

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44981/2013

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

.....
SIGNATURE

.....
DATE

In the matter between:

BEDEMAN JACQUES PIERRE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

MALI AJ

[1] This is a claim for future loss of income.

[2] In the particulars of claim at paragraphs 7 to 8.4 the plaintiff alleged as follows:

“7. As a result of the driving of the insured motor vehicle, the plaintiff sustained the following injuries:

7.1. Multiple fractures of the right ankle and foot and subsequent amputation of the right foot.

(“the injuries”)

8. As a consequence of the injuries sustained by the plaintiff:

8.1. The plaintiff had to undergo medical treatment and will in future have to undergo medical treatment, requiring accommodation, medical good and services as well as assistance and assistive devices;

8.2 The plaintiff was and/or is and/ or will continue to be subjected to pain, suffering, discomfort disfigurement, inconvenience, emotional impact due to the injuries, disability and loss of amenities of life;

8.3. The plaintiff was unable to attend to his income earning activities, resulting in a loss of income;

8.4. The plaintiff has suffered a partial alternatively complete destruction of his income earning capacity”.

[3] At the time of accident the plaintiff was employed by the First National Bank (“FNB”) as a Data Specialist for a period of approximately six (6) years on a contract basis. He was unable to work for a period of 9 (nine months) after the accident. He currently works for FNB as a Business Intelligent Analyst. When the accident occurred the plaintiff was earning a monthly salary of R60 850.00

[4] In January 2012 the plaintiff returned to his position at work and continued to earn the abovementioned salary, however during this time he received no annual bonus or salary increase. During 2013 he was appointed on a permanent basis due to his skills and expertise. In July 2013 he was promoted to the position of a Business Intelligence Manager and was later employed as a Business Intelligence Analyst.

THE ISSUES FOR DETERMINATION

[5] At the commencement of the trial the issue of liability had already been settled between the parties. The basis of settlement is that the merits of the action have been apportioned 75%/ 25% in favour of the plaintiff. Therefore the defendant will be liable for 75% of the plaintiff's proven damages.

[6] General damages have been agreed in the amount of R400, 000.00 per apportionment or R300, 000.00 post apportionment. It was also agreed that the defendant would furnish to the plaintiff an undertaking in respect of future medical expenses in terms of **section 17(4)(a) of the Road Accident Fund Act 56 of 1996("section 17(4)(a)).** Consequently, the only issue for adjudication in this trial is in respect of future loss of income and the determination thereof. The parties further agreed that no oral evidence was to be led, and that issues in dispute were to be determined by the court solely on the evidence contained in the various experts' reports filed by the plaintiff. The defendant did not file medico-legal reports.

PROSPECTIVE LOSS OF INCOME

[7] The plaintiff must prove that he will probably suffer financial loss or diminution of his income. In ***Sandler v Wholesale Coal Suppliers Ltd***¹ it was stated that:

¹ 1941 (A) 194

“It is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the Court of the duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African Courts”.

[8] In **Rudman v Road Accident Fund**², the Court said:

“There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.”

[9] In **Southern Insurance Ltd v Bailey NO**³ the following was said:

“In a case where the Court has before it material on which an 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 appellant’s counsel) as to what is fair and reasonable is nothing more than a blind guess. (cf Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920.)”

[10] It is evident from the reports of the experts that the plaintiff suffered an amputation of the right foot and currently still suffers intense pain and requires the use of prosthesis. There is a high possibility that plaintiff will have a revision of the amputation. The reports further state that the pain and suffering endured by the plaintiff will have a negative psychological impact on him and will limit his career opportunities. This is because amongst other issue his partially amputated right ankle lost most of its functions, he suffers ongoing headaches relating to the minor head injury that he sustained and

² 2003(2) SA 234 (SCA) at para [11]

³ 1984(1) SA 98 (A)

presents symptoms of depression. Furthermore recently as in 2014 he was not considered for a promotion to the Head of Department.

- [11] The report of the Occupational therapist is comprehensive and also notes the following:

“Plaintiff’s employment is sedentary in nature and plaintiff is also limited to sedentary work. In the opinion of his supervisor his injury does not limit his ability to do his job. Injury as suffered in the accident in question has led to subsisting consequences, affecting Mr Bedeman’s general functioning in daily life, inclusive of affecting amenity enjoyment and capacity for earning a viable income. (my underlining). It is accepted that maintaining of efficacy levels would relate directly to the conduciveness of his work tasks and work environment to his medical condition and treatability as well as controlling of symptomology, especially considering that he at the current time, does present with a neuroma. Deference is made to the Industrial Psychologists to quantify loss of earnings suffered post-accidental and anticipated in future.”

- [12] The report of the Industrial Psychologist which also took into account the plaintiff’s workplace feedback; states that the plaintiff’s performance was considered excellent **before** (my emphasis) the accident. He was rated as a well above average performer and one of the top performers by his employer. He had prospects of being promoted to the Department Head or “IT” Manager. It was postulated that promotion would likely have transpired over a period of six to 18 months in the pre-accident scenario. In this regard **Road Accident Fund v Guedes**⁴ is instructive, wherein the following was stated:

“In the specialised field in which she works such as Information Technology (IT), it is not unusual for the outstanding or even merely competent, young people to make rapid progress, sometimes even meteoric progress”.

⁴ 2006(5) SA 583 at 589 (A)

In *casu* the plaintiff is middle aged, but the industry he is in, undeniable has upward mobility prospects. As stated by his employer the promotion would have transpired sooner in the pre-accident scenario.

[13] Having regard to the unchallenged report of the Occupational Therapist read with the Industrial Psychologist's report; I am satisfied that the plaintiff will suffer future loss of income. Significantly the Industrial Psychologist reported that post-accident the plaintiff's career progression has been delayed by two and half years. Furthermore that the plaintiff's future work capacity and employability have been curtailed as he suffers from lower productivity and emotional difficulties which have limited and delayed his promotional prospects. In this regard it was submitted on behalf of the applicant that he is disadvantaged in the open labour market.

[14] The defendant disputes that the plaintiff's career opportunities will be limited. As indicated above the defendant did not submit any expert reports to challenge the medico-legal reports of the plaintiff. Mr Tonyela, counsel for the defendant relied on the plaintiff's Occupational Therapist's interview with the plaintiff's supervisor. The extract referred reads as follows:

“(i) he reported that they are happy with his work performance and have not experienced any difficulties.

(ii) It was confirmed that he was made permanent in October 2013. This was due to the reporting that they did not want to let him go, due to the skill and the knowledge he retains.

(iii) It was also indicated that his physical disability will neither advantage/ disadvantage him in securing of promotions”.

[15] Mr Tonyela relied on the opinion of the employer concerning the employee at that point in time based on his then performance. The opinion of the experts is that with the passage of time the injuries will increasingly interfere with his

employment. This opinion is not challenged by the defendant. The employer's opinion is not inconsistent with the experts' opinion as it is based on the fact which then presented.

[16] On the evidence before me, the plaintiff has satisfactorily demonstrated that he will suffer future loss of income.

CONTINGENCIES

[17] Contingencies have been described as the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned.⁵ In his book *The Quantum Yearbook*, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation..... The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of employment, promotion prospect, divorce etc.

[18] Koch refers to the following as some of the guidelines as regards contingencies:

- "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.
- Sliding scale: 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on **Goodall v President Insurance**⁶.1978 (1) SA 389.

⁵ AA Mutual Insurance v Van Jaarsveld 1974(4) SA 729 (A)

⁶ 1978 (1) SA 389

- Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[19] In the present matter the plaintiff's future loss of earning capacity has been calculated by Ivan Kramer, a fellow of the Actuarial Society of South Africa as at 7 May 2015. The basis of the calculation and the assumptions made which were not challenged included the following:

Values below are in Rands	But for the Accident	Having regard to the accident	Net loss
Gross accrued value of income	0	0	
Less contingency	0	0	
Net accrued value of income	<u>0</u>	<u>0</u>	<u>0</u>
Gross prospective value of income	10 846 227	10 437 373	
Less contingency	1 627 384	3 131 212	
Net prospective value of income	<u>9 221 843</u>	<u>7 306 161</u>	<u>1 915 682</u>
Total value of income	<u>9 221 843</u>	<u>7 306 161</u>	<u>1 915 682</u>
Contingency %			
accrued	0.00%	0.00%	
Prospective	15.00%	30.00%	

[20] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are

not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[21] After considering all the expert's opinions I agree with the actuarial calculations of the plaintiff that the value of the income but for the accident is R9221 843.00 and for having regard to the accident is R7306 161.00. The contingency deductions of 15% for the but for the accident scenario and 30% for the having regard to the accident will fairly compensate the plaintiff for the loss suffered as a result of the accident.

[22] I accordingly make the following order:

1. The defendant is to pay the plaintiff a sum of R2, 315,485.00 (being R1, 915, 682, 00 in respect of loss of income plus R400, 000.00 in respect of general damages) minus the apportionment of 25% which gives rise to a net award of R1, 736, 614.00.
2. The defendant is to provide the defendant with a section 17 (4) (a) undertaking in respect of future medical expenses.
3. The defendant is to pay the plaintiff his taxed or agreed party and party costs, such costs to include the costs of both 7 and 8 May 2015.

N. MALI

Acting Judge of the High Court of
South Africa, Gauteng Local Division,
Johannesburg

APPEARANCES:

Counsel for the Plaintiff : Adv D.J Erasmus
Instructed by : Attorneys
Counsel for the defendant : Adv D. Tonyela
Instructed by : Attorneys
Date of Hearing : 07 May 2015
Date of Judgment : 11 June 2015