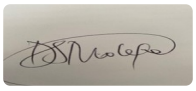
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: A43/2021

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



.....27 JUNE 2022

SIGNATURE **DATE**

In the matter between:

DAIL NATHAN JONKER APPELLANT

and

ROAD ACCIDENT FUND RESPONDENT

JUDGMENT

MOLEFE J

INTRODUCTION

[1] The issue in this appeal is whether the order granted by the court *a quo* as per Phahlane J, to dismiss the appellant (plaintiff in the court *a quo*) Mr. Dail Nathan Jonker's claim for loss of earning capacity, was correct. The appeal is with leave of this court and is not opposed by the respondent (defendant in the court *a quo*), the Road Accident Fund (RAF).

BACKGROUND

[2] Dail Nathan Jonker (Mr. Jonker) instituted a claim for loss of earnings as a result of a motor vehicle accident which occurred on 24 September 1999. At the time of the accident Mr. Jonker was 5 (five) years old and a passenger in the insured vehicle. The merits portion of the claim was previously conceded by the RAF. General damages were settled at R450 000.00 and the RAF undertook to furnish an undertaking in terms of section 17(4)(a) on the Road Accident Fund Act[1] in respect of future medical expenses. The issue of past and future loss of earnings/earning capacity was dismissed by Phahlane J on 22 July 2019.

[3] The parties had agreed in a pre-trial minute that in the instance where joint minutes had been compiled, the legal representatives would argue on the joint minutes and would be bound by the joint minutes in line with the *Glenn Marc Bee v The Road Accident Fund*[2] (the Bee judgment).

[4] There was no dispute between the parties regarding the injuries sustained by Mr. Jonker in the accident. As a result of the accident, he had a psychological problem. Various expert reports were admitted and the parties agreed to argue the matter on the joint minutes. The RAF admitted the joint minutes wherever the experts were in agreement, and as such, the parties agreed to lead *viva voce* evidence of their respective industrial psychologists where there was disagreement as per their joint minutes.

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[1] 56 of 1996.
[2] Glenn Marc Bee v The Road Accident Fund 2018 (4) SA 366 (SCA).

[5] In their joint minutes, the orthopaedic surgeons, Drs Prins and Enslin, agreed that though Mr. Jonker sustained a minor head injury with a loss of consciousness, a fracture of the left tibia and a fracture of the right distal tibia, the injuries sustained by Mr. Jonker and the sequelae thereof, physically or psychologically, would not hamper him in the slightest to complete his studies and to be an equal competitor as an Information Technology (IT) specialist.

[6] Both clinical psychologists, L Roper and NJS Els, in their joint minutes found that Mr. Jonker presented with symptoms of a major depressive disorder related to his involvement in the accident and found that he was also suffering from symptoms of post-traumatic stress. They agreed that he has been rendered psychologically more vulnerable as a result of the accident and its sequelae, and that his physical and psychological difficulties following the accident have contributed to a diminished quality and enjoyment of life.

[7] Dr. JH Kruger, the neurosurgeon, examined Mr. Jonker on 28 October 2016 and noted that he completed every grade at school and attained 2 (two) distinctions in Grade 12. Mr. Jonker was studying B.Sc. Information Technology at the University of Pretoria and failed 3 (three) subjects in 2016. He concluded that from a neurosurgery perspective, the accident will not influence Mr. Jonker's life expectancy, his workability in the labour market or his retirement age.

[8] The occupational therapists stated in their joint minutes at the time of Mr. Jonker's assessment in 2016 that he was in his third year of studying a B.Sc. IT degree and had one subject remaining to complete his degree. They agreed that from a physical perspective he met the physical demands of his current employment as a software developer, and that he might experience pain in his lower back while working.

[9] The educational psychologist Ms. Grobler stated that:

> "Now that the accident has occurred and considering that Mr Jonker did not seem to have suffered a head injury, the accident is considered to have contributed to significant long-term neuropsychological difficulties, one would expect his cognitive abilities and academic potential to have remained essentially unchanged. Therefore,

> Mr Jonker probably still has to reach his pre-morbid academic potential, permitting that the facts that could impact negatively on his academic performance are effectively addressed and compensated for. Mr Jonker had taken longer to obtain his degree than what could have been expected from an individual with similar cognitive and academic abilities. Although deference is given to the opinion of the clinical psychologist for comment in this regard, the academic difficulties he had reported are most likely related to psychological factors. His involvement in the accident and the psychological impact of this incident possibly have played at least some role in this regard, although his reported academic difficulty is not considered directly related to his involvement in this accident."

EVIDENCE OF THE INDUSTRIAL PSYCHOLOGIST

[10] Ms. Louis Coetzee, a qualified industrial psychologist, testified on behalf of Mr. Jonker. When she compiled the joint minutes with her counterpart Ms. Schlebush, they had already received the joint minutes of the orthopaedic surgeons, the clinical psychologists, the occupational therapists, and the educational psychologists. During her testimony Ms. Coetzee highlighted on what the educational psychologist noted that with the marks Mr. Jonker was obtaining in school, one would not have expected him to experience significant difficulty in obtaining a degree at university. It was also noted that Mr. Jonker had a destructive and abusive relationship around the period that he encountered academic difficulties. The educational psychologist, Ms. Grobler, opined that it was improbable for the accident and the head injuries sustained by Mr. Jonker to have impacted significantly on the academic difficulties he reportedly experienced at university. Surprisingly, Ms. Coetzee in her testimony explained that her understanding of the report meant that there had been an impact on Mr. Jonker's psychological functioning. She opined that Mr. Jonker had not passed his degree as anticipated because he had been living with the symptoms since he was 5 (five) years old.

[11] Ms. Coetzee testified that in their joint minutes, she and Ms. Schlebush agreed that Mr. Jonker would have passed his honours degree had the accident not occurred, and that the Paterson D3 level would be a reasonable earning pinnacle that he would have achieved at age 45 (forty-five). There was however a difference

in opinion regarding the possibility of Mr. Jonker having to work until age 70 (seventy). Ms. Coetzee opined that his income would likely have been around the median of the Paterson C5 level until age 70 (seventy), whilst Ms. Schlebush remained speculative that he would have continued to work in a freelance capacity until age 65 (sixty-five).

[12] According to Ms. Coetzee, Mr. Jonker will not be able to reach his pre-morbid potential and that if he does not complete his honours degree, the likelihood of him obtaining the same occupational growth at the same rate that he would have is highly unlikely. Under cross-examination she was confronted with Ms. Grobler's report that when Mr. Jonker failed 5 (five) of his subjects, he was involved in an abusive relationship, and that his failing had nothing to do with the accident. She finally admitted that she personally could not tell why Mr. Jonker was experiencing these academic difficulties.

[13] Ms. Suzan Schlebush, a registered industrial psychologist, testified on behalf of the RAF and opined that Mr. Jonker's delay in entering the open labour market is not entirely related to the accident. She based her post-morbid scenario on what the educational psychologist postulated in her report. Ms. Schlebush testified that if there were no other factors involved, then she would agree with Ms. Coetzee that the delay into open labour market was accident related. She disagreed with Ms. Coetzee's age of retirement of 70 (seventy) and opined that Mr. Jonker's age of retirement would be 65 (sixty-five), based on the normal retirement age used in the South African labour market.

[14] In the post-morbid scenario Ms. Coetzee recommended a higher-than-normal post-accident contingency deduction as a result of Mr. Jonker's delay in completing his degree. Ms. Schlebush also recommended that Mr. Jonker's psychological vulnerability can be addressed by means of a relevant contingency. The common ground is that the loss of earnings/earning capacity can be addressed by applying an appropriate contingency deduction.

[15] The general principle in evaluating medical evidence and the opinions of expert witnesses is to determine whether and to what extent their opinions advanced

are founded on logical reasoning. The court must be satisfied that such opinion has a logical basis and determine whether the judicial standard of proof has been met.[3]

[16] In *Life Healthcare Group (Pty) Ltd v Suliman*,[4] the court stated that:

> "Judges must be careful not to accept too readily isolated statements by experts, especially when dealing with a field where medical certainty is virtually impossible. Their evidence must be weighed as a whole and if it is the exclusive duty of the court to make a final decision on the evaluation of expert opinion."

[17] The court *a quo* concluded that there was no nexus between Mr. Jonker's cognitive sequelae or cognitive deficit, and that the accident was the sole cause of his memory difficulties. The court also found no basis on the experts' opinion to reconcile the cognitive deficits, the scholastic and first year university results and the long delay before the deficit manifested. Therefore, it was the court *a quo's* finding that Mr. Jonker's delay in finalising his study programme at the university could not be a contributing factor connected to his sequelae or the delay in entering the job market, and the delay could not be attributed to the accident which occurred 19 (nineteen) years ago. The court *a quo* dismissed Mr. Jonker's claim for loss of earnings/earning capacity.

[18] In the *Bee* judgment, a judgment by the Supreme Court of Appeal of the Republic of South Africa, it was stated that:

> "Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial'. In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings of facts agreed in a pre-trial conference."

[19] The court *a quo* had correctly recorded that the parties had agreed to argue the matter on the joint minutes between the parties' experts, but disregarded the fact

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[3] *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at para 36.
[4] 2019 (2) SA 185 (SCA) at para 15.

that the industrial psychologists agreed on Mr. Jonker's psychological vulnerability due to the accident, which had to be addressed by relevant contingency deductions.

[20] Ms. Coetzee, counsel for Mr. Jonker, submitted that since the RAF admitted the basis of the actuarial calculation, and Mr. Jonker's future uninjured income was calculated in amount of R14 968 893.00, a contingency differential of 10% which amount to R1 496 889.30 should be awarded to Mr. Jonker. As aforementioned, there was no representation on behalf of the RAF.

[21] An enquiry into damages for loss of earning capacity is of its nature speculative as it involves a prediction as to the future without the benefit of crystal balls. In *Southern Insurance Association Ltd v Bailey N.O.*,[5] Nicholas JA stated as follows:

> "Where the method of actuarial calculation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right.' (*per* Holmes JA in *Legal Assurance Company Limited v Botes* 1963 (1) SA 608 (A) at 614. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life.' These include such matters as the possibility that the plaintiff may in the result have less than 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness of accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case."

[22] Our courts have alluded to the difficulties in arriving at a proper allowance for contingencies. In *Goodall v President Insurance Co Ltd*,[6] Margo J remarked as follows:

> "In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of certain type of almanac is not numbered along the qualifications for judicial office."

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[5] 1984 (1) SA 98 (A) at 99E – F.
[6] [1978] 1 All SA 101 (W) at 104 – 105.

[23] In the present case there can be no doubt that there is a considerable amount of speculation involved in trying to qualify Mr. Jonker's future loss of earnings, particularly the approach adopted by Ms. Grobler, the educational psychologist, that the academic difficulties experienced by Mr. Jonker are most likely related to psychological factors, and that the accident possibly played some role in this regard.

[24] Mindful of these difficulties, the following factors require consideration. Mr. Jonker was 5 (five) years old when the accident occurred, and at the time of the trial he was 25 (twenty-five) years old. He would have had 40 (forty) years left in the open market if one assumes a retirement age of 65 (sixty-five). He is diagnosed with mood disorders, increased irritability, memory and anxiety difficulties, psychological vulnerability, truncation of career options, time off work for treatment and a possible delay in the open market. These are factors that might result in loss of earnings/ earning capacity. In addition, we have to take into consideration that Mr. Jonker has not received any intervention or treatment for the major depressive disorder and post-traumatic stress disorder since the accident.

[25] If one accepts a sliding scale of ½ a percent per year contingency deduction to retirement, a 'normal' contingency deduction would be 20% in the uninjured scenario. Having regard to all the above-mentioned factors, and bearing in mind that the industrial psychologists recommended a substantially higher contingency, my view is that a post-accident contingency deduction of 40% (with a contingency differential of 20%) is conservative and appropriate under the circumstances. The amount of R1 338 752.52 (One million three hundred and thirty-eight thousand, seven hundred and fifty-two rands and fifty-two cents) is therefore a fair amount for future loss of earning capacity.

ORDER

[26] In the circumstances, the following order is made:

1. The appeal is upheld.
2. The court *a quo* order is set aside and substituted with the following order:

i. The RAF is ordered to pay an amount of R1 338 752.52 (One million three hundred and thirty-eight thousand, seven hundred and fifty-two rand and fifty-two cents) in respect of the appellant's claim for future loss of earning capacity.

ii. The RAF is ordered to pay the appellant's costs of the appeal.

DS
MOLEFE JUDGE OF THE
HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree

S

POTTERILL JUDGE OF

THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree

NV KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 June 2022.

APPEARANCES

Counsel for the Appellant:	ADV. L COETZEE
Instructed by:	GERT NEL ATTORNEYS
Counsel for the Respondent:	UNKNOWN
Instructed by:	UNREPRESENTED
Date heard:	20 April 2022
Date of judgment:	27 June 2022