IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 56846/17
DATE: 13 May 2021

WINNERS LYMSON MABASA **Plaintiff**

V

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT

MABUSE J

[1] This is a claim for payment of money. The claim arises from a motor vehicle accident that took place on or about 27 November 2016 and at or near corner Burtekant Street and WF Nkomo Street, involving motor vehicles bearing registration numbers and letters […] and […]. At the material time of the said collision, the Plaintiff was a passenger in motor vehicle ….

[2] The said collision was caused by the exclusive negligence of the drivers of motor vehicles.

[3] According to the Plaintiff's particulars of claim ("POC"), following the said motor vehicle collision, the Plaintiff suffered the following damages and injuries:

3.1 future medical expenses;
3.2 loss of earning capacity; and
3.3 general damages.

[4] As a consequence of the said injuries the Plaintiff suffered the following: loss of future medical expenses R100,000.00; loss of earning capacity R90,000.00; general damages R400,000.00.

[5] Following the said collision on 29 January 2020 the Plaintiff commenced litigation by issuing summons against the Defendant in which it claimed the relief set out in paragraph [1] *supra*.

[6] The matter came before the court on 15 February 2021. It was stood down several times to enable the parties to reach settlement and once to enable counsel for the Plaintiff to consider the Plaintiff's position with regard to the actuarial report by Munro Forensic Actuaries. I will come back to this report later.

[7] Counsel for the Plaintiff was Adv Mametse. On 3 March 2021 before I reserved judgment in the matter, I asked him if he stood by the actuarial report. He responded positively. I also asked him if he had anything further to say upon which he asked for an adjournment in order to consider his brief. On resumption he asked for an order in accordance with the terms of his draft order. This draft order includes, among others, reasonable costs for attending medico-legal assessments of obtaining the reports and their preparation. The expert reports uploaded on Caselines were from Dr P Kumbirai, the orthopaedic surgeon, who also completed the RAF4; Dr JA Ntimbane, neuro-surgeon who also completed the RAF4; Dr Shibambo, occupational therapist; Mr Oscar Sechudi, industrial psychologist; Munro Forensic Actuaries as I referred to them above. As I already have pointed out there was no appearance for the Defendant on 15 February 2021 when the matter commenced. Adv Mametse informed the Court that the Defendant is aware of the date of hearing.

[8] The Defendant had resisted the Plaintiff's claim. For that purpose, the then Defendant's attorneys had delivered both a special plea and a plea on the merits of the claim. In the special plea the Defendant had asked for the dismissal of the Plaintiff's claim by reason of the fact that the Plaintiff had failed to comply with the provisions of Regulation 3(3). The Defendant contended for that reason this Court had no jurisdiction to make a finding on whether or not the Plaintiff's injury was serious nor to make a finding regarding whether the Plaintiff was entitled to claim non-pecuniary loss against the Defendant. In the main plea, the Defendant still

contested the Plaintiff's claim and asked that it be dismissed with costs, in the alternative that the Plaintiff's claim be subjected to s 2 of the Apportionment of Damages Act 34 of 1956.

[9] In terms of the pre-trial minutes of 10 February 2020, the Defendant had conceded the merits of the Plaintiff's claim. The recording in the said pre-trial minutes states that:

"3.1 The Defendant records that merits had been conceded already directly from the RAF."

Another recording states as follows:

"State whether the matter is ready to proceed on the merits only or merits and quantum or quantum or only. On this question the answer was only quantum."

A matter can proceed on quantum only if the issues regarding the merits have been sorted out between the parties. Once the merits have been settled by the Defendant conceding same, the need to lead evidence on the merits falls by the wayside. In this case no evidence on the merits was led. I must point out that there was no appearance by the Defendant at any hearing of the matter. So, the only issue that the Court had to determine was quantum with regard to the general damages and loss of earning capacity.

[10] The claim for loss of earning capacity must be considered in the light of the summons or to be specific, in the light of what was claimed in the summons and the amendment of the claims. Rule 18(4) of the uniform rules of court states that:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader (in this case the Plaintiffs) relies for the claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

In my view, the Plaintiff has, in his combined summons, satisfied the requirements of this sub-rule. For that reason, it is evident that the Plaintiff claims for:

10.1 future medical expenses;

10.2 loss of earning capacity; and

10.3 general damages.

[11] It is the duty of the attorney who consults from the beginning with the client to glean the essential facts which gave rise to the client's decision to consult with the attorney. A few short questions concerning the circumstances under which the accident took place will normally enable the attorney to advise the client whether these particular circumstances qualify for a claim under the Road Accident Fund Act. It is therefore the duty of the attorney to properly formulate the claim. In the course of time, the attorney may find it necessary to amend the claim against the Fund. An amendment of a claim may be necessitated by the expert report. The attorney may want to bring an amendment to the claim in order to bring it in line with the expert report. A claim may be amended at any time before judgment.

[12] As indicated above, one of the Plaintiff's claims is for loss of earning capacity. This is an independent and self-standing claim on its own. A person's bodily injury may be so severe that he is either temporarily or permanently prevented by the injuries he sustained during the accident from earning a salary he earned and prior to the said accident. This will result in damages he suffered due to loss of his capacity to earn in future. In terms of **Hawker v Life Offices 1987 (3) SA 777 C** a person's earning capacity is a recognised subjective right consisting of personality and monetary elements. An accident that results in the injuries to a person which is so severe as to either temporarily or permanently prevent such a person from earning what he earned before the accident is regarded as an unlawful interference with the right to earn a living. If that is the case it was imperative for the Plaintiff to recover such a future loss from the Defendant in the claim.

PRINCIPLES OF ASSESSMENT

[13] There is a basis for the assessment of loss of earning capacity (in other words the income of the claimant prior to the accident) it is possible mathematically to assess the loss of earning capacity. Pure mathematical assessment of such damages is not acceptable to the Courts due to the fact that such mathematical calculations will limit the Court's inherent jurisdiction to assess damages. In this regard see **Hulley v Cox 1923 AD 234 and Gravits v Mutual & Federal 1994 (1) SA 535 (A)**.

[14] According to the Law of Third Party Compensation 2nd Edition by HA Klopper, there are two approaches that are employed when assessing damages based on loss of earning capacity. The first approach is a reasonable and fair amount based on the proven facts and the proven circumstances. See **Union Government v (Minister of REH 1930 AD 385 and Hulley v Cox) 1923 AD 234**. In **Goldie v City Council of Johannesburg 1948 (3) SA 913 (W) at 920**, Ettlinger AJ, the Court had the following to say:

"Mr Hart, who argued the case for the Defendant, quoted a number of cases such as Union Government (Minister of REH) v Clay (1913 AD 385) Hulley v Cox (1923 AD 234) and Craig v Franks (1936 SR 41) in support of the proposition that it is wrong to calculate the amounts to be awarded under these heads of damage on the basis of an annuity, and that where such an actuarial calculation affords useful guidance, the true basis is what the court considers, under the circumstances of the case, to be a fair and reasonable amount to be awarded the Plaintiff as compensation. This may be so, but in the case where it is necessary to award compensation for loss of future earnings, I have difficulty in appreciating what better starting point there can be than the present value of the future income which the Plaintiff has been prevented from earning. From this point proper allowance must be made for various contingencies, but if the fundamental principle of an award of damages under the Lex Aquilia is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not on impulse or by guesswork."

This approach was adopted by Hennogsberg J in **Gillbanks v Sigournay 1959 (2) SA 11 (N)**. This is the case in which the Court stated that:

"As I appreciate the law on this aspect of the case, the court is not required to give an absolutely perfect compensation. Exact mathematical calculation is impossible. A computation upon an annuity basis affords some guide, but ought not to be considered as a perfect guide and other circumstances must be given due weight. In this connection I do not think that I can do better than apply the same principle as was applied in the court a quo in The New Indian Assurance Co Ltd v Naidoo supra. That principle, as appears in the abovementioned judgment, is that when one is asked to assess a claim based upon estimated loss of future earnings one is really required to arrive at such a sum presently payable as will give to plaintiff

a periodic payment: and the figure arrived at should be such that at the end of the period there would be no capital sum left."

[15] There is an English case of **Fletcher v Autocar and Transporters Ltd (1968) 1 ALL ER 726 (CA) at 739C to 741E** in which the actuarial of assessment of damages in respect of future loss of earning capacity was rejected. The Appellate Division has however now declined to follow this approach in these terms *"the second attack on the short judgment of the trial court was that an actuarial computation was inappropriate in the present case for the reason that it was based on assumptions and hypothesis so speculative, so conjectural, that it did not afford any sound guide to the damages which should be awarded.*

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, sooth-sayers, 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 and blind plunge into the unknown. The other is to try to 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 upon the soundness of assumptions, and these may vary from strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non possumus attitude and make no award, in case there 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 when the result of an actuarial calculation 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" (dealing with the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."

[16] A trial judge retains nonetheless a large discretion to award what under the circumstances he considers right. He may be guided but he is certainly not tied down by inexorable actuarial calculations. See in this regard **Legal Insurance Co Ltd v Botes 1963 (1) SA 608 A at 614 E-G**. In this judgment the Court had the following to say:

"The remedy relates to material loss "caused to the dependants of the deceased man by his death". It aims at placing them in as good a position, as regards to maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, perculiar, sui generis - but it is effective. In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations. In its present form, robust and practical, the remedy illustrates the growth and flexibility of a city of law, basically Roman-Dutch, which we have as heritage in this country."

CALCULATION

[17] Where the Plaintiff suffers a permanent impairment of his earning capacity the following is a proper and effective method of assessing loss of his earnings in the majority of cases:

17.1 calculate the present value of the future income which the Plaintiff would have earned but for his injuries and consequent disability;

17.2 calculate the present value of the Plaintiff's estimated future income if any, having regard to his disability;

17.3 subtract the figure obtained under (2) from that obtained under (1); and

17.4 adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies.

FUTURE MEDICAL EXPENSES

[18] The Plaintiff's claim for future medical expenses will be covered by the Defendant issuing a certificate in terms of s 17(4) of the Road Accident Fund Act. This certificate will cover all the Plaintiff's future medical expenses.

[19] At the outset, I must make it very clear that although the Plaintiff has filed several expert reports, no-one of such experts testified or tendered any evidence despite the Plaintiff's attorneys having delivered notices in terms of Rule 36(9)(b) in respect of each such expert. No affidavit has been tendered in respect of each expert's evidence. It is not enough simply
to file the expert reports and a notice in terms of Rule 36(9)(b). It is important that an expert should testify. If they are unable to attend Court in order to testify, their affidavits can be obtained and placed before court. In their affidavits they will confirm the contents of their report.

[20] It is important that the Court should be persuaded that a witness is competent to testify as an expert on the subject considered. This is normally done by questioning the witness himself. In this way the Court will learn about the witness' qualifications and experience. Failure to do so may result in a finding by the Court that the experts' evidence remains mere opinion and thus, irrelevant. See in this regard **Mkhize v Lourens & Another 2003 (3) SA 292 T**. In this judgment the Court found that the Rule 36(9)(a) and (b) notices and summary of the evidence to be given by the expert at a trial have no evidential value, and, accordingly, could not cure the defect of failure by the expert to testify. The judgment continues further at 292 G-H and state that:

"The Court still had to be satisfied that the witness did, indeed, possess expert and specialised knowledge which the Court did not possess or of which it could take judicial cognisance. Failure to place the expert qualifications and alleged expert knowledge before Court was a fatal flaw."

Mr Mametse did not tell the Court that the Defendant had consented to the expert reports being handed in. They were therefore not admitted by the Defendant. In the circumstances the expert reports remain mere opinion and are irrelevant.

LOSS OF EARNING CAPACITY

[21] The second claim that the Plaintiff has put against the Defendant is loss of earning capacity. This issue must be considered in the context of the summons. Firstly, apart from alleging it, there is no support for this claim in the particulars of claim nor is there any evidence to support it. The Plaintiff has furnished no basic reasons why he claims for loss of earning capacity against the Defendant.

[22] Now in this case the Plaintiff has not testified. It is therefore unknown to this Court whether the Plaintiff sustained temporary or permanent injuries. A projection of the Plaintiff's salary into the future is only possible if there is evidence of a permanent loss of earning capacity. In the absence of such evidence a claim for loss of earning capacity is not possible. The onus rests on the Plaintiff to prove that he has sustained physical injuries; that his injuries are so severe that he is permanently prevented by the injuries he sustained from earning a salary; he must prove that the injuries resulted to damages he suffered due to loss of his capacity to earn in future. In order to show a permanent loss of earning capacity, see in this regard **Commercial Union Assurance v Stanley 1973 (1) SA 699 (A)**, the claimant must be able to prove that he has no reasonable prospects of recovery.

[23] *In casu,* there is no evidence of change in personality; brain deterioration; loss of enjoyment of life; loss of his work; there is no evidence that he can no longer do the kind of work he was doing before the collision. No evidence of any change in his earnings. There is no evidence that the employer contemplates reducing the Plaintiff's earnings as a result of his injuries.

[24] It must be pointed out that a claim for loss of earning capacity is not the same as a claim for loss of earnings or income. For loss of income arises in a situation or in the event of a claimant suffering loss of legal income as a result of his bodily injuries due to the absence of his employment or business or profession. Such a financial loss can be recovered. See **Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194**.

[25] In respect of a claim for loss of earnings, it should be established from the employee whether there was any absence from work as a result of the injuries he sustained in the collision and if so, for what period. A claim for loss of earnings

should, like a claim in respect of hospital and medical expenses, be properly vouched. Documentary substantiation of a claim in respect of the loss of earnings is necessary. See **Van der Heuwel v SA National Trust Assurance Co Ltd 1950 Corbett and Buchanan 447 (C)**.

[26] On the other hand, injuries sustained by the claimant may have impaired his future ability to earn a living. This may either be temporarily or permanently. In such a case the claimant is entitled to claim damages for the future loss of earnings more accurately stated for his reduced earning capacity or for the period of the impairment.

[27] In my view, the Plaintiff has not proved any loss of earning capacity. The actuary's report by Munro Forensic Actuaries does not help the Plaintiff's cause. This is so because the actuaries were instructed "to estimate the capital value of the potential loss of earnings suffered by the claimant" and not the capital value of potential loss of earning capacity.

GENERAL DAMAGES

[28] In this regard I was referred by counsel to the following:

"Nithiananthan & Another v Auto Protection Assurance 1963(1) QOD 172D (2020 Quantum Year Book) in which an amount of R960 000.00 was awarded."

In this case the Plaintiff had suffered injury to the brain, fracture of the femur, minor cuts and abrasions which resulted in loss of intellectual and physical condition, temporary pain but no

permanent disability. He was treated for laceration of the forehead, a right arm fracture, left chest injury. He was admitted at the hospital for 5 days. He used over-the-counter medication. The Plaintiff had no headache nor did he have an epilepsy.

[20.2] Farber v Calidonian Insurance 1952 (1) CEB 347 Quantum Year Book Value. In this matter the Plaintiff sustained a fracture of both bones of the left forearm, torn ligaments at the back of the neck, bruising of right thigh and forehead metal plate inserted and tender over screws and permanent scar. The Plaintiff in that matter was awarded R195,000.00 in 1952.

[20.3] Blyth v Van der Heever 1979 (3) CEB 2020 Quantum Year Book Value are 792,000. In this matter the Plaintiff sustained a fracture of radius and ulna of the

right forearm which resulted in sepsis, limited functional capacity, ensuring insertion of a metal plate. The Court awarded him then R732,000.00.

[20.4] Sauerman v Road Accident Fund 2004 (5) QCEB B4-190 (2021) Quantum year book value for R483,000.

The Plaintiff had sustained a head injury, whiplash to injury to neck which resulted in concussive syndrome which became irreversible, failure to cope with demands of daily living and work, poor attention and memory, irritability, headaches, dizziness, fatigue and anxiety. The Court awarded him R483,000.

[29] In this matter I have had regards to what appears in paragraph 15 of this judgment. I am of the view that an amount of R400,000.00 is in my view a fair and reasonable compensation for the general damages.

[30] In the result, I make the following order:

1. The Defendant is hereby ordered to furnish the Plaintiff within 21 days of this order with a certificate in terms of s17(4) of the Road Accident Fund Act 56 of 1996.

2. The Plaintiff's claim for loss of earning capacity is hereby dismissed.

3. The Plaintiff's claim for general damages succeeds and it is ordered that the Defendant should pay the Plaintiff a sum of R400,000.00 in respect of general damages.

4. The Defendant is hereby ordered to pay the costs of this suit.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:	Adv AM Mametse
Instructed by:	Ndhima Attorneys
Counsel for the Defendant:	No appearance

Instructed by:	Mkhonto and Ngwenya Inc.
Date on the trial roll before Mabuse J:	15 February 2021; 17 February 2021; 19 February 2021; 3 March 2021
Date of the judgment:	13 May 2021