

SOUTH AFRICA / JUDGMENT

# Dolf v Road Accident Fund (3038/2014)

## [2014] ZAECPEHC 99 (11 December 2014)

**[2014] ZAECPEHC 99****COURT**

Eastern Cape High Court, Port Elizabeth

**BEFORE**

J M Roberson

**CASE / FILE NUMBER**

3038/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 3038/2014

DATE HEARD: 17/11/2014

DATE DELIVERED: 11/12/2014

In the matter between

MARSHALL GAVIN DOLF.....PLAINTIFF

and

ROAD ACCIDENT FUND.....DEFENDANT

**JUDGMENT**

ROBERSON J:-

- [1] In this action the plaintiff, a 31 year old man, claims damages arising from injuries he sustained in a motor vehicle collision which occurred on 24 March 2009. He alleged that the collision was caused by the negligence of the driver of the vehicle in which he was a passenger. One of the grounds of negligence was that the driver fell asleep at the wheel of the vehicle. The injuries which the plaintiff sustained were a fracture of the left acetabulum, a fracture of the right tibia, abrasions to the chest, and lacerations to the right lower leg. He claimed general damages, medical expenses, and an amount for loss of past and future earning capacity, capped in accordance with the provisions of s 17 (4) (c) of the Road Accident Fund Act 56 of 1996 (the Act). Despite the fact that prior to the issue of summons the defendant conceded the merits in an e-mail to the plaintiff's attorneys, the defendant

pleaded that the negligence of the insured driver did not cause the collision. The plaintiff was put to the proof of the injuries and the damages claimed.

- [2] The matter was set down for trial on 3 November 2014 and commenced before me on 10 November 2014. By that time various issues had been settled, including the merits. The remaining issues were the contingency deductions to be applied to the claim for loss of earning capacity and whether or not the costs of two counsel should be allowed.

#### Loss of earning capacity

- [3] Dr. Peter Whitehead and Ms Natasha Gerber, industrial psychologists, prepared a joint minute dealing with the plaintiff's pre- and post-morbid career and his respective earning capacity. The relevant portions of the minute are reproduced as follows (the initials PW refer to Dr. Whitehead and NG to Ms Gerber):

*"With regards to Mr Dolf's pre-morbid career path we agree as follows:*

Mr Dolf obtained a Grade 12 School qualification at Willowmore Secondary School in Willowmore in the Eastern Cape, where he grew up with his parents. Mr Dolf entered the open labour market thereafter as a Truck Driver's Assistant, reportedly in 2003. Based on his age, educational background, occupational experience, and general skills and abilities, Mr Dolf would in all probability have continued to work as Truck Driver's Assistant in his career, before progressing to the position of Truck Driver after acquiring a Code 14 Driver's Licence. He would have continued working as Heavy Duty Vehicle Truck Driver for the remainder of his career. No significant upward mobility in any organisational hierarchy was foreseen. He would have continued to work until at least a retirement age of 65 years. It is possible that after his retirement age of 65, he may have worked on contract or consulting basis, performing duties as Truck Driver for as long as possible.

With regards to Mr Dolf's pre-morbid earnings we agree as follows:

2003 : Enter open labour market as Truck Driver's Assistant earning a variable salary over time. Earn in region of R36 000.00 per annum. 2007 : Earn R63 881.00 per annum as Truck Driver's Assistant whilst obtaining Code 14 Driver's Licence. 2011 : Obtain employment as Code 14 Truck Driver, earning a Total Cost to Company Salary of R215 992.80 per annum in 2014 (inclusive of basic salary, average monthly commission and average monthly incentive bonus. Will continue to earn salary as above, with annual increases of 7,8%, this being the average increase in the South African labour market over the preceding 12 years according to P-E Corporate Services

Remuneration and Benefits Survey for General Staff, Volume 2, as per September 2014.

With regards to Mr Dolf's post-morbid career path we agree as follows:

Mr Dolf was appointed as Code 14 Truck Driver after the accident under discussion. He continued to work as such until 30 April 2014, when he and his employer agreed to Voluntary Termination of his services due to Ill Health. This was agreed to due to sequelae of the accident under discussion. He has been unemployed since. Considering all the relevant Expert reports, as well as

our own consultations and collateral research, we agree that Mr Dolf is now significantly compromised from a physical perspective. He will not be able to function as Truck Driver again into the future due to injuries sustained in the accident. We agree that it is improbable that Mr Dolf will secure permanent employment in any capacity in the open labour market again, as his occupational choices have been severely restricted. Any employment he may find will have to be based on sympathy,

considering the Addendum to the Joint Minute of the Occupational Therapists. We agree that Mr Dolf's narrow scope of occupational experience, computer illiteracy and psychometric assessment results, would likely preclude him from administrative

positions where he could progress to pre-accident levels and he would be dependant on his physical capacity and endurance to

progress to such levels – as evidenced by his progression as a truck driver. We further agree that whilst Mr Dolf may still have some residual earnings ability, he is faced with a number of barriers to re-entry into the open labour market and it is unlikely that any prospective employer will appoint Mr Dolf in a permanent position, considering the numerous proposed Medical Procedures he has to undergo, the associated extensive periods of sick leave required into the future and the accommodations that would be required in respect of Mr Dolf's physical limitations. NG notes that the preceding will likely result in extended periods of unemployment and the relevant contingencies should be applied in this regard. We note that Mr Dolf is resident in Beaufort-West, where any potential employment options will be extremely limited compared to bigger economic centres in South Africa.

With regards to his post-morbid earnings we agree as follows:

Mr Dolf continued to earn an income after the accident until the end of April 2014. Earnings during this period are for the record. Any earnings Mr Dolf may now receive into the future will be based on sympathy. Earnings in this regard will be negligible. We support dealing with any potential future earnings through applying appropriate contingencies. NG opines that, with due regard to the limited residual earning capacity and when considering the claimant is reliant on his income, he will likely seek part-time employment in the informal sector with limited earnings.

## CONCLUSION

We thus agree that Mr Dolf has been significantly compromised in the accident under discussion. It is not foreseen that this situation will improve into the future until retirement age.”

[4] A supplementary joint minute was also prepared in order to clarify the industrial psychologists' opinion on contingencies and increase percentages. The minute stated:

*“With regards to contingencies suggested in the post-morbid scenario, we agree that Mr Dolf in his injured state would at best be able to earn a negligible income from a sympathetic employer PW : up to a maximum of 50%, for the remainder of his career. NG takes note of Mr Dolf’s educational background and opines that the claimant will be able to earn an income of at least 50%, up to an unlikely maximum of 60%, for the remainder of his career.*

With regards to annual increase percentages in the pre-morbid scenario, we agree that annual increases can be calculated according to normal actuarial assumptions, but should at least be between 1,5% and 2% above the normal annual inflation rate. NG assumes that the aforementioned increases would apply to basic salary and is likely to apply equally to incentive payments and commission”

[5] Dr. Whitehead testified and elaborated on some aspects of the joint minutes. He explained that the statement that the plaintiff would be able to earn a post-morbid negligible income up to a maximum of 50% referred to the portion of his post-morbid career during which he would be able to work in his injured state. The plaintiff still had to undergo five operations and would be on sick leave after each operation. Further, according to the joint minute of the orthopaedic surgeons, the plaintiff’s post-morbid career would be truncated.

[6] According to Dr. Whitehead there is an oversupply of labour in Beaufort West’s limited economy and competition is strong.

In such an environment an injured person would stand a lesser chance of finding employment. Sympathetic employment would not enable the plaintiff to establish a career, and given his lack of skills and experience in fields other than truck driving, his income would not be competitive.

[7] He agreed that post-morbid income would not be nil and a residual earning capacity for half of the plaintiff’s remaining

employment career could not be ignored. That is why it was agreed in the joint minute that potential future income should be taken into account by applying an appropriate contingency deduction. He thought it would be good for the plaintiff to find employment but it would probably only be part-time employment in the informal sector.

[8] Dr. Whitehead said that he and Ms Gerber were of the view that pre-morbidly the plaintiff would have been employed until age 65 (this was the retirement age prescribed by his employer) and that if the plaintiff had a good track record he would have worked for as long as possible, even after reaching 65, in order to continue earning an income. There are always positions available for truck drivers, especially when they are older. Employers regard more mature persons favourably. The plaintiff’s father is still working as a truck driver at age 69. Dr. Whitehead agreed that because of the physical aspects of the work of a truck driver a person would have to be fit and healthy in order to work beyond 65. He further agreed that pre-morbidly the plaintiff would probably have worked until 65 and that it was possible that he would have worked beyond that age. In his report Dr. Whitehead had mentioned a pre-morbid retirement age of 65 to 70 but that was merely a range of retirement

ages and was not intended to mean that the plaintiff would definitely have continued to work until age 70. Dr. Whitehead agreed that the age up to which the plaintiff possibly would have continued to work could have been 66, or 67 or 68.

- [9] Actuaries on behalf of the plaintiff prepared calculations based on two scenarios: retirement at age 65 and at age 70. Two sets of calculations were presented in each scenario: the first with a contingency deduction of 5% for past earnings and 15% for future earnings and the second with a contingency deduction of 5% for past earnings and 20% for future earnings. In each of the four sets of calculations, the capped amounts were calculated in accordance with the judgments in *Sweatman v Road Accident Fund* 2013 JDR 2821(WCC) and *Jonosky v Road Accident Fund*

- [2013] ZAGPJHC 149 respectively. However I was not asked to decide which method should be preferred and Mr. Frost, who appeared

for the plaintiff, based his submissions on the amounts calculated in accordance with the *Sweatman*

### judgment.

- [10] Mr. Paterson for the defendant did not suggest that a contingency higher than 5% for past loss of earnings should be applied and I am of the view that 5% is an appropriate deduction for past loss of earnings. The amount calculated by the actuary for past loss of income is R235 280.00, employing the *Sweatman* method.
- [11] Mr. Frost submitted that there were no grounds to deviate from the so-called normal contingency deduction of 15% for future loss of income. He very properly referred me to the judgment of Huisamen AJ in *Morne van Eeden v The Road Accident Fund*, unreported, Eastern Cape Local Division Port Elizabeth, case number 2069/2011, judgment delivered 9 April 2013. In that matter the learned judge found on a balance of probabilities that the plaintiff had been rendered permanently unemployable in the open labour market, even in a sedentary position, as a result of his injuries. He nonetheless applied a contingency deduction of 25% to the pre-morbid future income, for the following reasons (at para [64] of the judgment):

*“64.1 The fact that the plaintiff does have a theoretical ability to do some sedentary work in the future;*

64.2 The possibility that the plaintiff might possibly in the future be favoured by a stricter application of the provisions of the Employment Equity Act; and

64.3 The fact that the plaintiff was in fact able to do some limited work, and did earn some income, after the accident, albeit with great difficulty.”

- [12] Mr. Frost submitted that although the reasons contained in para [64.1] and [64.3] above found application in the present matter, the case was distinguishable in that it was determined on a retirement age of 65. He submitted that the possibility that the plaintiff

would work until age 70 should be regarded as a positive contingency, bearing in mind that the amount he proposed should be awarded was calculated in accordance with the Sweatman judgment (which he said was the lower amount) and a retirement of age 65. The amounts calculated on the basis of a retirement age of 70 were substantially higher. He submitted that a contingency higher than 20% would ignore the positive contingencies.

- [13] Mr. Paterson submitted that the plaintiff's employment after age 65 was speculative and that the only proved probability was retirement at age 65. With regard to post-morbid income he submitted that not too much weight should be attached to the word "negligible" and referred to the opinion expressed in the joint minute that potential future earnings should be dealt with by applying appropriate contingencies. It was therefore recognised, so it was submitted, that there was a residual earning capacity. Mr Paterson further referred to Dr. Whitehead's agreement that the plaintiff would seek part-time employment in the informal sector.
- [14] Mr. Paterson submitted that a contingency of 25% should be applied. He referred to the lack of further details with regard to residual earning capacity, other than part-time employment in the informal sector for 50% of the plaintiff's employment career. In this regard he referred to the case of *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 (4) SA 95 (T) where Van Dykhorst J said at 100B-C:

*"Ek bevind dus dat die eiser op die waarskynlikhede wel 'n mindere werk sal verrig in die toekoms en nie op 'n deurlopende basis nie. Ek is egter nie in staat om met enige mate van sekerheid die tipe werk, die tydsduur daarvan of die vergoeding in verband daarmee te bepaal nie. In die woorde van dr Froman: 'We are asked to be totally prophetic.' Op hierdie aspek van die saak kom ek terug by die behandeling van 'n toelating vir gebeurlikhede.*

A contingency of 35% was applied in order to make provision for future earnings. As pointed out by Huisamen AJ in the Van Eeden matter (*supra*) the plaintiff in the Krugell matter would have been able to work again in the future, albeit on a limited basis.

- [15] As in the Van Eeden matter, the plaintiff worked after the accident and in fact gained a further qualification and obtained a higher level of employment.

He is therefore not the type of person who as Dr. Whitehead expressed it would "sit and do nothing." The industrial

psychologists also agreed that the plaintiff has a residual earning ability. On the other hand they also took into account that employment prospects in Beaufort West are extremely limited compared to bigger economic centres. With regard to the plaintiff's retirement age, I agree that the evidence is speculative to some extent, but nonetheless two experienced industrial psychologists saw fit to mention the possibility of contract work beyond 65, and Dr. Whitehead mentioned that there is always work for truck drivers and that the plaintiff's father is still driving a truck at age

69. I do not place a great deal of weight on merely a possibility of work beyond 65 but I cannot ignore it. Lastly the plaintiff has 17 years left of a working life. Taking all these factors which I have mentioned into account, I am of the view that a higher contingency deduction than 15 % should be applied to future loss of earning capacity, and that a deduction of 20% would be appropriate. The amount calculated by the actuary based on a 20% contingency deduction and employing the Sweatman method is R3 969 626.00

[16] The total amount to be awarded for past and future loss of earnings is R4 204 806.00

#### Costs of two counsel

[17] Mr. Dala who appeared with Mr. Frost for the plaintiff, submitted that it was a wise and reasonable precaution to employ two counsel from the start. He referred to the amount and the issues involved, as well as the fact that the matter was to be heard on 3 November 2014 and up until the day the trial commenced, 10 November 2014, there were a number of attempts to settle the matter as was evidenced by a number of pre-trial minutes. By 7 November 2014 all that was settled was general damages and an undertaking in terms of s 17 (4) (a) of the Act. It therefore took a whole week before the issues ultimately to be tried were agreed upon. A further aspect of the matter was whether the calculations based on the Sweatman or Jonosky method should be accepted, and that at the time the trial commenced the defendant had not yet reverted on this aspect. Although the ultimate issues to be tried were narrow, the future loss of income was an important one to the plaintiff.

[18] Mr. Paterson submitted that the matter had crystalised into crisp issues. With reference to the claim for future loss of income, he referred to the judgment of Eksteen J in *Smit v The Road Accident Fund* [2014] ZAECPEHC 11 where at para [22] where the learned judge said:

*“Whilst the claim for loss of earning capacity is large it was always clear, in the absence of any contradictory expert opinions, that the plaintiff’s claim would exceed the maximum cap set out in the Act and would accordingly be pegged at such capping.”*

[19] In this matter both parties served notices of intention to call a number of expert witnesses. The defendant served four such notices. Its ultimate bundle of expert reports contained four reports, those of Dr. R. Ngobeni, an orthopaedic surgeon, Ms Gerber, Ms T Mkanzi an occupational therapist, and Liberty Corporate Consultants and Actuaries. In her report, Ms Gerber concluded that it was anticipated that the plaintiff would be able to enter into employment in the open labour market in a position relevant to his education and skills, although she did rate him as an unequal competitor in the open labour market. This conclusion was watered down considerably in the joint minute which was only available on 5 November 2014. The defendant’s actuarial report contained two scenarios: one based on Ms Gerber’s recommendations and the other based on Dr. Whitehead’s recommendations. The total loss of earnings based on Ms Gerber’s recommendations was R1 950 285.00 and the total loss based on Dr. Whitehead’s recommendations was R3 191 002.00 There was a very large difference between these two amounts. Neither of the calculations made provision for a deduction in accordance with s 17

(4) (c) of the Act. The report stated that the limit contained in s 17 (4) (c) did not have an impact on the calculations.

[20] According to the minute of a pre-trial conference on 4 November 2014 the merits were conceded. It was recorded inter alia that the defendant admitted the orthopaedic surgeons' joint minute and one of the occupational therapists' joint minutes, and that the parties had requested their industrial psychologists to prepare a joint minute, after which actuarial calculations would be obtained. It was recorded that the defendant requested the plaintiff whether he would agree to the defendant's actuaries' calculations. The plaintiff declined to do so. It was recorded that the defendant would revert on whether the loss of earning capacity was to be calculated in accordance with the Sweatman or the Jonosky

### judgment.

[21] The minutes of a pre-trial conference held on 7 November 2014 reflected inter alia that the defendant admitted the joint minutes of the occupational therapists and the industrial psychologists, as well as the report of Dr. Whitehead insofar as it accorded with the joint minutes. The defendant requested the plaintiff to admit the correctness of actuarial calculations in an addendum to the actuarial report. The plaintiff declined to do so. The defendant tendered an undertaking in terms of s 17 (4) (a) of the Act and tendered R500 000.00 for general damages which the plaintiff accepted.

[22] In my view the volume of expert reports on behalf of both parties, the differences of opinions and the various actuarial calculations up to a late stage rendered this matter sufficiently complex to warrant the employment of two counsel from start to finish. This was not a matter where it was always anticipated by both parties that s 17 (4) (c) of the Act would apply. The claim for future loss of earning capacity was large and involved more than one set of actuarial calculations which the plaintiff had to consider up to a late stage. There was also the aspect of the Sweatman or the Jonosky approach.

### Order

[23] The following order will issue:

[23.1] The defendant is to pay to the plaintiff R500 000.00 for general damages.

[23.2] The defendant is to pay to the plaintiff the sum of R 4 204 806.00 for past and future loss of earning capacity.

[23.3] Payment of the above amounts is to be made to the plaintiff's attorneys, Boqwana Burns Inc, Port Elizabeth.

[23.4] The defendant is to pay interest on the above amounts at the rate of 9% per annum from a date 14 days after date of this order to date of payment.

[23.5] The defendant shall furnish plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, for 100% of the costs of future accommodation of plaintiff in a hospital or nursing home, or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the collision on 24 March 2009, after such costs have been incurred and upon proof thereof.

[23.6] The defendant is to pay plaintiff's costs of suit as taxed or agreed, such costs are to include:

[23.6.1] The costs of the reports and supplementary reports, if any of:

Dr P A Olivier;

Dr F A Gebremariam;

Dr P Louw;

Ms L Strauss;

Mr M Eaton;

Dr P Whitehead;

Dr N Androos;

Mr W Loots of Independent Actuaries and Consultants.

[23.6.2] The reasonable qualifying expenses and fees, if any, of:

Dr P A Olivier

Dr F A Gebremariam;

[23.6.3] The reasonable testifying expenses and fees of:

Dr P Whitehead.

[23.6.4] The costs of photographs.

[23.6.5] The costs involved in attending a pre-trial inspection in loco with counsel.

[23.6.6] Costs of the employment of two counsel.

[23.7] Defendant is to pay interest on plaintiff's taxed or agreed costs of suit at the rate of 9% per annum from a date 14 days after allocatur or agreement to date of payment.

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J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv A Frost and Adv I Dala, instructed by Boqwana Burns Inc, Port Elizabeth.

For the Defendant : Adv N Paterson, instructed by Bokwa Attorneys, c/o Ketse Nonkwelo Attorneys, Port Elizabeth

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