

SOUTH AFRICA / JUDGMENT

Dorcas v Road Accident Fund (543/2020) [2022] ZAFSHC 342 (5 December 2022)

[2022] ZAFSHC 342**COURT**

Free State High Court, Bloemfontein

BEFORE

Mathebula

CASE / FILE NUMBER

543/2020

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HEADNOTE: JUDGE – LOSS OF INCOME – EXPERT WITNESS Motor collision – Serious bodily injuries – Experts relying on plaintiff's version – Industrial psychologist not following up on reasons for departure from employment – No evidence injuries affecting retirement age – Current employment status better than before injuries – Diminished earning capacity of 10%.

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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

Case number: 543/2020

In the matter between:

MARAMBA NYASHA DORCAS:

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON:

16 AUGUST 2022

CORAM:

MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 05 DECEMBER 2022. The date and time for hand-down is deemed to be 05 DECEMBER 2022 at 13H00.

- [1] In this matter the plaintiff sustained serious bodily injuries in a motor vehicle collision on 7 August
2017. As a result, the plaintiff instituted a claim for damages under different headings. A substantial part of the claim was settled before my brother Loubser on 4 May 2022. The only issue for determination is the value of the plaintiff's claim for future loss of earnings and earning capacity. I pause to mention that the defendant has made an interim payment under this heading which must be taken into consideration in the final calculation of the appropriate award. Agreeing to pay in this regard is an acceptance of liability and that the plaintiff has established entitlement thereto.
- [2] The plaintiff gave evidence concerning the circumstances leading to her injuries and their effect in daily life activities. This is largely common cause between the parties. Especially the effect on her productivity as an employee. The onus is therefore on her to prove that she is entitled to the amount of damages claimed. I will proceed to set out in some detail her evidence and that of experts called to fortify her assertions.
- [3] At the time of the collision the plaintiff was twenty-five (25) years old and employed by One World Media as a Public Relations Specialist. Her duties were mainly media relations of her employer which constituted eighty (80) percent and twenty (20) percent were meetings. Her job required extensive travelling both locally and internationally. Because she was employed at a medium sized firm, she functioned without an assistant. She was hands on. Her main goal was working to become an independent consultant in the future.
- [4] The injuries sustained and treatment received is also common cause. After the collision her employer was supportive. She simply stated that she went back to her employer but never got her job back after spending about four (4) months on sick leave. She could not fulfil her duties anymore. This important aspect was not dealt with adequately and will be discussed at length in the succeeding paragraphs. As a result, she was unemployed for a period of two (2) years. Her monetary claim under the heading past loss of earnings was admitted by the defendant. During this period, she enrolled for and acquired a Digital and Marketing Certificate offered by Google.
- [5] She is currently employed as a Digital Campaign Manager by Media 24 with effect from 1 July 2019. The contract of employment clearly stipulates that it will continue until the retirement age of sixty

- (60) or until it is terminated for other reasons. At her current position, ninety (90%) percent of her duties are performed while sitting down in front of a computer screen. She described her work environment as a fast paced, pressurised and desk bound job in-front of a computer screen. Since her employment she has been working from home in line with the Covid-19 policies of her employer. This changed about two (2) months ago as they were required to physically report at the office twice a week. The changed circumstances have negatively impacted her situation because she cannot sit over long periods and rest her leg.
- [6] As previously stated the plaintiff called experts who examined and assessed her on different occasions. Their evidence is to a significant extent a repetition of what is contained in their reports. They seem to rely extensively on what the plaintiff narrated to them. They dealt with her prospects for promotion and that although she intended to work until age of sixty-five (65), she will now not do so primarily because of her injuries sustained from the accident. The one aspect that stand out is that those reports are fairly old and somehow the plaintiff did not see the need to refresh them for the purposes of this hearing. They were both sourced about three (3) years ago about a collision that occurred in 2017.
- [7] The evidence of the plaintiff about the circumstances that led to the termination of her employment at One World Media is somewhat unsatisfactory. This is important because the plaintiff carries the burden to show that the employment relationship was terminated as a direct result of the collision and her injuries. She simply testified that she went back and did not get her job back. This aspect was also not followed by the Industrial Psychologist primarily from collateral sources. Counsel for the plaintiff downplayed it as a factor that it does not advance or detract anything from her case. It does. It has an important bearing on the case to demonstrate the extent to which her injuries served as an impediment to her continued employment at the aforementioned entity. Her version on this aspect is unsatisfactory and did not possess a ring of truth, candour and frankness. This court is not satisfied that evidence shows that she left her employment because of the injuries she sustained.
- [8] This brings into the fore the consideration whether the injuries she sustained did have any effect on her retirement age. The evidence and surrounding circumstances shows that they played no role at all. The plaintiff is a confident, well-read and spoken person with great ambitions for her future life. She is pursuing academic qualifications with determination and passion in her chosen field. It is safe to conclude that in this environment the plaintiff could not have continued working beyond the retirement age of sixty (60) as stipulated in clause 1.2 of her employment contract. There is no conclusive evidence that she finds it impossible to comply with the intensity of work. There is no independent evidence that the genesis thereof is the injuries she sustained. In clause 7.1 of the aforementioned employment contract the plaintiff confirmed that she is medically fit to comply with the requirements of the job. Either she lied then or she is doing so now. Somehow the plaintiff shied away from presenting evidence of her appraisal performance at her current employment. This could have assisted to shed some light about her current difficulties to

perform her duties.

- [9] There is also no evidence that she is in some kind of sheltered employment. Her evidence is that she has been able to hide away her injuries from her employer for fear of appraisal. This far she has been able to get away with it. If her injuries were so intense, they would have given her away in many ways. As to why she would go into this elaborate dishonest venture boggles the mind. It cast a dark cloud over her as a witness. This conduct is plain disingenuous. Evidence about her performance, unacceptable absence from work due to illness and physical ability to attend to work are all aspects that are missing in her case. The plaintiff rather conveniently, in her papers, left out the payslips of One World Media and attached those of her current employer. They too, indicate that her emoluments particularly commission earned increased instead of dwindling. That speaks to good performance.
- [10] What stand out is that the plaintiff must prove on a preponderance of probabilities the causal link between the accident and the damages. The pertinent question is whether the defendant must compensate the plaintiff for her loss of income or earning capacity. It was agreed between the parties that the report of Dr Versfeld pertaining to her present condition and prognosis would be tendered in evidence without proof.
- [11] The vital role of an expert in our law is well-known. It is to assist the court to come to a just decision. The opinion of an expert must make legal sense and be based on the facts. This passage in *Schneider NO and Others v AA and Another* is illustrative of the approach followed in our courts. It reads as follows: -
- “In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess”.[1]*
- [12] The two (2) experts that were called seemed to be leaning exclusively on the side of the plaintiff. It is the duty of the plaintiff to put before her experts all relevant information before them so that a proper evaluation can be made. An opinion can only be underpinned by proper reasoning if the facts are correct. Despite being confronted by these, the experts found it difficult to concede. The court ventures to say that if proper facts inter alia about her age of retirement were put before experts, their opinion on this aspect would have been different.

[13] Counsel for the defendant contended that the plaintiff has failed to establish that she suffered any loss of future earnings. The defendant correctly conceded the existence of diminished earning capacity. The legal position is trite that the capacity to earn is part of a person's estate. Therefore, a person must be compensated for the loss or impairment if it has the effect of diminishing his/her estate.[2] In order to qualify it simply means that the capacity to earn must no longer be there.

[14] This court agrees with the contention above for the reasons that were enumerated in the analysis of the mosaic of evidence on behalf of the plaintiff. It has already been stated that in assessing the expert evidence, there must be satisfaction that his/her opinion had a foundation in logical reasoning.[3] A court must be content that the expert has considered comparative rules and benefits and has "reached a defensible conclusion".

On this aspect and because of the paucity of the facts, that is not the case with the experts called for the plaintiff. Despite clear pointers that their conclusions were also based on wrong facts, the two experts were hell-bent to rely on their reports.

[15] The point is that despite her injuries, the plaintiff has not allowed it to hinder her from progressing in her work. Her academic achievement is unaffected and there is no evidence that it will be in the future. The plaintiff is already doing work of sedentary nature. With her ever improving qualifications, it can be accepted that she will not have to do work which requires physical strength. Even in her previous employ, she only did that because of the size of her company. The evidence shows that it is not the case with her counterparts who are employed in much bigger companies.

[16] It is trite that once the plaintiff has established that her injuries have somewhat compromised her earning capacity, she is entitled to damages. The approach of the court quoted in a long line of cases was articulated in *Herman v Shapiro & Co* in the following terms: -

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use 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 is certain that pecuniary damage has been suffered, the Court is bound to award damages".[4]

[17] When it comes to the actuarial assessment report which largely serve as a tool to assist the trial court, Nicholas JA in *Southern Insurance Association Ltd v Bailey* NO said the following: -

"Where the method of actuarial computation 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 Co Ltd v Botes 1963

(1) SA 608 (A) at 614F). 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 a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980

(3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case".[5]

[18] This brings us to the controversial issue of contingencies. In *Goodall v President Insurance Co Ltd* the court said the following: -

"In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office".[6]

[19] It is trite that the court has a wide discretion on this issue and contingencies cover a wide range of considerations peculiar to each case. Some of the factors to be considered include loss of employment, promotion, career path but for the injury and career path having the injury, the age of retirement. These must be taken into account in making deductions in the injured and uninjured earnings. The exceptional circumstances of this case is that she has made full recovery. She is no longer at risk to develop major thrombo-embolic complications. It is a fact that the injuries have not affected her life expectancy. Her current employment status is better than before her injuries with more remuneration and she is not in sheltered employment. There are, of course, some minor capacity loss sustained as a result of her injuries. Given all the factors enumerated above, I agree with counsel for the plaintiff that her diminished earning capacity must be calculated at only ten (10%) percent.

[20] In the light of all the evidence, the following Order is made: -

20.1. The Defendant shall pay to the Plaintiff the capital amount of R 1 318 266.40 (One million, three hundred and eighteen thousand, two hundred and sixty-six rand and forty cents only) in respect of the balance of the Plaintiff's claim for delictual damages sustained, which is calculated as follows:

20.1.1. Past loss or earnings: R 356 081.00

20.1.2. Future loss of earnings: R 1 962 185.40

TOTAL: R 2 318 266.40

20.1.3. Less interim payment in respect of loss: R 1 000 000.00

TOTAL: R 1 318 266.40

20.2. Payment shall be effected within 180 (one hundred and eighty) days from date of this order being granted.

20.3. Defendant shall pay the Plaintiff's taxed or agreed High Court party and party costs to date, which will include the following, but will not be limited to, subject to the taxing master's discretion:

20.4. The costs in respect of the preparation of the medico legal reports of the following experts, served in terms of the High Court Rules:

20.4.1. Dr. Botha (Internis / Specialist Physician);

20.4.2. Ms. Basson (Occupational Therapist);

20.4.3. Ms. Grove (Industrial Psychologist);

20.4.4. Mr. Whittaker (Actuary).

20.5. The costs relating to the reservation, preparation, travelling, accommodation and consultation with legal representatives including counsel and attendance at court of the following experts on the 16th of August 2022:

20.5.1. Ms. Basson (Occupational Therapist);

20.5.2. Ms. Grove (Industrial Psychologist);

20.6. The costs of counsel for trial on the 16th - 17th of August 2022.

20.7. Any costs attendant upon the obtaining of payment of the capital amount and the taxed costs.

20.8. Subject to the following conditions:

20.9. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

20.10. The Plaintiff shall allow the Defendant 14 (Fourteen) court days to make payment of the taxed costs.

20.10.1. No interest will be payable, except in the event of default of payment of such costs, in which case interest will be payable tempora morae at the prevailing rate of interest in terms of the Prescribed Rate of Interest Act from date of taxation.

20.11. The capital and the taxed or agreed costs shall be paid directly to the Plaintiff's attorneys of record with the following particulars:

NAME OF ACCOUNT: Munro Flowers & Vermaak Trust Account

BANK:

Nedbank

BRANCH CODE: 187505

Universal

branch Code: 198765

BRANCH: Northern Gauteng

ACCOUNT NO: [...]

REFERENCE: MS K Vermaak/tgb/MARAMBA (M.4750)

M.A. MATHEBULA, J

On behalf of the Plaintiff: Adv. H. Schouten

Instructed by:

Munro, Flowers & Vermaak Attorneys

C/O Webbers Attorneys

BLOEMFONTEIN

On behalf of the defendant: Ms. J. Gouws

Instructed by:

STATE ATTORNEY

\TKwapa

[1] 2010

(5) SA 203 (WCC) at 211J – 212B.

[2] Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A) at 917B.

[3] Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE).

[4] 1926 TPD 367 at 379.

[5] 1984 (1) SA 98 (A) at 116G – 117A.

[6] 1978 (1) SA 389 (W) at 392H – 393A.

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