

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 2799 /2018

In the matter between:

ROUCHER BURGER

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 22 JULY 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 2 November 2022. The date and time for hand-down is deemed to be 02 November 2022 at 14: 30.

[1] The plaintiff claims damages arising out of the motor vehicle accident which occurred on 29 January 2016. The issue of the liability of the respondent

was settled on the basis that the insured driver was solely negligent in causing the accident. The issues relating to future medical expenses as well as general damages were also settled. This court is thus only called upon to adjudicate the claim for past and future loss of earnings.

[2] The plaintiff testified on his injuries, their sequelae as well as his pre- accident income potential. He is a qualified diesel mechanic having done his apprenticeship with Raubex Construction. He took employment with Volvo SA and earned about R23 000 per month. He thereafter took employment with BZM Transport earning a salary in the amount of R23 187 per month. From BZM he was employed as a workshop manager at Hestony Transport. The salary advices of the plaintiff handed into evidence reflect his monthly earnings to have been R34 450 per month. He also received a thirteenth cheque. His annual income amounted to R447 525.00.

[3] He left the employment of Hestony Transport to start up his own business. Shortly after being self-employed, he was involved in an accident which led to these proceedings. It is his evidence that after he started his business, he entered into a working agreement with Knottco. In terms of the said agreement he was given the permission to use the business premises of Knottco free of charge. Knottco paid him a salary to supervise and service its clients in respect of repair work Knottco referred to him. He testified that over and above the agreement he had with Knottco, the latter allowed him to pursue his trade. Knottco paid him R22 745.00 on a monthly basis.

[4] With regard to the free use of the workshop, he called Mr Carl Buchow. The latter testified about the value of the business premises. He opined that the area used as a rental space by the plaintiff was, however, 525 square metres which totaled a rental of R26 250.00 per month having taken into account the rental space per square metre, water consumption and electricity.

[5] This claim of the plaintiff that he had free use of the business premises of Knottco is at the heart of this dispute as the plaintiff contends that the value of the use of the workshop without paying any consideration must be taken into account in calculating his loss of income. The defendant holds otherwise.

[6] Dr Zievogel, an orthopaedic surgeon, in his report handed into evidence indicated that the plaintiff sustained a humeral shaft fracture which was treated by performing an open reduction and internal fixation with a plate and screws. According to Dr Ziervogel, the plaintiff probably had a four part fracture and internal fixation with a plate and multiple screws.

[7] At the time of consultation with Dr Ziervogel, it was noted that the plaintiff's shoulder had serious limitation of active movement and was painful. The plaintiff had also sustained a compression fracture. The Dr opined that the compression might in future cause mechanical lower backache. The Dr also opined that the plaintiff could not do the job for which he was trained for but was more suited to do supervisory duties.

[8] Ms Susan Van Jaarsveld, an industrial psychologist, also testified on behalf of the plaintiff. She, together with Me Kheswa, also an industrial psychologist commissioned by the respondent, compiled joint minutes. Both industrial psychologists agree that had the collision not occurred, the plaintiff would in all likelihood have been self-employed as a diesel mechanic or would have worked in a similar position until the retirement age. They both opined that the plaintiff cannot currently compete fairly for a job in his field in the open labour market, especially in an occupation that requires increased mobility and heavy physical exertion. They further hold the view that the plaintiff will be disadvantaged in terms of efficiency, effectiveness and productivity when compared to his uninjured counterparts.

[9] It is common cause that the plaintiff could not return to her work as a diesel mechanic in his own business. During the said period he did not perform any kind of remunerative work while he was recuperating. He thus generated no income. Though he later returned to work, he performed his work with considerable pain and discomfort. Due to the injuries and its sequelae he can only perform supervisory duties although from time to time he is expected to exert himself in order to do other duties. Due to the challenges in his work he was forced to close business and is currently employed as a depot manager. He has apparently been employed by a sympathetic employer and earns about R30 000.

00 per month.

[10] The parties essentially agree on the aspect that there has been loss of earnings and the future loss save whether the use of the business premises free of charge should be taken into account in the calculation of the said loss.

[11] That the plaintiff had his own business as a sole proprietor and also earned a salary in the amount of R22 745 from Knottco is not in dispute. The plaintiff contends that the probabilities are in his favour for this court to find that he had the use of the business premises free of charge. It is the case for the plaintiff that in this regard his evidence is undisputed and uncontroverted. It is further contended that there is nothing in the evidence of the plaintiff which indicate to the contrary and this, it is submitted is an indication that the plaintiff's version is more reliable.

[12] I am unable to agree with the submission on behalf of the plaintiff with regard to the above contention. It became clear during cross examination that at no stage did the plaintiff inform any of his expert witnesses, including Ms Van Jaarsveld, that he had this beneficial free use of Knottco premises. He has not explained why he did not inform his industrial psychologist about the free use of the business premises. When probed about the whereabouts of the owner of Knottco his explanation was unsatisfactory. Initially it appeared as if he did not know the whereabouts of the owner. He later recapitulated and informed court that the owner had apparently emigrated and could be contacted. His evidence on this aspect was unsatisfactory. I accordingly find that the submission that the plaintiff had beneficial use of part of Knottco free of charge stands to be rejected. With the same token, such purported use cannot be taken into account in the calculation of loss of earnings.

[13] Mr Wim Loots, an actuary, compiled three actuarial reports dated 9 June 2019, 23 February 2022 and 16 June 2022 on behalf of the plaintiff. On the other hand, Mr Grant Pretorius, also an actuary, compiled an actuarial report on behalf of the defendant. These two experts also compiled a joint minute which was accepted in evidence. They confirm that they used the same actuarial

methodology, namely, the actuarial present value method in the calculation of the loss of earnings. They further used the same table of mortality.

[14] In his report of 16 June 2022 Wim Loots was provided with the report of Susan Van Jaarsveld as well as one of Grant Pretorius for the purposes of calculating the present value of the potential loss of earnings of the claimant. He was instructed by the claimant's attorneys, had the accident not occurred, to base his calculations on the following earnings:

Date	Age	Earnings	Terms	Increases	Sources
29/01/1016	33.25	R60 000pm	01/20166	inflation	Total earnings at date of accident
					inclusive of free benefits
06/10/2047	65.00				Retirement

[16] On the post-accident earnings, he was instructed to base his calculations on the earnings based on Grant Pretorius' calculations. These are fully set out in the report and because of the finding I make, it is unnecessary to set them out in detail. In my view the calculation of the loss of earnings of the plaintiff by Pretorius in the first scenario has to be preferred. He calculated the said loss based on two scenarios. Firstly, the calculation is based on the report of the industrial psychologist called and commissioned by the plaintiff. The second

scenario was calculated as instructed by the legal representatives of the respondent

[17] It is not in dispute that the plaintiff was not able to return to his work as a diesel mechanic after the accident due to the injuries he sustained. He only returned at the end of October 2015. Before his return following his accident, he earned no income. He was forced to close his business which he conducted as a sole proprietor. At the end of 2015 he secured employment with Strada and earned R18 000 per month. During 2017 he became employed in Middleburg as Depot Manager. It is undisputed that the earning capacity of the plaintiff has been compromised. That compromised earning capacity constitute a loss for which the plaintiff is entitled to compensation.

[18] In *Dippenaar v Shield Insurance Co Ltd*¹ the court said:

[39] "In our law, under the /ex 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. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:

'In later Roman law property came to mean the universitas of the plaintiff's rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act f damage, and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland. '

¹ *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917B - D

See also Union and National Insurance Co Ltd v Coetzee 1970 (1) SA 295 (A) where damagers were claimed and allowed by reason of impairment of earning qapacity."

[19] I am in agreement with the opinion of Ms. Van Jaarsveld that seeing that the plaintiff can no longer be able to perform the work of a diesel mechanic he must be compensated for the difference between what he could have earned as a diesel mechanic and what he currently earns. In the joint minutes the actuaries agree, inter alia, that should this court accept the earning scenarios as set out in the report by Pretorius, as well as the contingencies illustrated, then they agreed with the report of Pretorius.

[20] The loss of earnings calculated having taken into account the contingencies and capping as illustrated by Pretorius, in my view establishes the amount of compensation due to the plaintiff. The report reflects a past loss of earnings of R742 776.00 and future loss of earnings of R2 444 784 .00 which all add up to the total loss of earnings in the amount of R3 187 560. I am of the view that the plaintiff has to be compensated in the amount of R3 187 560.00. The following order is thus made:

ORDER

1. The defendant shall pay the plaintiff the sum of **R3 187 560** in respect of loss of earnings;
2. The defendant shall pay the abovementioned amount into the plaintiff's attorneys account details of which are as follows:

ACCOUNT HOLDER: MAREE & PARTNERS - Trust

BANK:ABSA, Brandwag, Bloemfontein

Branch Code: 632005

Account No: [...]

Deposit Reference: JB4037

3. In the event that the defendant does not, within one hundred and eighty days from date on which this order is handed down, make payment of the capital amount, the defendant will be liable for payment of interest on such amount at 7% (the statutory rate per annum) compounded and calculated fourteen days from date of this order.

4. The defendant to pay, subject to the discretion of the taxing master, the plaintiff's taxed or agreed party to party cost, on a High Court scale up to and including the date, when this order is made an order of court, including but not limited to the following:

5. The reasonable qualifying fees of the following experts:

5.1. Dr. J F Ziervogel;

5.2 Ms. Susan Van Jaarsveld;

5.3 Mr. Wim Loots.

6. . The costs attendant upon obtaining the payment of the amounts referred to in this order

7. In the event that costs are not agreed the parties agrees as follows:

7.1. The plaintiff shall serve a notice of taxation on the defendant's attorney of record;

7.2. The plaintiff shall allow the defendant fourteen court days to make payment of the taxed cost.

P E MOLITSOANE, J

Counsel on behalf of Plaintiff:

Instructed by:

Mr JJ Maree

Maree & Partners Attorneys

BLOEMFONTEIN

Counsel on behalf of Defendant:

Instructed by:

Me C. Bornman

State Attorney

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