

THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

PRESIDENT INSURANCE COMPANY LIMITED Appellant

v

JEREMIAH NXELE

Respondent

CORAM : HEFER, MARAIS JJA et VAN COLLERAJA

HEARD : 16 AUGUST 1995

DELIVERED : 5 SEPTEMBER 1995

JUDGMENT

HEFER JA :

This appeal is directed at the quantum of the trial court's award in an action in which the respondent successfully sued the appellant, a nominated agent of the Motor Vehicle Accidents Fund, for compensation under the provisions of Act 84 of 1986.

Prior to the collision in which he was injured the respondent, although he had no formal training, used to work from home as a self-employed auto electrician. It is alleged in the particulars of claim that his injuries have brought about inter alia that he is "disabled in the workplace where he cannot lift heavy weights or bend forward as required in his trade". The loss which he allegedly suffered as a result of his disablement is claimed on two alternative bases. Claim A is for a total amount of R847 086 in respect of his past and future "loss of earnings" and is based on the allegation that, but for his injury, he would have continued to earn an income of R3 840 per month working for his own account. Claim B (the alternative) is for a total amount of R494 184 in respect of his past and future "loss of earning capacity" and is based on the allegation that, but for his injury, he would have been able to be employed in the formal sector as an artisan's aid earning a salary of R1 700 per month.

The trial court was not prepared to grant claim A because the respondent

had no reliable personal recollection of his earnings immediately before the collision and the documents on which he sought to rely by way of proof were found to be fabrications. However, since it was common cause that he would have been able to work as an artisan's aid should he ever have wished to seek employment in the formal sector and it was found that his ability to do so had been seriously diminished by his injury, the court upheld claim B to the extent that he was awarded an amount of R206 300 which was intended (as appears from the reasoning and calculations in the judgment) to compensate him for his loss of earning capacity but is listed in the actual award under the rubric of loss of earnings.

The only question to be decided is whether the respondent has proved his loss. In contending for a negative answer appellant's counsel submitted that it has not been established that he has suffered any loss and, alternatively, what the extent of his loss is.

There is no substance in the first submission. The argument in support thereof is to the effect that, because the respondent's earnings at the time of the collision have not been proved, it has not been shown that he conducted a profitable business and without proof of a profitable business it cannot be found that he suffered a loss.

This line of reasoning reveals

an obvious misconception of the nature of claim B and the award made in respect thereof. Appellant's counsel seems to have overlooked that we are no longer concerned with claim A to which his argument might have been a logical answer. On claim B which relates to an alleged loss of earning capacity it has no bearing. The nub of the claim is that the respondent has lost his ability to compete for employment in the open market and the trial court's finding that this admitted ability has indeed been gravely diminished is not challenged. The measure of success with which he conducted his own business in the past has thus become entirely irrelevant.

For his alternative submission appellant's counsel relies heavily on the respondent's attempt to mislead the trial court by producing fabricated documentary proof of his loss of earnings under claim A. This, he argues, also taints the evidence produced in support of claim B. The quantification of the loss of earning capacity is based on the evidence of Mrs Barbara Donaldson, an industrial psychologist, about the respondent's prospects before the collision to obtain employment as an artisan's aid and his probable rate of remuneration. Since Mrs Donaldson's assessment is partly based on information given to her by the respondent who has been found to be a wilfully untruthful witness, the submission is that her evidence should not have been accepted.

I do not agree. Admittedly the respondent did inform Mrs Donaldson of his earnings and that his business had been "very successful" until he was injured. Admittedly she did rely on this information. But the enquiry plainly does not end here. Mrs Donaldson's evidence was presented in support of both claims and it is only with regard to claim A that she relied on information which was subsequently found to be false. For that claim to succeed it was necessary to discount the possibility of the respondent abandoning his business to seek employment. On the assumption, as she repeatedly stressed, that he conducted a lucrative business Mrs Donaldson expressed the (obviously acceptable) view that he probably would not have made such a change. But this remained a viable option at least until the respondent was injured. Mrs Donaldson's evidence relating to the respondent's prospects of obtaining employment and his probable rate of remuneration does not rest in any respect on any proven or even suspected falsehood. The respondent was put through what is known as the Industrial Test Battery - a test specially developed for illiterates and semi-literates in South Africa - and produced exceptionally good results. This achievement together with his "track record" - ie his employment record before commencing his own business and the experience gained while working as an auto electrician - persuaded Mrs Donaldson (and eventually the trial judge) that, had he sought employment in the formal sector, he could have

been expected to earn a salary in at least the upper quartile because he was "better equipped in terms of the service he could render" to an artisan. At the trial the results of the test and Mrs Donaldson's interpretation thereof went virtually unchallenged. It was not suggested then, nor is it suggested now, that there is any reason to doubt the reliability of this part of her evidence or of the figures which she presented relating to the rates of remuneration of artisans' aids. Moreover, the respondent's own evidence about his "track record" was not questioned in the trial court nor has it been challenged in this court. There is thus a firm foundation in the evidence for the award under claim B which has not been shaken in the least by the respondent's mendacity in relation to claim A. The alternative submission must also be rejected.

The appeal is accordingly dismissed with costs.

CONCURRED :

MARAIS JA

VAN COLLER AJA