IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal case no: **A110/2023**

In the appeal of:

MANANYANA JANE MOLOI Appellant

and

ROAD ACCIDENT FUND

Respondent

CORAM: **MHLAMBI J, et MOLITSOANE J et MOTHIMUNYE AJ**

HEARD ON: **27 NOVEMBER 2023**

DELIVERED ON: **07 MARCH 2024**

JUDGMENT BY: **MOLITSOANE, J**

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[1] The Appellant instituted a delictual claim against the Respondent for damages arising out of the injuries sustained in a motor vehicle collision on 07 August 2018. On 21 April 2019, the merits were settled by the parties at 100% in favour of the Appellant. The general damages were settled at R800 000. The court was only called upon to adjudicate the outstanding claim in respect of the loss of earnings.

[2] Having listened to the evidence and submissions by the parties, the court a quo granted an order allowing only a claim for past loss of earnings in the amount of R840 211.00 and costs, but dismissed the claim for future loss of earnings. Aggrieved by the order, the appellant appeals the judgment and order of a single Judge of this Division. The appeal is with leave of the Supreme Court of Appeal. The Respondent does not oppose this appeal.

[3] The Appellant assails the judgment essentially on the following grounds:

1. The Court a quo erred in holding that the Appellant's case was about the appellant's earning capacity as opposed to adjudicating the issue of loss of earnings, both past and future;
2. The court a quo erred in not finding that the case was about the appellant's three (3) years' delay in entering the labor market and the concomitant delay in career progression;

3. The court a quo failed to take into account that the appellant could, pre-morbidly, advance to an income at the Paterson level D2 at the age of 45 and post-morbidly only advanced to an income at Paterson level D1 at the age of 45.

[4] It is appropriate to reproduce the following parts of the judgment of the court a quo as the appeal revolves around them;

"[13] Mr. Immelmann mentioned that Dr Fourie recommended a higher-than-normal post-morbid contingency deduction for the Plaintiff to account for the factors he set out in his report. The factors mentioned by Dr Fourie originated inter alia from the outdated report of me Stanton and a report by me. Gibson, an educational psychologist, which is dated earlier this year. Me. Gibson was not called to testify, and her report was merely handed in. As a result, me. Gibson could not be cross-examined, and this factor obviously reduced the probative value of her findings.

[15] In my view, Dr. Fourie has not given sufficient weight to the fact that the Plaintiff had obtained a degree some 10 months ago and that she is currently a trainee at an auditing firm, while she is furthering her studies at Unisa. Nor have Dr. Fourie, me. Stanton and me. Gibson bothered to interview the current employers of the Plaintiff to gain information regarding her performance at the workplace. In addition, the Plaintiff attended the hearing in Court, and no scarring or facial injuries could be observed by the Court where she sat some 7 to 8 meters from the bench.

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[16] Also having regard to Dr. Fourie's opinion in Court that the Plaintiff is a woman of potential and that she has a better chance of finding employment because she is a woman, I am of the view that the prognosis for the Plaintiff's future is far too pessimistic, as postulated by Dr. Fourie. Also bearing in mind that the Plaintiff did not testify while she carried the onus of proving on a balance of probabilities that she suffered a loss of earnings as far as her future career is concerned, I have to conclude that she has failed to make out a proper case for future loss of earnings.

[17] In respect, I emphasize that the Plaintiff's claim for future loss of income is premised on her alleged emotional and cognitive problems arising from the injuries she sustained in the accident, and not on the physical injuries themselves. Her present emotional and cognitive state is therefore of vital importance in the adjudication of this matter. There is simply no evidence before this Court to sustain a conclusion that her emotional state will have a detrimental effect on her future career. There is also no evidence before this Court to suggest that her present performance at her place of employment is not up to standard. The Plaintiff herself did not take the Court into her confidence by testifying and informing the Court of any emotional problems she is currently experiencing in the workplace and in the furtherance of her studies".

[5] The crisp issue for determination is whether the court a quo erred in dismissing a claim for future loss of earnings and the final full costs thereof.

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[6] In order to succeed with a claim for loss of earnings, the Plaintiff must adduce evidence to enable the court to determine whether, as a result of the injury sustained, his/her earning capacity has been compromised. In so doing the claimant may rely, inter alia, on the expert evidence. In this regard, the court in *Michael and Another v Linksfield Park Clinic (Pty)Ltd and another*[1] said the following;

> "That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinion advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL (E))"

[7] It is settled law that the Plaintiff bears the onus to prove on a balance of probabilities that the injuries sustained have reduced her earning capacity. That reduction in the earning capacity would lead to actual loss with reference to the calculations of past and future loss of earning capacity. *RAF v Kerridge*[2] held as follows;

> "Indeed, a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income. However, where loss of income has been established but proof of quantum thereof cannot be produced in the usual manner, the courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence rendered to give to the finding of proven reduction in loss of

[1] 2001(3) SA1188 (SCA) at para 36
[2] 2019(2) SA 233 at 239

income-earning capacity. As long as almost a century ago in Hersman v Shapiro the court said the following;

> Monetary damage having been suffered, it is necessary for the Court to assess the amount and the best it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it certain that pecuniary damage has been suffered, the Court is bound to award damages."

[8] The Appellant submits that the evidence of the Industrial Psychologist and the Actuary established that the Appellant would not complete her degree in 2018 but only in 2021. The objective fact is that the Appellant only entered the labor market in 2022. This according to the version of the Appellant, constituted a loss in the potential earnings.

[9] It is clear from the evidence and the finding of the court a quo that Dr. Fourie, had based his conclusions on the reports of Dr. Stanton and Me. Gibson. The court a quo criticized Dr. Fourie in that it found that the said Dr had not given sufficient weight to the fact that the Appellant had obtained an auditing degree some 10 months earlier and was currently a trainee at an auditing firm whilst also still studying at Unisa.

[10] It is necessary to indicate that the Appellant bears the onus to prove the damages on a preponderance of probabilities, much as it is argued that the court a quo, in this case, erred in holding that the issue for adjudication was the loss of earnings as opposed to the loss in earning capacity, the burden of proof irrespective of the two issues, still lies with the Appellant.

[11] The Appellants' claim, as held by the court a quo, is not based on the physical injuries she sustained but is premised on her alleged emotional and cognitive problems, which are the sequelae of the injuries. Dr Stanton, a Clinical Psychologist assessed the Appellant. According to her, the objective of the assessment was to determine the emotional and overall functioning of the Plaintiff before the accident and also the emotional and overall impact of the accident on her current functionality. She conceded during the cross-examination that her assessment was about 4 years before she gave testimony in court. It is accordingly apt to refer to the following parts of her testimony[3]:

"Ms. GOUWS: Ma'am, at the outset of your evidence you indicated that you interviewed the plaintiff herein on 22 May 2018

Ms. STANTON: Yes, M'Lord

Ms. GOUWS: Correct. It is more than four years ago. Is that correct?

Ms. STANTON: Yes, M'Lord

Ms. GOUWS: I noted while you testified that you kept on saying that at the time of the assessment or at the time of the testing this was the finding or the conclusion that you reached.

Ms. STANTON: Yes, M'Lord

Ms. GOUWS: Did you stress the fact that it was the finding at the time because it could be that if you reassess the plaintiff the finding may differ?

[3]Paginated record page 408 lines 12 et seq. including page 408.

Ms. STANTON: Yes, M'Lord. It was the finding at the time, that was the assessment conclusions

Ms. GOUWS: So, it is possible that if you reassess the plaintiff that you could come to another conclusion if you have to draft a report again.

Ms STANTON: It is possible. What I want to add is that my assessment was done nearly two years after the accident. So, at that stage, the symptoms were already chronic, but it is possible that if I have to assess her now it could be different.

Ms. GOUWS: It could have improved.

Ms. STANTON: It could have improved or it could have stabilised. Yes, M'Lord.

Ms. GOUWS: But it is possible that it could have shown improvement.

Ms. STANTON: I cannot really give an opinion about that. That will be dependent on other factors such as treatment if ……[intervenes]

Ms. GOUWS: I understand. But in general, is it possible a plaintiff or a patient, I do not know if you refer to them as patients, that they may show improvement over a period of more than four years?

Ms. STANTON: Generally, the standard in psychology is that after two years we consider that to be the plateau if there is no treatment. "

[12] The above interactions illustrate that the report of Dr. Stanton was outdated. In her version, the condition of the Appellant may have improved in the later years. Assessment was thus imperative at least at the time when she had taken the new employment. At the time of the hearing of this matter, her

current emotional and cognitive state was unknown. The court a quo correctly held that the Plaintiff's present emotional and cognitive state is of vital importance in the adjudication of the loss of earnings. Dr. Fourie took into account the outdated report of Dr. Stanton and also chose not to seek the current collateral information from the current employers of the Appellant in order to assess the current emotional and cognitive state of the Appellant, which is crucial to her case, as the claim is based on that alleged psychological state.

[13] It is submitted that pre-morbidly, the Appellant would have entered the labor market in 2017. This year, 2017, forms the basis for Dr. Fourie to say that the Appellant's entrance to the labor market was delayed by three years as she only entered the labor market in 2022. Dr. Fourie postulated that pre-morbidly, was expected that the Appellant would reach her employment peak at D2 on the Paterson level at the age of 45. But for the accident, she would only reach D1 on the same age.

[14] The Appellant's contention that her loss of earnings had to be looked at, through the prism of the 'three-year delay of entering the labor market' only, is misplaced. In this regard, it has to be borne in mind that the loss which she claims, was calculated over the period of her possible employment. As indicated above, it is contended that had the accident not occurred, the Appellant could have reached her employment peak at D2 on the Patterson scale when she reached forty-five years of age. It is now contented that because of the accident, she would now reach her peak at the same age at

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a lower level of D1. In both scenarios, it is assumed that she would retire at 65. Her loss can thus not be confined to the three-year delay in entering the labor market.

[15] It is submitted that the reports of the experts were admitted into evidence and were unchallenged. It appears that Counsel for the Plaintiff seems to argue that in the absence of any contrary evidence, such reports must be accepted as they are. It cannot be correct. The cross-examination was directed to showing that the reports, though they might have held truthfulness in them, were not without criticism. The fact is that they do not take into account the changed circumstances of the Appellant as, according to her experts, her circumstances may have changed. The reports do not talk to the present circumstances of the Appellant and for this reason, they do not provide reliable current evidence to sustain a conclusion that the alleged injuries detrimentally affected her future career. She chose not to testify as to her current difficulties or challenges, if any, in her current employment. Despite the delay in entering the labor market, there is simply no evidence before us to back the allegation that the injury sustained would prevent the plaintiff from reaching her peak of D2 on the Paterson scale at the age of 45. She has accordingly not convinced us of her loss of earnings. We accordingly hold the view that the court a quo was correct in dismissing the claim for future loss of income.

[16] It is trite that the award of costs lies in the discretion of the court. It is further settled that this discretion must be judicially exercised in order to achieve

fairness on both sides, in our view, the respondent was successful in opposing the relief sought. It cannot thus be contended that the court a quo exercised its discretion in the award of the costs, arbitrarily or capriciously. We thus cannot interfere with the discretion exercised by the trial court, This court on appeal cannot interfere with the honest exercise of the discretion[4].

[17] The Respondent did not oppose the appeal, and as such no costs would be awarded against the Appellant. We accordingly make the following order.

ORDER

1. The appeal is dismissed.
2. There is no order of costs of the appeal.

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P. E. MOLITSOANE, J

I agree

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J.J MHLAMBI, J

I agree

[4]See Levin v Felt and Tweeds 1951(2) SA 401 (A) 416.

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MTHIMUNYE, AJ

On behalf of the Appellant:	Adv.M Mphaga SC
	Adv N Gama
Instructed by:	Phatshoane Henney Attorneys
	BLOEMFONTEIN
On behalf of the Respondent:	
Instructed by	The Road Accident Fund
	BLOMFONTEIN

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