IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50107 / 2019

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

09 May 2022
DATE

SIGNATURE

In the matter between:

G MAHLATJI Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded on Case lines and is deemed to be 09 May 2022.

JUDGMENT

Munzhelele, J

Introduction

[1] The Plaintiff, a young man of 36 years of age, is claiming from the Road Accident fund (the RAF) for damages arising from the injuries he suffered from the accident at or near Brits and Mabopane road. The amount for damages is as set out on the amended particulars of claim as follows:

1. Past medical and hospital expenses: R 5 000,00
2. Estimated future medical treatment: R 195 000,00
3. Past loss of income: R 260 388,00
4. Estimated future loss of income: R1 206 787,00
5. General damages: R 800 000,00

[2] At first, the RAF defended the matter. Later, the RAF attorneys withdrew as attorneys of record, and there was no defence attorney appointed to proceed with the matter any further. The RAF never reacted to any notices served by the plaintiff since the withdrawal of the defence attorneys. They were requested to attend pre-trial proceedings and failed to do so. The plaintiff then struck out their defence during the interlocutory application. Now, this matter came before me on the default judgment roll. Both the merits and quantum were to be proved by the plaintiff. There were no witnesses who were called to testify *viva voce*. However, the plaintiff submitted his affidavit as evidence in this case on merits. Counsel for the plaintiff presented their case.

[3] The facts of the case on merits are as set out on the plaintiff's affidavit filed on the case lines. The affidavit avers that:

> 'On 7 April 2018 during the night while the plaintiff was walking and hiking next to the R566 road, between Brits and Mabopane he was involved in an accident. The plaintiff was wearing a white T-shirt, blue jeans and white tekkies. He walked on the left hand side of the road approximately 2 meters away from the tarmac. While trying to catch a ride to Mabopane a vehicle collided with him on the gravel part of the side walk from the back. He presumes that the vehicle must have left the road because he was outside the tar road. Before collision he saw the vehicle's lights

approaching, but cannot know why the vehicle left the road and collided with him. After collision, he only woke up in the hospital later on.'

[4] In his arguments for merits, the counsel for the plaintiff submitted that since the court struck out the defence, the plaintiff should succeed a hundred percent on merits because there is an inference of negligence from the explanation by the plaintiff of how the accident occurred. The counsel developed his argument for the plaintiff around the fact that the defence should have explained what steps they took to avoid the collision to dispel the *prima facie* evidence that they were negligent.

The plaintiff's version is the only version which is before me. As stated above, the defendant's defence for contributory negligence was struck out. The significance of the matter is that there is no version by the defendant regarding the contributory negligence.

[5] It is trite law that when a litigant fail to adduce evidence about a fact in an issue, it goes without saying that he runs the risk of his opponent's version being believed. (See *Brand v Minister of Justice and Another*[1], and *Van der Westhuizen No v Kleynhans*[2]. However, the onus rests on the plaintiff to prove the defendant's negligence. In the absence of any contradictory evidence, the plaintiff's evidence would typically be accepted as being *prima facie* valid; it does not, however, follow that because the evidence is not contradicted; therefore, it is true. The evidence may be so improbable in light of all the evidence that the court cannot accept it. See *Meyer v Kirner* [3]. Due regard must be given to all the case circumstances, including the strength of the plaintiff's case.

[6] The evidence is that the defendant is said to have followed the plaintiff from outside the road where he was walking, and in the absence of any other version to dispute

---

[1] 1959 (4) SA 712 (A) at page 714-717

[2] 1969 3 SA 174 (O) at page 176-177)

[3] 1974 4 SA 90 (N) at para 93H

this version, the court will have to accept that this is how the events of that day unfolded. See *Galante v Dickison*[4] where Schreiner JA said;

> 'it seems fair at all events to say that in an accident case where the defendant was himself a driver of the vehicle the driver of which the plaintiff alleges negligence and caused the accident, the court is entitled in the absence of evidence from the defendant, to select out of the two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one favours the plaintiff as opposed to defendant'.

[7] I am therefore unable to make a different finding to the view of the plaintiff's counsel and the Supreme Court of Appeal on *Road Accident Fund v Grobler*[5] who said that, in the absence of the defendant's explanation of what steps he undertook to prevent the collision, therefore, the road accident fund or the insured driver was found to be negligent in the circumstances. The defendant caused the collision by getting out of the road and colliding with the plaintiff. From the plaintiff's evidence, I find that the plaintiff was able to establish that the defendant was negligent in causing the accident, which resulted in the plaintiff being injured on his knee, and fractured patella. The defendant is 100% liable for the proved damages of the plaintiff.

Quantum

[8] On the particulars of the claim, the plaintiff avers that he fractured the left knee patella and soft tissue injury as a result of the accident. As a result of the injuries, the plaintiff is claiming damages as per the amended particulars of the claim. These are:

1. Future medical expenses in the form of an undertaking in terms of section 17(4) (a) of the Road Accident Fund[6]
2. Loss of income and income capacity R1 186 912,83
3. General damages R550 0002,00

---

[4] 1950 (2) SA 460 (A) page 465

[5] 2007(6) SA 230 (SCA)

[6] Act 56 of 1996

The plaintiff's counsel, during arguments, submitted that no past medical expenses would be claimed as the plaintiff was treated at the public hospitals.

[9] The plaintiff was thirty-six years old during the accident. He sustained a left knee abrasion, and his knee was swollen with decreased range of movement on the left knee. The x-ray revealed that the left patella was fractured. The back slab was applied to the left leg. An open reduction and internal fixation of the left patella with tension band wiring operation was performed on him. The plaintiff's injuries were recorded on his medical records from the George Mukhari Hospital and Brits District Hospital.

[10] The orthopaedic surgeon confirmed the injuries that the plaintiff sustained. His opinion is that the plaintiff's left knee will always be a deficit for him and make him an unfair competitor in an open labour market. He diagnosed that the patella fracture treated with tension band wiring will result in residual knee pain, restricted range of knee movement, post-traumatic osteoarthritis of the patellofemoral joint and scarring on the knee. The orthopaedic surgeon recommended that the plaintiff's instrumentation be removed and there be replacement of the arthroscopic debridement of the knee joint, and patellofemoral joint.

[11] Before I can deal with the plaintiff's assessment by the occupational therapist, it is essential to note that the plaintiff informed the orthopaedic surgeon that he was unemployed and still is unemployed at the time of the accident. However, the occupational therapist on the report noted that the plaintiff was working as a hawker. The plaintiff himself did not give the court his version of what the position was, and neither did he give any proof of any small business (hawker) he was involved in before the accident.

[12] Further, the plaintiff never gave evidence regarding the amounts he realised from his business before and after the accident. His particulars of claim are silent about such allegations as well. There was no such proof attached to his particulars of claim regarding the amounts of income he was making as a hawker. All that we have is the different versions that the experts have on their reports in the form of hearsay about his type of

employment and income amounts without any proof. In determining this head of damages for loss of earnings or income, it was imperative that the plaintiff's evidence is before me and cannot only be determined by expert evidence. All I have before me is hearsay evidence. In *Mathebula v RAF*[7], it was stated that;

> "an expert is not entitled, anymore more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence".

Experts evidence regarding loss of earnings and earning capacity

[13] The opinion of the orthopaedic surgeon, Dr Marin, regarding the plaintiff's injuries concerning the labour market is that there would always be a deficit in the competitive world labour market because of his knee injury. He deferred this to the occupational therapist appointed to assess the plaintiff's severity of his injuries in the labour market.

[14] The occupational therapist Rita van Biljon's assessment revealed that Mr Mahlatji has slight muscle atrophy of the left thigh, reduced range of left knee flexion, and slightly reduced muscle strength in the quadriceps muscle group. Participation in the Dynamic Strength Assessment revealed him to be able to manage weights falling within the medium parameter. His pain level increased when he was required to carry and walk with a weight. His capacity for positional tolerance and mobility tasks also fell within medium parameters, and his overall level of work during this functional capacity evaluation fell within medium parameters.

[15] The plaintiff informed the occupational therapist that he passed grade 9 and worked as a self-employed hawker. He started selling wares such as perfume, sunglasses, belts

[7] (05967/05) [2006] ZAGPH

and second-hand clothes in 2007. (He was unemployed up until 2005). Post-accident, he could not earn an income for four months, during which time his family supported him. He resumed selling his wares after the time mentioned above period. There are days that pain is intrusive, preventing him from going to work. This occurs approximately six to seven days per month, mostly in winter and inclement weather.

[16] He further informed the occupational therapist that he sells his wares at a shopping complex in Marabastad. He travels there by taxi and takes a packet containing his wares. He estimated this to weigh in the region of 4 kg. He sells 5 and 6 days per week and his working hours extend between 10h00 and 19h00. At least once a month, he goes to Rustenburg or Johannesburg, where he sells his wares at a flea market. The requirements of his occupation necessitates extensive standing and walking.

[17] This functional capacity evaluation results indicate that he has the residual capacity to participate in tasks requiring medium strength. Participation in this assessment revealed that he could train on a practical level. The Industrial Psychologist should comment on the type of work to which he would be suited when considering his level of education and aptitude. He is likely to work until retirement age if he manages to secure work falling within sedentary to light parameters.

[18] The counselling psychologist Karin Havenga's report, narrates information she heard from the plaintiff without any supporting papers. She avers that the plaintiff was working from 2003 until the date of the accident. From 2003 until 2004, he was a hawker. 2005-2007 he was working at the tavern, and since 2008 he has been working as a hawker earning from R5 000,00 to R6 000,00 per month.

[19] He should be accommodated in a light/sedentary environment because he gets exhausted while walking long distances. The plaintiff will be able to retire from work until the normal retirement age of 65 years old. Mr Mahlatji was a hawker before the accident and still is a hawker after the accident. He said that he could not return to work for three months after the accident.

[20] Mr Mahlatji informed the counselling psychologist that he did not experience any cognitive problems before the accident. This included his ability to pay attention and concentrate, his short- and long-term memory, his ability to track a conversation, and his word-finding ability. Subsequent to the accident, he has noticed a mild decline in his short-term memory. He indicated that he hides his money at home and tends to forget where he hid it. He further experienced emotional changes. He reported that he has become short-tempered and is more likely to shout at his children. He further indicated that he has been angrier since the accident. His inability to provide has also resulted in increased feelings of stress, anxiety and guilt. He related that he feels like a failure as a man and a father.

[21] From the results of the psychometric assessment with counselling psychologist Karin Havenga, Mr Mahlatji presented moderate levels of depression and anxiety and symptoms of post-traumatic stress. An improvement in his physical appearance will aid in improving his emotional functioning.

[22] The plastic surgeon Dr Pienaar found that the plaintiff had a 13 cm x 1.5 cm broad, hyper pigmented scar over his left knee that is visible and unsightly. This scar can be improved to only 30%. He will retain the rest of the scarring, which will not have further surgical improvement.

[23] Industrial psychologist Dr A.C. Strydom avers that the plaintiff was unemployed from 2002 until 2007. In 2008 he worked as a hawker from 10:00 until 17:00 Monday to Friday, walking and selling in Johannesburg, Pretoria and Rustenburg. He used a bag to carry his stock. His stock worked out about R7 000,00 in income per month. He budgeted and bought stock from a China Shop in Johannesburg and sold them in busy areas.

[24] Mr Mahlatji reported that his profit is approximately R6 000,00 per month and R72, 000 per annum. The industrial psychologist Dr Strydom said that it is well known that people working in the informal labour market cannot provide proof of their income, as they are primarily paid in cash. This expert is usurping the court's duty to assess the evidence about whether the plaintiff had such kind of earnings or not. These earnings should be proved.

[25] The industrial psychologist said that the plaintiff would probably have continued working in his pre-morbid position as a self-employed hawker. His employment opportunities would have always been ambulatory, manual and physical. Pre-morbid contingencies should be applied to accommodate for fluctuations in earnings and business sustainability. An industrial psychologist suggests that the earnings noted on the plaintiff's affidavit be used as the basis for calculations. This affidavit which the industrial psychologist is talking about, is not commissioned; and as such, it cannot be of any value because it is defective.

[26] The industrial psychologist opines that Mr Mahlatji has suffered a loss of employability, work and subsequent earning capacity. He should be compensated for the difference between the pre-and post-morbid earnings. Furthermore, an appropriate post-morbid contingency deduction is suggested to accommodate uncertainty when and if he would resume duties as a Vendor.

[27] The actuary Johan Sauer calculated the past and future loss of earnings based on the assumptions that the plaintiff was working as a hawker earning R6 000,00 per month and retiring at 70 years pre-morbid and post morbid retiring at 65 years. I am not sure where the actuary got this information that the plaintiff's pre-morbid would have retired at 70 because no expert has said that. This projection would be based on the wrong information. Since the accident, he has not worked but remained unemployed. He further assumed that the plaintiff would have to work on a lower quantile income and unskilled workers at R21 400,00 per annum. The actuary projected a higher contingencies deduction for future post- morbid allowance of 5% for past earnings and 10%-30% for

future earnings because of the plaintiff's vulnerabilities. The actuary has calculated the plaintiff's total compensation to R1 467 175,00 as past loss and future loss of income and retirement at 70 years.

Applicable law

[28] The plaintiff bears the onus to prove his case on a balance of probabilities. He must adduce sufficient evidence of his income to enable the court to assess and quantify his past and future loss of earnings, see *Mlotshwa v Road Accident Fund*[8].

[29] The above statement is enchoed in this classic case, Santam Versekeringsmaatskappy Bpk v Byleveldt[9], it was held that:

> 'In a case such as the present, damages are claimed on behalf of the aggrieved party and damages mean the difference between the victim's position of ability before the wrongful act and thereafter. See, e.g., Union Government v Warneke 1911 AD 657 on p. 665 ... Damage is the unfavorable difference caused by the wrongful act. The impairment must be in respect of something that is valuable in money and would include the reduction caused by an injury as a result of which the injured party can no longer earn any income or alone but earning a lower income. " The plaintiff is required to provide and prove the factual basis that allows for an actuarial calculation, which the court is then asked to use as the basis to determine the plaintiff's loss of earnings' *(Brink v Road Accident Fund* (CC03/2014) [2017] ZAWCHC 28 at *paras* 21 to 24).

Particularly since actuarial reports and calculations are premised upon the assumptions of the industrial psychologist or other experts. See also *MS v Road Accident Fund*[10] .

[30] In *Mlotshwa v Road Accident Fund* (9269/2014) [2017] ZAGPHC (29 March 2017) paras 14 to 17, the court quoted with approval the following from *Lazarus v Rand Steam*

---

[8] (9269/2014) [2017] ZAGPHC (29 March 2017) paras 14 to 17

[9] 1973 2 SA 146 (A)

[10] (10133/2018) [2019] ZAGPJHC 84; [2019] 3 ALL SA 626 (GJ) (25 March 2019) para 13

Laundries1946 (Pty) Ltd[11], Bressler AJ, concurring with De Villiers J, elaborated on the duty of the appellant to prove her damages. On page 53 at para B-F:

"...We were urged, on the authority of Turkstra Ltd V Richards, 1926 TPD. 276, to find that as there was an admission of damage, the Court should not be deterred by reason of the difficulty of computing an exact figure from making an award of damages ... In Turkstra v Richards there was an actual valuation, 'an estimate of some sort', in the language of Stradford, J. (as he then was) ...It does not seem to me that Turkstra v Richards, supra, meant that, given one or two facts, including that of damages, a judicial officer should then be required to grope at large in order to come to the assistance of a litigant, especially one whose case has been presented in such a vague way. It seems to me that the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative assessment, a state of affairs which would result in injustice to one of the parties ..."

Evaluation of the plaintiff's case

[31] The plaintiff did not prove his income at all. The counsel is also aware that the plaintiff did not prove his income. The plaintiff wants the court to grope at large to come to his assistance and speculate the income pre-and post- accident. That is not the only issue which the court is concerned about in this case.

[32] The fact that the plaintiff was employed pre and post-accident is also riddled with discrepancies, and this leaves the court with uncertainties regarding whether the plaintiff was working or not. In paragraph 17 of the RAF1 form under self-employed the plaintiff indicated that, that portion is not applicable. RAF4, which Dr Marin completed, the orthopaedic surgeon paragraph 4.9, indicated that the plaintiff was unemployed. His report reflects that the plaintiff was unemployed before and after the accident.

[11]1952(3) SA 49(T) at 53 para B-F

[33] The occupational therapist Rita Van Biljon said in paragraph 1.2 of her report that the plaintiff has always been working as a hawker. This is totally different from what Dr Marin had said about the plaintiff's employment. The plaintiff, unfortunately, did not testify or file an affidavit to this effect. Nor discover any document that shows that he has ever worked as a hawker, e.g. till slips of the places he was buying his merchandise, affidavit of the person who mainly was selling him the merchandise. Any eye witness who saw him selling his merchandise. The attorneys and the experts never investigated this issue even when they saw the discrepancies.

[34] The occupational therapist further said that the plaintiff was still working as a hawker after the accident, which contrasts with what Dr Marin, the orthopaedic surgeon, said. This means that the plaintiff has been changing his circumstances per different consultations with different experts.

[35] The plaintiff's particulars of claim (amended and the original particulars) are silent about the self-employment as a hawker. There was not even any mention of his income. These clearly shows that the plaintiff was making up his case on the loss of income.

[36] Further discrepancies are on the issue of the income, for which is alleged that the plaintiff was able to realise as a hawker. The counselling psychologist Karin Havenga said that the plaintiff earned R5000-R6000 per month from his business. The industrial psychologist said that the plaintiff was earning an amount of R7 000,00 per month. The probability is that the plaintiff was making up these amounts. There was not even any evidence from the plaintiff about these earnings before court.

[37] It is clear that the counselling psychologist and the industrial psychologist did not investigate these incomes so that they could base their assessment upon the truth of the facts. They instead let the plaintiff be the one dictating their report instead of finding the truth and assessing such found truth. The reports based on the wrong information are

misleading and cannot be trusted. The actuarial report was also based on such reports, which were misleading regarding the income, and the calculations thereof would be incorrect. See Seriti JA in *Bee v Road Accident Fund*[12] who affirmed that:

'The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militate against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the Court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the Court.' *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 23. (See also *Jacobs v Transnet Ltd t/a Metrorail* **[2014] ZASCA 113; 2015 (1) SA 139** (SCA) paras 15 and 16; see also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F.'

[38] The plaintiff has no evidence either through an affidavit or *viva voce* about his employment or his income except what the experts are saying. Further, the plaintiff did not have any supporting documentation regarding his income that corroborates or is consistent with the report of the occupational therapist, counselling psychologist and industrial psychologist. Instead, several glaring factual inconsistencies in the expert reports regarding his employment and his income remain unresolved. A court is entitled to reject an expert report and place no reliance upon it if it believes that the expert report is based on incorrect facts and incorrect assumptions and is unconvincing and therefore unreliable. See *Modise v Road Accident Fund*[13].

[39] The plaintiff's counsel argued that because the plaintiff is a hawker, there is no need to prove his income before and after the accident. This doesn't seem right because every plaintiff is expected to prove their case on a balance of probabilities according to the case laws quoted above.

---

[12] 2018 (4) SA 366 (SCA) para 22

[13] (10329/2019) para 4.12

[40] The court is aware of the nature of the informal sector in South Africa. Many of our people's livelihood depends on generating an income in this sector on cash bases. Our court must treat every member of the society equally before the law. The court cannot turn a blind eye to a litigant's duty, where he bears the onus, to provide sufficient proof of income. The proof of such income is essential. The lack of evidence by the plaintiff regarding his employment and his income calls for me to speculate when quantifying the past and future loss of earnings. I am not prepared to speculate.

[41] I am also not bound by nor obliged to accept the opinion of an expert witness whose reports are based on the information which has not been proved to be correct and which is again riddled with contradictions. The plaintiff failed to prove his earnings pre and post-accident. See *Road Accident Appeal Tribunal & others v Gouws & another*[14] . Therefore, the actuarial calculations provided are of no assistance because it is based on the report of the industrial psychologist, whose information is not verified. In *Lazarus v Rand Steam Laundries*[15]:

> "..... the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative assessment, a state of affairs which would result in injustice to one of the parties.".

[42] In *Nonyane v Road Accident Fund*[16] it was said that:

> "The tendency to think that our courts capitulate to every evidence or report of an expert is wrong and has to be dispelled and discouraged. Each case has to be determined on its merits. That responsibility for evaluation of the reliability of facts and or evidence lies in the domain of the courts contrary to belief of those participating in the court proceedings."

---

[14] [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33

[15] (1946) (Pty) Ltd 1952 (3) SA 49 (T)

[16] (3126/2016) [2017] ZAGPPHC 706 (10 November 2017)

[43] I will refer to the well-known judgment of *Modise v Passenger Rail Agency of South Africa*[17], where the Court held that:

'This is an unfortunate case. One suspects that the plaintiff did suffer a past loss of earnings and will suffer future loss of earnings. However, I may not allow a suspicion, nor my sympathy for the plaintiff, to translate into a basis for awarding damages where the evidence does not allow this. The variables in the equation are simply too many.'

The plaintiff failed to prove the past loss and future loss of income; as such, their claim for past loss of income and future loss of income cannot succeed.

General damages

[44] The fund did not assess the plaintiff's claim for general damages yet; and as such the court cannot deal with this head of damages without the report from the road accident fund agreeing that the plaintiff has suffered general damages.

[45] In the circumstances, I make the following order:

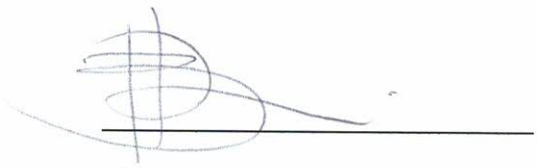
(a) The plaintiff's claim regarding general damages is postponed *sine die.*

(b) I grant absolution from instance for past and future loss of earnings.

(c) Future medical expenses in the form of an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 are granted.

(d) Defendant to pay the taxed costs.

[17] (A5023/2013) (11 June 2014) para 1



M. Munzhelele

Judge of the High Court Pretoria

Virtually heard: 17 November 2021

Electronically Delivered: 09 May 2022

APPEARANCES:

For the Applicant: Adv. D Max

Instructed by: VZLR Inc

For the respondent: No appearance