

SOUTH AFRICA / JUDGMENT

Nkgau v Road Accident Fund (23282/16) [2022] ZAGPJHC 642 (17 August 2022)

[2022] ZAGPJHC 642**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Matsemela

CASE / FILE NUMBER

23282/16

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(SOUTH****GAUTENG LOCAL DIVISION)****CASE****NO: 23282/16****REPORTABLE:**

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
YES
17
August 2022
In

the matter between:

NKGAU
L
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

JUDGEMENT

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MATSEMELA AJ

INTRODUCTION

- [1] This is an action for delictual damages in terms of the Road Accident Fund Act arising out of personal injuries sustained as a result of a motor vehicle collision that occurred on the 12 August 2012.
- [2] On the 27th of October 2021, the Judge Matojane granted an order whereby the Defendant's defence in the principal action was dismissed and the matter will proceed by way of default judgment.
- [3] By agreement between the parties liability was conceded in favour of the Plaintiff in September 2014. The quantification of Plaintiff's damages remains in dispute.

ISSUES

FOR DETERMINATION

- [4] This court has to determine the following:

4.1. Past loss of earnings

4.2. Future loss of earnings and earning capacity.

PAST AND FUTURE MEDICAL EXPENSES AND GENERAL DAMAGES

- [5] Counsel for the plaintiff addressed the Court that plaintiff abandons his claim for past hospital and medical expenses.
- [6] The Plaintiff served and filed a RAF 4 Serious Injury Assessment Report Form by Dr. Kruger who qualifies the Plaintiff's injuries as serious in terms of the Narrative Test 5.3 (Severe long-term mental or severe long-term behavioural disturbance or disorder). The issue of general damages and Section 17(4)(a) undertaking is postponed sine die pending the outcome of the full court decision which has been constituted by acting JP Ledwaba regarding these issues.

EMPLOYMENT AND EDUCATIONAL HISTORY

- [7] The Plaintiff completed a grade 12 level of education at Springs Technical College in 2010. He completed his theoretical N3 in aircraft maintenance in June 2011 and his practical training in December 2011. He commenced his with his apprenticeship at Execujet in January 2012 in order to become an Aircraft Maintenance Engineer ("AME").

- [8] The accident intervened on 20 August 2012 and after 3 months off duty he was able to return and was officially appointed as an apprentice AME from December 2012. He passed his trade test on 09 December 2014 and qualified as an aircraft mechanic at the same time. He worked as an apprentice AME from 10 December 2012 up to July 2015. He was then promoted to learner AME until May 2018 and was appointed as a qualified AME in June 2018 to current.

JOB DESCRIPTION

- [9] His employment generally consists of visual inspections and then hands on removal and replacements of the following components:

9.1. Airframe,

9.2. Engines, and

9.3. Wheels

9.4. His job demands is stipulated as a Medium work category occupation.

LOSS OF EARNINGS

- [10] To claim loss of earnings or earning capacity the Plaintiff must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss.[1]

- [11] Loss of earnings or earning capacity is assessed under the Lex Aquilia on the basis that the Defendant must make good on the

difference between the value of the Plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed.[2]

- [12] There must be proof that the disability gives rise to a patrimonial loss, this, in turn, will depend on the occupation or nature of the work which the Plaintiff did before the accident, or would probably have done if he had not been disabled.[3]

- [13] In *De Klerk v Absa Bank Ltd And Others* [4] the court held that causation should be distinguished from quantification. Quantification is depended not on proof on a balance of probabilities but on the Court's estimation of the likelihood of a future state of affairs. In the case of uncertainty, the Court should make the estimate in favour of the Plaintiff, provided that the best evidence was led.

CONTINGENCIES

- [14] Once the value of the income which the Plaintiff will lose in future has been ascertained, contingencies has to be taken into account. In *Southern Insurance Association Ltd v Bailey* NO[5] it was held that any enquiry into damages for loss of earning capacity is of its nature speculative, as it involves a prediction as to the future. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

- [15] It is trite that where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is tied down by actuarial calculations. The court has "a large discretion to award what the court considers right".
- [16] 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.
- [18] The technique of assessing damages involves consideration of relevant events which may occur or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a balance of probability justice may require that what is called a contingency or allowance be made for a possibility of that kind. See *Burger v Union National South British Insurance CO.*[6]
- [19] It is trite that the Plaintiff's capacity to earn an income has to be impaired. It is only once impairment has, as a fact, been established, that the question of quantification arises, and that the question of appropriate contingency provisions fits into the quantification exercise not the first, enquiry. The approach would firstly be whether there is a conceptual difference between the question whether a plaintiff has suffered an impairment of earning capacity. This has to be determined on a balance of probability in that plaintiff has the onus to discharge. The answer to this question is at least theoretically answered affirmatively if the plaintiff will have established a 51% chance of impairment being present.
- [20] Secondly is whether the plaintiff will in fact suffer a loss of income in the future. The answer to this question is an assessment in respect of which there is no onus in the traditional sense. This assessment involves the exercise of quantifying as best one and the chance of the loss actually occurring. The answer to this question is provided by the best match between the likelihood of a loss been suffered and the fraction expressed as a percentage.[7]
- [21] The rate of the discount cannot be assessed on any logical basis. The assessment must be largely arbitrary and must depend upon the trial judge's impression of the case. See "MVA Handbook"[8]
- [22] In *Road Accident Fund v Guedes*[9] the court referred with approval to "The Quantum Yearbook", 2004 by R Koch at 106 under the heading 'General contingencies',

where it states that when: "assessing damages for loss of earnings or support, it is usual for a deduction to be made for

general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court. . . . There are no fixed rules as regards general contingencies. "

[23] Then follows what is termed a 'sliding scale' and the following is stated: 'Sliding Scale: % for year to retirement age, ie 25% for a child, 20% for a youth and 10% in middle age. See Goodall v President Insurance Co Ltd[10]

[24] The Quantum Yearbook,[11] under the heading "General Contingencies" where it is stated:

"There are no fixed rules as regards general contingencies.guidelines can be helpful:sliding scale of ½ % per year to retirement age..."

[25] A short period of exposure to the risk of adversity justifies a lower deduction than would be appropriate to a longer period.

MEDICO LEGAL EXPERTS

V MOOLMAN /OCCUPATIONAL THERAPIST

[26] V Moolman noted in his report that based on the Plaintiff's lifting abilities he tested suited for work in the Light Work Category. This is not a match for his pre- accident position as apprentice aircraft mechanic. His capacity for light work is only a partial match for his current position. It appears as if the Plaintiff finds himself in a position where his employer is lenient towards his limitations by not assigning work to him which would require heavy lifting.

[27] He does however find himself in situations where he would not have a technician available to assist him where he would then have to exceed his safe lifting capacity especially when he has to do on-site repairs which, for preservation purposes is not recommended. His work capacity has been compromised as a result of the accident related injuries. From a psychological perspective it appears that he continues to have difficulties with bad moods and impatient behavior which has a negative impact on relationships at work. It appears that these are worse when he has to work under pressure.

[28] The Plaintiff stated that that he finds working in the aviation industry too stressful and he does not envision himself doing this work in the longer term due to the difficulties he experiences at times when he is under pressure.His emotional difficulties have made a negative impact on his level of competence at work. His ability to progress to working on bigger aircraft and thus handling and manipulating components has also been compromised, thus promotion in his career has been curtailed.

L. LINDE AND K JOOSTE/ INDUSTRIAL PSYCHOLOGISTS

[29] L Linde and K Jooste noted in their report that Pre-morbidly the Plaintiff would have continued with his career at Execujet and would have developed in a similar way as it has to date. However, he would have been psychologically and physically healthy and therefore qualified for promotion to the position of Senior AME.

- [30] As a Senior AME he would have earned within the Patterson C5 level. He would probably have continued in this position until his retirement age of 65. Post- morbidly, when interviewed in 2015 about his future aspirations the Plaintiff stated that he aspires to be promoted to the role of Senior AME.15.6. In his 2020 interview he stated that his physical difficulties at work are managed by an assistant who can do most of the heavy lifting. He did however note that the stress and responsibilities at work have increased which in turn is exacerbating his headaches and overall emotional and psychological difficulties and composure.
- [31] They explained that he does have a passion for his work and he does enjoy his work, however he does not believe his physical capabilities and psychological state , post- morbidly, is adequate to keep him going in the industry. He cannot see himself coping long-term physically and mentally.
- [32] They received collateral information indicates that the Plaintiff still has potential to Be promoted to Senior AME but that such promotion has been delayed by at least two years. Mokoena confirmed that the Plaintiff has physical limitations but that they do accommodate him. Mokoena however added that these limitations might cause problems for him as a Senior AME because as a Senior you have to do everything on your own. So some of the things that are expected from a senior to be able to do, the plaintiff cannot do due to the accident.
- [33] Mokoena and Snyman confirmed that the work that the Plaintiff does is highly stressful as they work with people`s lives essentially, and with a promotion there will be more overtime hours.
- [34] The Plaintiff will probably not be able to cope with the demands of the more senior position, as he is already experiencing difficulties in his position as AME even although he is enjoying a degree of sympathy. He will suffer at least a two year delay before his appointment as a Senior AME.
- [35] When taking the collateral information and expert opinions in consideration he will battle even more to cope with the demands of this more senior position. It is foreseen that he will at best return to his position of AME after a period of 12-24 months, including a period of management of poor performance and then being declared incompetent to act as Senior AME.
- [36] There is a real risk that the Plaintiff will resign at this stage as he may be disheartened and unmotivated to continue in his previous position as AME. A higher contingency deduction should be applied for the risk that he will resign at a young age. Alternatively, should he persist in his position as AME it is not foreseen that he will be working until the usual retirement age and probably the Plaintiff will not work beyond the retirement age of 55.

ACTUARIAL CALCULATIONS

[37] GA Whittaker prepared calculations in determining the Plaintiff's past and future loss of earnings and earning capacity. Post-accident 2 year delay in promotion to Senior AME i.e. 01 January 2023. Returns to working as AME from 01 July 2024 increasing in line with inflation until retirement age 65.

Past Loss

Value of income uninjured R 1 021 529

Less contingency 5 % R 51 076

R 970 453

Value of income injured R 594 629

Less contingency 5% R 29 731

R 564 898

Net past loss R 405 555

Future Loss

Value of income uninjured R 16 747 946

Less contingency 17.5% R 2 930 891

R 13 817 055

Value of income injured R 10 234 270

Less contingency 37,5% R 3 873 851

R 6 396 419

Net future loss R 7 420 637

Total net loss R 7 826 192

Loss after application of the limit

Net past loss R 282 338

Net future loss R 6 176 755

R 6 459 093

Applying the same scenario with a retirement age of 55 the net loss after application of the limit is R 6 798 271.

[38] I have considered all the arguments, expert reports and actuarial calculations and decided to follow the actuarial calculation by GA Whittaker. I came to the conclusion that 15% pre-morbid and 35% postage morbid contingencies should apply. The contingency differential spread is thus 20%. Having said that I therefore make the following order:

ORDER

The Defendant is liable 100% for the Plaintiffs' proven damages. The Defendant is to pay the Plaintiff an amount of R 6 459 093 for past and future loss of earnings.

MOLEFE MATSEMELA

ACTING JUDGE OF THE SOUTH GAUTENG LOCAL DIVISION

Date of hearing:

25 MAY 2022

Date of judgment:

17 AUGUST 2022

For the Plaintiff

ADV. A Louw

Instructed by Erasmus De Klerk Inc

[1] See . RUDMAN V ROAD ACCIDENT FUND 2003 SA 234 (SCA).

[2] See SANTAM VERSEKERINGSMAATSKAPPY BEPERK V BEYLEVELD 1973(2) SA146(A) 150 B-D

[3] See UNION AND NATIONAL INSURANCE CO LIMITED V COETZEE 1970(1) SA295 (A) AT 300A.

[4] 2003(4) SA 315 (SCA)

[5] 1984

(1) SA 98 (A) FROM para 99-100

[6] 1975 4 SA 72 (W) 75.

[7] See De Klerk v ABSA Bank Ltd and Others 2003(4) SA 315 (SCA) went on length to explain the difference between causation and quantification of damages .

[8]BY D P HONEY AND H J NEWDIGATE PAGE 176).

[9] 2006

(5) SA 583 (SCA) at Paragraph [9] at 587 to 588

[10] 1978

(1) SA 389 (W)

[11] 2014 by Robert Kock (Actuary) at 114

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