

SOUTH AFRICA / JUDGMENT

Nkosi v Road Accident Fund (08/25592) [2018] ZAGPPHC 597 (12 July 2018)

[2018] ZAGPPHC 597

COURT

North Gauteng High Court, Pretoria

BEFORE

Dodson

CASE / FILE NUMBER

08/25592

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA, PRETORIA

CASE NO:08/25592

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

DATE:12 JULY 2018

In the matter between-

NKOSI:TAMMY

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DODSON AJ

- [1] The plaintiff sues the defendant for damages arising from a serious accident that took place on 6 August 2005.

- [2] In the accident, the plaintiff suffered a fracture of the midshaft right femur, an intertrochanteric fracture of the proximal part of the left femur, fractured ribs, a back injury and a head injury.[1] He was hospitalised for approximately a month after the accident. Open reductions of both femur fractures were performed and post-operatively he received intensive rehabilitative physiotherapy and occupational therapy. He was in a wheel chair for a considerable period of time after the accident.
- [3] The merits were settled on the basis of a 70/30 apportionment in favour of the plaintiff.
- [4] Past medical expenses of R190 285,55 (before apportionment) were awarded on 25 November 2010. General damages of R650 000 (before apportionment) were awarded to the plaintiff on 18 June 2015.
- [5] The matter was enrolled for hearing before me on 14 May 2018 for the determination of past loss of income and future loss of earning capacity only.[2]
- [6] The plaintiff's date of birth is 14 August 1956, meaning that he was 49 years old at the time of the accident and 61 years old at the time of the hearing before me.
- [7] He has an education up to grade 11 and has no other formal training subsequent to that. It is essentially common cause that the plaintiff earned a living before the accident by running his own business from his home importing and selling clothing and footwear. He had done this for most of his working life at the time of the accident. The plaintiff testified that at the time of the accident the business was in a growth phase. He used to travel overseas on a regular basis for purposes of acquiring his merchandise for sale in South Africa.
- [8] However, the accident brought about the end of his business and the discomfort he suffers as a result of the accident prevents him from travelling overseas and purchasing merchandise as he used to do. In this regard he testified to two unsuccessful post-accident overseas trips in an attempt to revive his business. On account of the pain, discomfort and problems caused by the injuries, he had difficulty getting around on the one trip and missed a connecting flight on the other.
- [9] He spent approximately two years after the accident overseas with a friend to recover and from who he sought to learn agriculture as a possible new basis for earning a living. However nothing came of this. Nor did anything come of his attempts to revive his business through getting others to purchase for him.
- [10] He now earns a state pension which is currently set at R1700 per month and has other small amounts of intermittent income.

[11] The plaintiff himself and an industrial psychologist, Mrs B Donaldson, testified on behalf of the plaintiff. Mr K Prinsloo, an industrial psychologist, testified on behalf of the defendant. Both their recommendations were then taken up in actuarial reports in order to quantify their competing versions as to the amount of damages that should be paid to the plaintiff in respect of loss of income and loss of earning capacity.

[12] The industrial psychologists concluded a joint minute, the material parts of which read as follows:

""1. PRE-ACCIDENT

12.1 We note Mr Nkosi's reported, and in some cases, documented scholastic and vocational histories prior to the accident under review. In this connection, we note, too, that he was reportedly in Form V/Gr 12 in Soweto in 1976 when the riots took place, as the result of which he left school without completing his final year of secondary schooling. We agree thus that he has Std 9/Gr 11 to his credit.

12.2 We also agree that very soon after leaving school he embarked on an entrepreneurial venture as a self-employed fashion consultant and was still working in this capacity when the accident in question took place on 6 August 2005. In this regard:

12.2.1 We note what employment-related data is to hand in the form of financial statements , sales slips and invoices, customs documentation, international flight records as well as a business plan for further expansion of Mr Nkosi's endeavours and we agree that the indications are that he was well placed in his business. We also agree that the remuneration data we have available to us indicates that he was earning at a level substantially above his employment potential based on his educational attainment.

12.2.2 We agree, however, that further expert comment on the trends in Mr Nkosi's business and what these would have implied for the sustainability of these earnings and the financial future of his business, and even the accuracy of the earnings reflected, goes beyond our expertise.

12.2.3 Instead, we agree that a more realistic, albeit conservative and prudent, approach to the quantification of Mr Nkosi's earnings would be via the utilisation of relevant market- related earnings for a (KP: Sales Representative 1, which is graded at a Paterson B5 level,BD:General sales Representative with 5-10 years' experience and with 10+ years' experience (sic)).[3]

1.3 With respect to Mr Nkosi's employability and employment prospects had the accident in question not taken place:

1.3.1 BO that he would probably have continued to progress in his business (with his probably earnings being quantified in terms of 1.2.3 of this minute) and reaching his earnings ceiling (BO: at the upper quartile levels of remuneration (annual guaranteed package)

characteristic of Sales Representatives with 10+ years of experience by the time he was 60 years of age, with only inflationary increases being relevant thereafter.

1.3.2 KP that Mr Nkosi would probably have sustained his business with earnings growth aligned to the annual corporate increases for a Paterson 85 (basic earnings) as outlined in Table 14 of KP's report. Subsequent earnings growth (from 2016 onwards) would have been the annual CPI percentage increases until retirement.

1.4 With respect to Mr Nkosi's pre-accident retirement age, we agree, given his self-employed status, that he would probably have retired at the date of 70 years.

2. POST-ACCIDENT

2.1 We note that Mr Nkosi's report to us that he was unable to work for nearly a year after the accident under review but had stock on hand and was able to manage financially for some time via the sales of this stock. We also note that, despite significant pain, psychological trauma and physical restrictions, Mr Nkosi made two overseas trips in 2006 to procure more stock but was reportedly in so much pain and experienced so many accident-related difficulties that

he could not visit his usual suppliers and had to regard both of these trips as failures which further depleted his finances.

2.2 We note, too, the anomaly inherent in Mr Nkosi's post- accident financial statements which indicates that he actually increased his income post-morbidly. We agree that it is doubtful that the sale of old stock would have been responsible for this increase

in income over the 18 months after the accident under review, but we are unable to comment from an expert point of view as to any other origin of the income reported.

2.2 (sic) We note that Mr Nkosi closed his business in about July 2017 and KP is of the opinion that, in addition to the sequelae of the injuries sustained by Mr Nkosi in the accident in question including the psychological trauma, there were also market forces and Mr Nkosi's decision to learn farming skills in Hong Kong which led to his decision to close his business.

2.3 We note that, after the close of his business, Mr Nkosi spent nearly 2 years as the guest of a friend in Hong Kong recuperating (he

told BO that it was there that he learned to walk again) and learning farming skills from this friend during which time he earned no income.

2.4 We also note that subsequent to his return from Hong Kong, Mr Nkosi reportedly attempted to eke out a living by selling Russian sausages and Vienna sausages on the street, saving up money (about R2 000 at a time) and then giving this to friends who were going overseas and asking them to purchase goods which he was then able to sell at a 100% profit. It is our understanding that this was not a regular occurrence and that he essentially subsisted on the proceeds

from the sale on the streets of the sausages.

2.5 We note the inference to be drawn from the most recent report of Dr Versfeld (dated 18.02.2018) that Mr Nkosi is currently unemployed.

2.6 We have seen no documentation in respect of Mr Nkosi's work endeavours since he closed his business but we would naturally defer to any factual information in this regard which may come to hand.

2.7 With respect to their probable value:

2.7.1 KP has provided suggestions as to the quantification of these endeavours as set out in his report on p.33.

2.7.2 In BD's opinion, however, that the indications are that these work endeavours appear, despite their undoubted therapeutic value, to have been of a sub-economic nature.

2.8 With respect to Mr Nkosi's employability and employment prospects in the future:

2.8.2 We note the differing opinions of the Orthopaedic Surgeons with respect to the nature, aetiology and prognosis of Mr Nkosi's

orthopaedic injuries and defer to each Orthopaedic Surgeon.

2.8.2 In the event that the opinion of Dr Blignaut is accepted, we agree that the indications are that Mr Nkosi would be restricted to sedentary or semi-sedentary work. We also note, however, that Dr Blignaut has recently advised that Mr Nkosi '... be evaluated by an Industrial Psychologist for final outcome of his work ability and prognosis in the future as the patient is now 62 years old and most probably retired.' (cf. joint expert minute, dated 09.05.2018,

p. 4).

28.3. In the event that the opinion of Dr Versfeld is accepted, we agree that the indications are that Mr Nkosi, on the basis of his current orthopaedic condition and its prognosis, has been rendered unemployable. In this regard, we defer to Dr Versfeld's opinion, based on his recent reassessment of Mr Nkosi, that '... Mr Nkosi has become unfit for his normal work and is now unemployed and is likely to remain so in future.' (cf. Joint expert minute dated 09.05.2018, p. 4).

28.4 Although we have each considered alternative sedentary or semi-sedentary employment prospects for Mr Nkosi in his post-morbid condition, with the details of these having been set out in our respective reports with our respective suggestions for the quantification thereof, we agree that the indications are that the realities are that Mr Nkosi has not worked since the close of his business in any situation other than the ad hoc street trading he was doing at the time of our assessments.

28.5 Given, thus all of the limitations operating in his particular situation now, including his age, his orthopaedic condition and its

prognosis, his psychological condition and its prognosis, the length of time he has been out of formal employment, his lack of a Senior Certificate, his lack of contactable references and his lack of market-related skills such as computer literacy, we agree that it would not be unreasonable to accept that he has been rendered unemployable, for all practical intents and purposes."

[13] Consistent with paragraph 1.2.2 and 1.2.3, Mrs Donaldson in her expert report assumed a notional model whereby the plaintiff would have been employed in the corporate sector as a general sales representative earning commission and a range of benefits over and above a salary. She then determined a possible range of incomes that he might have earned in this capacity at the time of the preparation of her report in 2013, based on a salary survey by an organisation known as P-E Corporate Services. She then went on to say in her report, consistent with her assumed model, that -

"Had Mr Nkosi worked in the formal sector, he would probably then have retired at the normal retirement age of 65 years."

[14] For the same reasons, Mr Prinsloo also assumed a notional model where the plaintiff would have been employed as a sales representative, but not in the corporate sector, at the level of B5 on the Paterson scale. He translated this into an income with reference to an income survey provided by Deloitte.

[15] This difference between Mrs Donaldson and Mr Prinsloo was characterised as the main point of difference to be adjudicated in the proceedings.

[16] However, at the trial, matters proceeded on somewhat different basis.

Counsel for the plaintiff made reference to a table that appeared in Mr Prinsloo's expert report. The table was based on two sets of unaudited financial statements purporting to reflect the assets and liabilities of, and the income earned in, the plaintiffs business during the financial years ending 28 February 2004, 2005, 2006 and

2007. These financial statements were discovered by the plaintiff and included in the trial bundle. The table was as follows:

[17] The plaintiff was led with reference to this table when testifying about his income from the business before the accident, focusing on the year of the accident, ie the financial year ending 28 February

2006. In particular, the figure of R293,562 (as at the date of the accident) was identified by his counsel as the basis upon which his past loss of income and future loss of earning capacity should be calculated.

- [18] The plaintiff in his evidence referred to various developments that he said evidenced a business in a growth phase. Reference was made to two immovable properties that he owned and his acquisition of a Mercedes Vito which he equipped with racks so that he could move around with and sell his clothing.
- [19] He explained the very substantial jump in earnings, reflected in the financial statements, in the financial year following his accident (gross revenue from R568,705 to R860,664; salary and net profit combined from R293,562 to R520,100) on the basis that he was able to sell an accumulation of "dead stock" from the last ten years and the fact that, with his overseas travel coming to an end, he was able dramatically to reduce his overheads.
- [20] When Mrs Donaldson testified, she abandoned her reliance on the model contained in her report and, having heard the plaintiff's evidence in court, proceeded on the basis that the plaintiff had proven an income from his business based on the financial statements. She referred to an actuarial report that had, on the basis of this assumed income level at the date of the accident, calculated the total loss of income and the loss of earning capacity. The income of R293,562 per annum at the date of the accident in 2005 was then assumed to increase with headline inflation to R613,121 as at 1 June 2018.
- [21] Two scenarios were provided by the actuary, one being an assumption of a retirement age of 65, giving a total loss of R3,879,255, after deducting post- accident earnings and earning capacity, and the other based on an assumed retirement age of 70, giving a total loss R5,292 ,844 after deducting post-accident earnings and earning capacity. On both scenarios, contingencies were, for illustration purposes, assumed and deducted at 5% for past loss and 15% for future loss. Both scenarios factored in the alleged actual post-accident income earned (ie with the effects of the injuries) based on the amounts in the right-hand column of the table (ie based on the financial statements for the year ending 28 February 2007) for a year after the accident and thereafter an income of R36000 per annum. The plaintiff's focus was on the amount based on the scenario of a retirement age of 70, presumably because of the agreement in this regard in paragraph 1.4 of the joint minute.
- [22] Although Mrs Donaldson based her oral evidence on the financial statements, she nevertheless sought also to justify the model in her report based on the assumption that the plaintiff would have fitted into the corporate sector as a general sales representative. She did so with reference to the sophistication of his clientele (which included Parliamentarians and people like the brother of the governor of the Reserve Bank), his overseas business travel and the evidence of the lifestyle he led. She considered Mr Prinsloo's model of an ordinary sales representative, not in the corporate sector, to be too conservative and not to reflect the fact that a sales representative would earn commission over and above a basic salary. However, being matters of opinion and assumption, she could not say that Mr Prinsloo was necessarily wrong.

[23] I asked plaintiff's counsel to arrange for an actuarial report giving the loss of income and earning capacity based on Mrs Donaldson's original model in her report in order to provide for the eventuality that at the end of the day I might not be persuaded that the income based on the financial statements could be relied on. This report assumed only a scenario of retirement at age 70 and came to a total loss of income and earning capacity even higher than that based on

the financial statements ie R5,405,183.

[24] In his oral evidence, Mr Prinsloo explained that he had prepared the table set out above using the figures given for operating profit and "owner's salary" in the income statements in the financial statements put up by the plaintiff. However he testified that, while he did not purport to be a financial expert, there were a number of aspects of the financial statements that he found anomalous. Principal amongst these was the very substantial earnings figure for the year following the accident. This income was earned during a time when he was seriously compromised by his injuries from the accident,

having been in serious pain and unable to mobilise for a six or seven months and having suffered psychologically from the accident. He also had no employees to assist him. The plaintiff's explanation that he had earned this money selling his "dead stock", was questionable in view of the fact that the balance sheet for the years ending February 2005 and 2006 reflected an increase in inventory from R60,948 to R152,336 and in the year following the accident ie between the year ending February 2006 and 2007, from R152,336 to R196,523. This pointed to the acquisition of new stock rather than the sale of old or dead stock.

[25] There was the further difficulty that, as was common cause, the plaintiff was not paying any income tax, so there was no income tax-related documentation to prove the level of his earnings.

[26] It was these concerns that had led to the approach recorded in paragraph 1.2.3 of the joint minute, where both industrial psychologists had considered it "more realistic, albeit conservative and prudent" to use a model based on notional employment as a salaried employee .

[27] He also testified as to the bases for the particular model that he chose based on a Paterson 85 grading and falling outside the corporate sector, which he considered to be more realistic than the model of Mrs Donaldson. He took into account that the plaintiff did not have matric, had only worked for two years in the formal employment sector as a "pageboy" when he started his career and, whilst successful , had not run a formal business employing or managing people and paying tax, but rather an informal business and he was not computer literate. Based on his experience, such a person would not walk into a high level position in the corporate sector, which is what he considered Mrs Donaldson to peg him at, having regard to the income level she worked on in her model. However, he too acknowledged that the difference with Mrs Donaldson was a matter of opinion, which would have to be

decided by the court. He acknowledged his respect for her professional ability, having been involved in other matters where they were both called as experts.

[28] Based on his model, the defendant's actuarial report calculated his losses as follows. A grading on the basis contended for by Mr Prinsloo would have him at a starting salary of R94,484 for the tax year ending 28 February

2006. There would then be increases annually that took him to R173,330 in 2016, with inflationary increases after that until a retirement age of 70.

[29] As a starting point, it is appropriate to remember that the plaintiff bears the onus of proving his loss of income and his loss of earning capacity on a balance of probabilities[4].

[30] Counsel for the plaintiff argued strongly that the plaintiff had, through his testimony with reference to the table, proven his income at the level provided for in the financial statements for the year ending February

2006. This evidence he argued had gone unchallenged and therefore had to be. Moreover, it was supported by the evidence as to the assets that the plaintiff had been able to acquire, to which I have made reference above. It was also justified with reference to

his evidence about his business being in a growth phase. There are however difficulties with these contentions.

[31] The plaintiff's examination in chief with reference to the table proceeded as follows:

"Counsel: Your Lordship will note 9.1.2 sources of earnings financial statements, do you have it Mr. Nkosi?

Mr. Nkosi: What page?

Counsel: 74

Mr. Nkosi: Yes I got it

Counsel: Right 9.1.2 my Lord sources of earnings, financial statements for years 2004, 2005, 2006 and 2007 pre and post morbid earning capacities, now there is a paragraph there actual remuneration and they set out the first blocks there is financial statements, annual gross revenue 1 March 2003 to 28 February 2004, there is an amount indicated as R195 729, do you see that Mr. Nkosi?

Mr. Nkosi: I've got a problem. ... I have got a glaucoma in sight so it makes it difficult [to see]

Counsel: Alright fine but there is an amount indicated there of R195 729 and just below there is a total net profit indicated the members' salaries and a total income per year indicated of about R100 000 then the following year is 1 March 2005 and 28 February 2005 that was approximately just before the accident occurred the same year, the same year as the accident in 2005, do you agree with that?

Mr. Nkosi: Yes

Counsel: Now there is an indication there of annual gross revenue and that is R376 521 and then below that the income per year indicated as R206 749,[5] now you don't necessarily have an independent recollection of these specific numbers do you?

Mr. Nkosi: No

Counsel: Do you have an independent ...You cannot recall what you ...

Mr Nkosi: No

Counsel: But this is based on the documentation and we will show and argue that at a later stage. Now the important period for us is the following period, that is the period of 1 March 2005 to 28 February 2006...it should be 2006, now that is over the period where you were injured August, is that correct?

Mr. Nkosi: Yes

Counsel: 2005 to 2006 from March to February in August you were injured as indicated already?

Counsel: And it shows there a total income per year of R293 562. That is very important. Now the following ...

Court: Can I just stop you there for a moment and clarify something. Part of what is deducted from gross revenue is the members' salaries. Is that irrelevant to the income calculation?

Counsel: No, it is not. I will get to that just now my Lord, as it may please the court. Now with regard to the members salary indicated the R240 000, what is that indicative of? Is that the what payment is that...members' salary of R240000 ?

Mr. Nkosi: Can you repeat that?

Counsel: There is an indication of total earnings after the gross revenue was R568 000 then there is a total earnings indicated of R240 000 what is ... or total ... sorry I beg your pardon the total earnings or total income per year indicated as R293 000 and it consists of two aspects, the first aspect is members' salary R240 000 and then net profit or loss of R53 000, can you explain to the court what those two aspects are?

Mr. Nkosi: I use to go and buy stock and come back and that will include the transport, flight, hotels and buying of goods, so that was the thing that I used to do every maybe after two months or three months.

Counsel: Alright, but can you explain is that expenditures you obviously had to pay? The question is, the R240 000 indicated, which is indicated as a members' salary, now who is that member?

Mr. Nkosi: That was myself

Counsel: The net profit indicated there is R53 000 now that means you got a salary of R240 000 that specific year, what is the R53 000 net profit, what was that for?

Mr. Nkosi: The profit? ... This time I buy stock I am expecting to get a profit so that fifty something thousand it was the profit that I make after I deducted all the expenditures.

Counsel: So you testifying now that the R293 000 odd that is indicated here according to the documentation received by the defendant's industrial psychologist was the total income or the total salary you got including the profit?

Counsel: Right and the salary you took, the R240 000 members' salary that was the amount that you reinvested or you bought stock with?

Counsel: And the rest of the profit that is for you to live with?

Mr. Nkosi: Yes sir

Counsel: Now with regard to the following column that is after the accident the year after the accident 1 March 2006 to 28 February 2007 and this surprisingly indicates an amount and a profit a total income for the year of R520 000, almost R200 000 or R220 000 more than the year that you were injured in, can you explain that to the court?

Mr. Nkosi: Yes, I can. That ... I used to go maybe after a month or so, so I had stock that was ... I used to call it a dead stock ...

Counsel: A dead stock?

Counsel: Like death, dead, deceased?

Mr. Nkosi: Yes, so I had stock. Each time I go I will be left with some other items and go and add and add and add on the items, the stock that I had in the house so in that year after the injury I had a lot of stock in my possession so that is stock that I sold whilst I was injured.

Counsel: So that indicated for that specific period that is not stock that you bought that time, that is stock you had already, the deadstock that accumulated over a period of what?

Mr. Nkosi: Oh maybe 10 years or so, so the profit there because I was not going now using money to go overseas, hotels and stuff so that's why there was a profit because I was wheelchair bound at that time and people were coming to me so I didn't have any expenditure now of going and sleeping in the hotels and stuff, so it was, I was in the house so people were coming to buy and they were feeling you know sympathy for me because they thought I would never walk again". (emphasis added)

[32] This evidence was in my view inadequate to support the table as an accurate source of the plaintiffs earnings from his business for several reasons. Firstly, underlying the leading of this evidence and the presentation of the plaintiffs case, was a suggestion by plaintiff's counsel that the incorporation of the table in the defendant's expert's report suggested acceptance by the defendant of the accuracy of the amounts reflected in it. This was not so.

The table simply sought to present the information in the financial statements discovered by the plaintiff in a more accessible format. And it was a precursor, both in the report and in his oral evidence, to his questioning of the reliability of the information in the financial statements.

- [33] Secondly, as appears clearly from the transcript, the plaintiff was unable to read the figures to which he was testifying because of his glaucoma. Thirdly, he made it clear that he had no independent recollection of them.
- [34] Fourthly, he was not the person that had prepared the financial statements. They were prepared by an accountant, Mr Isaac Ngobeni, of Full Colour Financial Management cc. He was not called to verify or explain how he had arrived at the amounts in the financial statements. Fifthly, there was no attempt through any other method or using the evidence of an expert witness to reconcile the amounts in the financial statements with the documents in the trial bundle. Sixthly, there were documents in the trial bundle that called for an explanation that was not forthcoming. For example, accompanying the financial statements for the year ending 28 February 2005 is a letter from the same Mr Ngobeni dated 26 January 2005 that informs "to whom it may concern" that "we are the duly appointed accountants of Mr T. Nkosi and we hereby confirm that he earns a monthly remuneration of R7,125.00" which translates into an annual income of R85 500. Yet according to the table recording the income as per the financial statements for the year ending 28 February 2005, he was earning R208,749. Another example: there do not appear to be any bank statements in the trial bundles that pre-date the accident. Seventhly, he testified that the amounts described as "members' salaries" were used to purchase stock. But this suggests that they should have been reflected as an expense relating to the purchase of stock, rather than a salary.
- [35] It is so that a number of these issues should have been, but were not, taken up in cross-examination. But the failure to do so does not convert the plaintiff's lack of a prima facie case into something else. He was cross-examined about his failure to pay income tax on the operating profit of the business. The plaintiff sought to explain this on the basis that it was all ploughed back into acquisition of stock for the business. But if that was so, that amount too should have been reflected as expenditure on stock in the income statement.
- [36] I also agree with the observations made by Mr Prinsloo as to the unexplained anomalies in the financial statements and the difficulties presented by the absence of any income tax-related documentation that might have provided an objective basis for assessing his pre-accident income. His concern about the anomalous increase in income after the accident was justified. The plaintiff's explanation that this increase was explained in part by the decrease in overheads is not born out by the figures. If one calculates the difference between gross revenue and income in the table, it suggests that expenditure between the year before the accident and the year of the accident increased from R167,772 to R275,143. From the year of the accident to the year after the accident it increased from R275,143 to R340,564.

- [37] Insofar as reference was made to his immovable properties, at face value, the documents in the trial bundle seem to suggest that the plaintiff was substantially indebted in terms of mortgage bonds registered over the properties. A document dated 16 October 2007 in respect of one property reflects a total mortgage loan of R1,450,000 with total outstanding finance charges reflected at R2,877,452. The Mercedes seems to have been financed and there does not appear to be any basis to know what amount had been repaid on the capital sum and what the outstanding finance charges were.
- [38] In these circumstances there was a real need, if one was to rely on the financial statements, to have a person with the appropriate expertise testifying as to whether or not they fairly reflected the plaintiff's financial position at the material times. I am accordingly of the view that the plaintiff failed to prove his actual pre-accident income as a basis for determining past loss of income and future loss of earning capacity.
- [39] In my view, the industrial psychologists were correct when they recorded in their joint minute that a more realistic, albeit conservative and prudent approach was required. They both chose to work off a model of a notional salaried sales representative . This was less than ideal because it strayed so far from reality. Nonetheless, that is all the court has. The question then becomes which of the competing models of the two industrial psychologists should be accepted.
- [40] In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*,^[6] the Supreme Court of Appeal laid down the following approach to dealing with conflicting expert opinions:
- "[34] .. it is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised.
- [35]
- [36] ... what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning."
- [41] Although these dicta related to the merits of a delictual claim, the same principles would apply to all expert evidence, including that dealing with the assessment of damages.
- [42] Both of the witnesses gave cogent evidence. There are certainly no credibility issues involved and it was correctly pointed out by them that the court must decide the difference of opinion between them.

[43] In terms of the choice between characterising the plaintiff either as operating at a reasonably high level in the corporate sector as a general sales representative, on the one hand, or outside of the corporate sector at a Paterson B5 level on the other, each expert was able to point to some evidence to support his or her respective model. The level of clientele that the plaintiff was supplying his merchandise to and his overseas purchasing of stock, tend to support

Mrs Donaldson's view. The non-payment of income tax, the absence of any permanent employees assisting in the business, the educational

disadvantages from which the plaintiff suffered, his working from home and only latterly from a vehicle, point to a business operating

outside of the corporate or formal sectors.

[44] Counsel for the plaintiff argued that the fact that Mrs Donaldson's model produced a loss of income and earning capacity in an amount similar to (in fact larger than) the amount based on the financial statements, supported using either of those amounts as the basis for the award of damages. In my view this cannot be correct. If there is a failure to prove an income level on a factual basis, a court should in my view be slow to accept a model-based assessment that, in effect, simply bypasses that failure.

[45] In any event, on balance, I am more persuaded by the reasoning of Mr Prinsloo in support of his model, for the reasons that he gave and which I have outlined above.

[46] At best for the plaintiff, the arguments of the respective experts are equally compelling. If this is so, then the fact that the plaintiff bears the onus of proof means that my assessment must favour the defendant.

[47] In the circumstances, the calculation of loss of income and loss of earning capacity, assuming there had been no accident, must be on the basis set out in the defendant's actuarial report. That gives an amount of R1,693,278 for past loss of income and R1,250,157 in respect of future loss of earning capacity, totalling R2,943,435.

[48] The figure derived thus far on the basis of Mr Prinsloo's model does not take into account the deduction of the income that he has earned or has been capable of earning, taking into account the impact of the accident. On this aspect, Mr Prinsloo chose simply to use a model of a full time unskilled or semi-skilled worker, using the remuneration

guidelines from Robert Koch (2010-2015) in respect of the non-corporate/informal sector. Based on this approach the amount to be deducted would, on his model, be R1,279,776.

[49] The selection of this model was in my view in conflict with the agreement reflected in the joint minute to the effect that the plaintiff "has been rendered unemployable, for all practical intents and purposes." He would be confined to income from his State retirement pension and his limited street vending activities. Moreover, because of the means test, his State retirement pension will likely fall away when damages are awarded.

[50] On this aspect, the quantification of income earned or capable of being earned, taking the accident into account, is more appropriately reflected in the actuarial quantification based on Mrs Donaldson's model. In her report she more fairly characterised and quantified his post-accident circumstances earnings and capacity to earn. The figure for deduction based on her model is R862,665, which is the lowest of the various models presented by both sides on this aspect of the

calculation.

[51] The figures thus far have not reflected any adjustment for contingencies. Given the conservative model adopted by Mr Prinsloo and the relatively short period until the plaintiffs retirement age, I am of the view that a low contingency deduction is appropriate in respect of loss of income and earning capacity assuming no accident.

[52] As far as loss of income and earning capacity taking into account the

accident is concerned, Mrs Donaldson and the actuary quantifying her model also adopted a relatively conservative estimation, although

assuming quite a high (albeit reducing) income between the date of the accident and 1 January 2009. A contingency of 10% is appropriate

in respect of that figure.

[53] The plaintiffs damages are then calculated as follows:

Assuming no accident:

Past loss of income and future loss of earning capacity:

R2,943,435

Less 4% contingency:

R117,737

Total A:

R2,825,698

Factoring in the accident:

Income earned and income earning capacity:

R862,665

Less 10% contingency:

R86,267

Total 8:

R776,398

Total A- total B:

R2,049,300

Applying apportionment 70/30

R1,434,510

[54] I accordingly make the following order:

[54.1] The defendant shall pay the sum of R1,434,510 to the plaintiff's attorneys in settlement of the plaintiff's claim in respect of past loss of income and future loss of earning capacity, which amount shall be payable by direct transfer into their trust account:

Munro, Flowers & Vermaak Trust Account Nedbank

Branch : Business North Rand Account number: 1469036657

Branch number: 146905

[54.2] The defendant shall pay interest on the sum referred to in the preceding paragraph at the rate of 10% from the date of judgment to the date of payment;

[54.3] The defendant is ordered forthwith to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Funds Act No. 56 of 1996, limited to 70%, in respect of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, after the costs have been incurred and or proof thereof, resulting from the accident that occurred on 6 August 2005;

[54.4] The defendant must make payment of the plaintiffs taxed or agreed party and party costs on the High Court scale, which costs shall include the following -

- (a) the fees of senior junior counsel on the High Court scale;
- (b) the reasonable taxable costs of obtaining all medico-legal and actuarial reports from the plaintiffs experts which were furnished to the defendant;
- (c) the reasonable taxable preparation and reservation fees, if any, of the following experts in respect of whom notice has been given, being -
 - (i) Dr Versfeld (orthopaedic surgeon);
 - (ii) Ms Gropp (occupational therapist);

(iii) B Donaldson (industrial psychologist);

(iv) G Whitaker - (actuary).

(d) The above costs will also be paid into the aforementioned trust account.

[54.5] The following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs -

- (a) the plaintiff shall serve the notice of taxation on the defendant's attorneys of record;
- (b) the plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs from the date of settlement or taxation thereof;
- (c) should payment not be effected timeously, plaintiff will be entitled to recover interest at the rate of 10% on the taxed or agreed costs from date of allocatur to date of final payment.

AC DODSON

Acting Judge of the High Court

Date of hearing: 14, 16 May 2018

Date of judgment: 12 July 2018

For the applicants J Barn

Instructed by: Munro, Flowers and Vermaak

For the first respondents: W Binase

Instructed by: Rambevha Morobane

- [1] The head injury seemingly had temporary rather than permanent consequences, although nothing turns on this.
- [2] By agreement, the defendant is also to be ordered to provide an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996 as appears from my order at the end of the

judgment.

- [3] BD referring to the industrial psychologist called by the plaintiff and KP the industrial psychologist called by the defendant.
- [4] Sentrachem Bpk v Wenhold 1995
- (4) SA 312 (A) at 325G - 326E.
- [5] In fact the figure is R208749.
- [6] 2001 (3) SA 1188 (SCA).

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