression in that the plaintiff managed to establish himself as a business owner at a very young age.

[12] Ms Kotze on the other hand suggests that the calculations should be based on the plaintiff's reported earnings, being in the average of R1500.00 per month. Contrary to the views of Kheswa, Kotze is of the opinion that, due to the high rate of unemployment, there is very little room for the plaintiff's business to progress in that many people try to earn a living as hawkers and this has the effect of increasing competition and decreasing profit.

[13] The two psychologists differ with regard to the retirement age of the plaintiff, with Kheswa suggesting that he can work up to 65 years up to 75 depending on his general health. Kotze on the other hand, states that the plaintiff's deformity in the form of partial blindness and deformed left foot, should be considered.

[14] Kotze stated in the joint minutes that the plaintiff did not disclose the fact that he is running a spaza shop during consultation. She however opines that if this fact is accepted, the court should find that the plaintiff would be able to generate the same income as he has generated before the accident, if not more, from the spaza shop with the assistance of his

nephew and sister. It is necessary to state that the fact that the plaintiff is running a spaza shop is not in dispute.

[15] With regard to the possibility of growing the business, it was argued on behalf of the defendant that the court should take the plaintiff as is, *i.e* a semi blind person with a sever left foot deformity. It was submitted further that it would be unreasonable to expect the plaintiff, who is physically challenged, to work up to 70 years. It was argued that in view of the fact that the plaintiff was the owner of a spaza shop from which he generated income of R700. 00, the court should conclude that his loss is R800. 00.

[16] In **Southern Insurance Association Limited v Bailey NO 1984 (1) SA 98 (A)** at 113F-114E, Nicholus JA stated as follows:

> *"Any inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefits of crystal balls, 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.*
>
> *It has open to it two possible approaches.*
>
> *One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.*
>
> *The other is to try and make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course on the soundness of the assumption, and these may vary from strongly probable to the speculative.*

It is manifest that either approach revolves on guesswork to a greater or lesser extent. But court cannot for this reason adopt a non possum attitude and make no award…In a case where the court has before it material on which actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge's "gut feeling" (to use the words of the appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess…"

-See also the unreported case of **The RAF v Sweatman (162/2014) [2015] ZASCA** 22 (20 March 2015).

[17] For actuarial calculations, the plaintiff is relying on the report compiled by Koch. The defendant on the other hand is relying on that compiled by Robert Oketch of NBC. Of the two scenarios referred to in the report compiled by Oketch, I am of the view that it would be appropriate to have regard to scenario 2, in view of the fact that it allows for spaza shop earnings of R650 per month, of which 30% goes towards costs of two assistants. That he owns a spaza shop is in any event a matter of common cause. Allowance for the deduction of an amount of R68 915.00 the plaintiff received as disability grant post-accident is also made in this scenario 2.

[18] Both actuaries reject the view expressed by Kotze that the plaintiff is likely to generate more income from the spaza shop than the one he used to make as a hawker. Oketch is of the view that it is not realistic to allow for this higher income without simultaneously allowing for capital to stock the spaza in order to produce that same higher income. I tend to agree

with them in this regard. It is my view that the plaintiff is disadvantaged in that he will now be required to share the money that he will generate with other two people. Oketch calculated the total loss suffered by the plaintiff as R269 567 after allowing deductions for contingency of 5% for past loss and 25% for future loss of earnings.

[19] With regard to the report compiled by Koch, the total loss as calculated on the basis of the report compiled by Kheswa, is R808 626. He calculated the loss as R241 066, as calculated on the basis of the report compiled by Kotze. No general contingencies have been applied by Koch except for allowance for early death.

[20] Counsel for the defendant argued that it would be unreasonable for the court to accept that the plaintiff would most likely retire at age 67. It was contended that the court should have regard to the fact that the plaintiff would most likely retire earlier due to severe disability on the right foot as well as the fact that he is partially blind. It was submitted that the likelihood is that he will retire at age 60 when he will be eligible for pension grant from the government. I find this argument to be credible in that the likelihood is that the older the plaintiff grows, the more the chances that his foot will give him problems. It is reported that he left one of his previous employment because his foot was painful.

[21] Koch's calculations based on Kheswa's calculations, which suggests that the plaintiff will be able to continue to work up to age 65-70, is rejected on the basis that the plaintiff's deformity on his left foot and the fact that he is short sighted was not taken into account when that report was compiled. It is however understandable in view of the fact that

Kheswa did not have the advantage of the report compiled by Williams in which the deformity is clearly depicted on the photos.

[22] One other aspect that persuades me to reject the calculations based on Kheswa's report is that it will be unreasonable to calculate the loss based on the general earnings of self-employed persons as opposed to the actual earnings of the plaintiff pre-accident. I agree with Kotze's reasoning that the plaintiff provided the Industrial psychologists with certain amounts as the money he earned as a hawker and that the court should make its findings based on that aspect. As the amounts furnished to the two Industrial Psychologists differ, I am inclined to accept that the average of the two amounts, being R1 500.00 is what the plaintiff was earning.

[23] It was argued on behalf of the plaintiff that the court must take into consideration the fact that the plaintiff has managed to start a business at an early age in spite of his disabilities and that on that basis alone, the court must accept that the business was bound to grow. I however agree with Kotze's opinion that the level of unemployment in this country has left many people with little option but to resort to the type of business run by the plaintiff. It is indeed so that this increases competition and limits the possibility of growth.

[24] I accept that the plaintiff was unable to operate as a hawker and to generate income for some time as a result of the collision. This constitutes loss of earnings. I however agree with actuaries that a deduction in the amount he received as grant from government must be made. It is indeed correct so that deduction of general contingencies, what are referred to in Sweatman (above) as the hazards of life, is the prerogative of the courts. Having said

so, I however align myself with the deductions as suggested by Oketch as it is substantiated and supported by the facts.

[25] With reference to the statement made by Nicholus JA in Bailey above I am also of the view that while the calculations made by the actuaries may be no more than an informed guess, they have are an attempt to ascertain the value of what was lost on a logical basis. The amount of R269 567 arrived at by Oketch as the total loss suffered by the Plaintiff is found to be fair and reasonable.

[26] I am satisfied that the plaintiff has suffered loss or impairment of his capacity to earn money post the collision. I am further satisfied that this loss has diminished his estate and the defendant is required to make good that loss.

[27] I make the following order:

27 .1 The defendant shall pay to the plaintiff the amount of R267 567.00 together with interest thereon calculated at the rate of 15.5% per annum from a date 14 days after the judgement to the date of payment;

27.2. The defendant shall the plaintiff's costs of suit on the High court party and party scale. Such costs shall include the fees and qualifying expenses of all expert witnesses that prepared medico-legal reports that were referred to during argument;

27.3 payment of travelling expenses of the plaintiff to attend the medico-legal examinations with the defendant's experts;

26.4 the reasonable costs of attending to the examinations and obtaining the medico-legal, and such reports, addendum reports and any joint reports;

27.5 The reasonable taxable costs of transportation of the plaintiff to the medico-legal examinations;

27.6 The costs of preparation of the trial bundle; and

27.7 the reasonable costs of the plaintiff's attorney which shall include travelling costs, attendance to court,, costs of preparation for pre-trial conferences and formulation of pre-trial minutes and the costs for actual attendance to pre-trial conferences.

M.V SEMENYA
JUDGE OF THE HIGH COURT
POLOKWANE, LIMPOPO DIVISION

APPEARANCES

Attorneys for the Plaintiff	: Chueu Attorneys
Counsel for the Plaintiff	:
Attorney for the Defendant	: Hamman-Moosa
Counsel for the Defendant	:
Date Reserved	: 13 February 2018
Date of Judgment	: 29 March 2018