



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

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

CASE NO. 70315/2014

In the matter between:-

JETINA MBEDZI

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

GWALA AJ

1. On 28 June 2011, the plaintiff was involved in a motor vehicle collision in which she sustained some bodily injuries. She instituted an action against the defendant for the recovery of the damages suffered. The Defendant conceded liability in full in favour of the Plaintiff.

2. The issue pertaining to quantum was partially resolved. The Defendant agreed to provide the Plaintiff with the usual undertaking certificate as contemplated in terms of Section 17[4][a] of the Road Accident Fund Act 56 of 1996. The Defendant rejected the seriousness of the plaintiff's injuries. The plaintiff referred the dispute in that regard to the Health Professions Council of South Africa ("the HPCSA") which has since rendered its outcome. The HPCSA assessed the injuries as non-serious. The plaintiff is not claiming any compensation for past medical/hospital expenses.
3. What remained for determination was the issue pertaining to plaintiff's loss of earnings. The defendant disputed that the plaintiff had suffered any loss of income. In the alternative, it argued that the high contingency deductions should apply. Both parties appointed and filed corresponding experts' reports.
4. The trial proceeded on 16 November 2018 only on the issue of loss of income. At the beginning of the trial counsel for the parties informed me that they had reached an agreement regarding the way the experts' reports should be treated. They had agreed that the respective experts' report were admitted and as such constitute evidence and that none of the experts would be called to testify since their respective reports were admitted as evidence. They agreed that they would use and refer to the experts' report during the trial including argument, and they did.

5. The experts who examined and investigated the plaintiff's loss of earnings could not find a common ground regarding her earnings. This was due to inconsistencies and discrepancies in the information given by the plaintiff regarding her earnings before the motor vehicle accident. I will deal with these discrepancies later in the judgment. In view of the inconsistent account that the plaintiff provided regarding her income, the experts took a view that she should be called to testify orally in court. It is against this background that the matter proceeded to trial.
6. The only witness that was called to testify *viva voce* was the plaintiff after which both parties closed their respective cases. Her evidence was limited to her earnings. She submitted an affidavit deposed to by herself dated 14 November 2018. The relevant portion of the affidavit states that:-
 - “3. *I confirm that I used to do business as an informal [T]rader importing fruits and vegetables from South Africa and selling [it] to other traders in Zimbabwe from 1998 up until 2011.*
 5. *I further confirm that I used to make around R 6000.00 in a month and it was cash in hand.*
 6. *I further confirm that I am currently not working at the moment”.*
7. In her oral testimony in chief she testified that she was an informal trader importing fruits and vegetables into Zimbabwe. She started this business in

1998. According to her, she derived an income of approximately a sum of R6, 000.00 a month from this business since 1998. She had business partners with whom she was working. She stopped the business due to the injuries she sustained during the accident.

8. She did not have a bank account and according to her she kept the profit made from the business at home. She did not have any form of documentary proof of income. She could not bring any of her business partners to corroborate her version and apparently, according to her, she was somehow previously informed to bring such a person to court but she did not. She could not explain why her business partner could not come to court to corroborate her version about their business and income.
9. She was cross-examined extensively about the expenses of her business. At first she stated that the total expenses of the business were R2, 200.00 which she used to buy stock from the market to sell. She confirmed that this would bring the gross income of the business to R8, 200.00. Later asked about whether she had employees, she stated that she employed two employees whom she paid a sum of R1, 600.00 a month in total and this was admitted to constitute an expense to the business.
10. It was put to her that taking into account the gross amount of R8, 200.00 made per month and less all expenses (being the sum of R2, 200.00 plus

R1, 600.00) her net income would still be less than R6, 000.00. The plaintiff changed her version and stated that the salaries of her employees were in addition to the sum of R8, 200.00 originally confirmed by her as a gross income.

11. She was asked about transportation costs for transporting the goods. She stated that she had a vehicle which she used to transport the goods and she would pay R600.00 for fuel. Once again it was suggested to her that if the fuel costs were taken into account from the gross income of R8, 200.00 confirmed by her the net income would be less than R6, 000.00. In response she stated that even the fuel costs expense was in addition to gross income of R8, 200.00 originally confirmed by her.
12. Still under cross examination the plaintiff testified that she earned the said income in the sum of R6, 000.00 and paid the same expenses since 1998 until the date she was involved in an accident.
13. Counsel for the defendant asked the plaintiff to explain the reason she could not continue with her business. The plaintiff stated that she stopped the business because during 2012, the Zimbabwean authorities introduced some Regulations that do not allow anyone except the politicians and related persons to import fruit and vegetables from South Africa to Zimbabwe. She stated that since the introduction of the Regulations it

became impossible for her to continue with the business.

14. She confirmed that she was still doing business during 2012, at the time when the Zimbabwean authorities introduced these Regulations which restricted traders from importing goods from South Africa. Since the introduction of these Regulations traders are not allowed to import goods into Zimbabwe and this affected her too.
15. She was confronted about the inconsistent account of her earnings that she gave to various experts that examined her and investigated her loss of income. She could not offer any explanation as to the discrepancies in the information about her earnings.
16. Indeed the plaintiff gave varying accounts about her earnings. For instance, to defendant's Occupational Therapist, Leazanne Toerien, the Plaintiff reported that she was importing fruits and vegetables into Zimbabwe from 1996 to 2008. She reported earnings of R24, 000, 00 per month. She reported that she was unemployed at the time when she was involved in a motor vehicle accident and her last employment was during 2008.
17. To Dr Pienaar she reported that she was self-employed house builder. To the Occupational Therapist, Melloney Smit, appointed by her, she

indicated that together with her three to four partners they would purchase a stock of vegetables and fruits to the value of about R4, 000, 00 to R6, 000, 00, and that they would split the profit between themselves resulting in them earning about R500, 00 per load, and this would be R1, 000, 00 per week and thus a profit of about R4, 000, 00 a month per person.

18. Confronted with the varying information regarding the plaintiff's earnings, the Industrial Psychologists ultimately recommended that she should be called to testify in court to provide clarity on her actual pre-morbid employment at the time of the accident. It appears from the reports that both Industrial Psychologists questioned the plaintiff on several occasions during their respective assessments about her employment at the time of the accident. To Nicolene Kotze, Defendant's Industrial Psychologist, the plaintiff was adamant that her only source of income from 2008 to date of examination was derived from the rentals in respect of her property. She denied engaging in any other form of work.
19. Did the plaintiff suffer any loss of income? if so, was such loss suffered as a result of the motor vehicle accident under consideration? Although determination or quantification of the actual amount of loss may be speculative, the issue whether a litigant has suffered any loss is based on proof on a balance of probabilities.

20. Once a matter is before court, the standard of proof always applies. There is no room for speculation. In **Southern Insurance Association v Bailey NO 1984 1 SA 98**, the following is stated:-

"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, 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".

21. In a civil trial (as this is a civil trial), the trier of fact seeks to attain the "right" or "correct" decision based on proof (or lack thereof) on a balance of probabilities. In so doing he/she must satisfy him/herself that the party that bears the onus of proof has discharged it on a balance of probabilities in order to be successful. It is axiomatic that the onus was on the plaintiff to prove her case on a preponderance of probabilities.
22. In order to put the plaintiff to a position she was but for the accident, she must prove that the loss occurred. Invariably, in this regard she must prove the source of her income. Once the source and the income is established, there follows the quantification of the loss. On the principle of **Bailey NO**, the quantification of the loss of earnings may be speculative and estimated.

23. The plaintiff's problem in this matter is not so much about quantification of the actual amount of loss of her income. There is plethora of authorities on how to assess and quantify such damages. The issue that confronts the plaintiff is whether indeed she had the income she claims to have lost in the first place.
24. In her oral evidence the plaintiff kept on shifting goal posts on the gross income of the business. She kept on retrofitting the expenses of the business whenever it appeared that such expenses would impact on the amount she purported to have earned. Every question asked elicited a contradiction and an escalation to what she claimed to be the gross income of the business. It did not matter if she had already confirm the gross income of the business, for any other question that was posed she kept on moving the amount higher and higher. This is compounded by the inconsistent account that she provided to the experts who consulted her which information is now part of the evidence.
25. She was aware that due to inconsistent account of her income given to the various experts the defendant did not admit that she had a business of importing goods into Zimbabwe. Indeed with the inconsistent accounts regarding her earnings some objective evidence would be needed to prove the existence of such earnings. This notwithstanding, the plaintiff did not

submit any proof that the business existed at all or at least proof of her earnings except for her say so which is tainted by inconsistencies. She elected not to call any of her business partners to corroborate her version at least about the existence of the business and its income.

26. There are further problems with the plaintiff evidence. It is improbable that her business could have made the income and earnings and kept the same amount of expenses consistently since 1998. Over time there would be some changes taking into account the inevitable impact of consumer price index and inflations that occurred over the years.
27. The plaintiff did not adduce any credible evidence of her income even of her loss. She was not convincing at all. At times she would mumble when she answered questions. She had to be cautioned several times to speak audibly.
28. It remains unclear as to what caused the plaintiff to discontinue her business if she ever had any. At one stage during examination in chief she testified that she ceased her business due to injuries. During cross examination she stated that she continued with her business up to 2012 long after the accident had occurred. She stated, still in cross examination, that the reason to discontinue her business was due to the introduction of the new regulations by the Zimbabwean government which prevented

traders from importing goods into Zimbabwe. She stated that she can no longer conduct such business due to political climate.

29. The fact that the plaintiff continued with her business until the introduction of new Regulations on importation of goods into Zimbabwe is inconsistent with her allegation that she could not continue with the business due to injuries sustained in the motor vehicle accident. This coupled with the inconsistent account about her income and the absence of objective evidence regarding her income complicates her case.
30. In **Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 A** the following was stated at 9178-0:-

"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..."

31. Even if it would be accepted that the plaintiff did have the business as she alleged, it would still be a hard task to determine the difference between the value of her estate before and after the accident because of the inconsistent account of her earnings.

32. It is trite that the court must assess the amount of the loss by making the best use it can of the evidence placed before it (**See Hersman vs Shapiro & Company 1926 TPD 327 at 379**). All of this, though, requires the plaintiff to place before the court best evidence she has so that the court may assess the damages. The damages are not assessed in a vacuum and merely on the say so of the plaintiff.
33. On the evidence before court the plaintiff has not established that she had an income at the time of the motor vehicle collision. There is an inconsistent account as to the reason to discontinue the business. The plaintiff expected the court to choose either she ceased her business in 2008 when the business fell or in 2011 when she was involved in a motor vehicle or in 2012 after the introduction of the Regulations on importation of goods into Zimbabwe.
34. The alleged business of trading in vegetables and fruits is so contaminated that I cannot rely on it to make a finding for the plaintiff. With that, there is no evidence upon which a finding may be made in favour of the plaintiff.
35. It may very well be so that the plaintiff indeed suffered the loss of income but she was unable to present her account of earnings. Where the plaintiff has failed to present evidence upon which a finding may be made in her favour, an order for absolution from the instance is competent even at the

end of the defence case. That is an order I think is appropriate in this matter. The absolution from the instance should be limited though, only to the issue relating to her earnings.

36. Accordingly, in the result the following order is made:

- a) An absolution from the instance is granted in so far as the matter relates the plaintiff's loss of earnings;
- b) Plaintiff is ordered to pay the costs of the trial.



M. Gwala AJ
Acting Judge of the High Court of South Africa

Date of Hearing: 16 November 2018

Date of Judgment: 14 DECEMBER 2018