

SOUTH AFRICA / JUDGMENT

Povey v Road Accident Fund (63390/16)

[2022] ZAGPPHC 32 (18 January 2022)

[2022] ZAGPPHC 32**COURT**

North Gauteng High Court, Pretoria

BEFORE

JT Leso

CASE / FILE NUMBER

63390/16

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Source record**FLYNOTES:**

PSYCHOLOGICAL HARM AND LOSS OF INCOME

ACTUARIAL

– Loss of income – Proof – Psychological harm

after death of pregnant wife in accident –

Mother employing

plaintiff in accommodative work environment – Lack of bank

statements, financial records or affidavits

which confirm his

income – No evidence that he heeded the advice to obtain

psychotherapeutic treatment to improve his

condition –

Actuarial calculations based on speculation by experts and not

justified by factual evidence – Loss

of income claim

dismissed.

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case number:63390/16

COLIN

POVEY

PLAINTIFF

And

THE

ROAD ACCIDENT FUND

DEFENDANT

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives, by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 18 January 2022.

JUDGMENT

LESO, AJ

INTRODUCTION

- [1] Plaintiff instituted a claim of damages against defendant due to a motor vehicle accident which occurred on 15 August 2004 at R34 road, Memel Free State. Plaintiff lost control of the motor vehicle he was driving and overturned when he was avoiding collision with the unknown insured driver. The accident resulted in the death of the plaintiff's wife who was four months pregnant.
- [2] The issue of merits was finalized on 29 April 2020 wherein Mngqibisa-Thusi J found that the defendant was 100% liable for the plaintiff's proven or agreed damages. The plaintiff made an application to struck out the Road Accident Fund defence in terms of Rule 30A and in terms of the court order granted by Ledwaba DJP on 13 July 2021. The Road accident Fund defense was struck out, and the matter proceeded on a default basis.

ISSUES

IN DISPUTE

Quantum

- [3] The matter is set down for the determination of non-pecuniary loss(general damages), loss of earnings(past and future) and future medical expenses.

BACKGROUND

- [4] Before me is the plaintiff's eight(8) expert reports(five(5) main reports and three(3) addendums), two expert reports for the defendant, five(5) affidavits in terms of Rule 38(2) by the five experts and one set of joint minutes by the Psychiatrists. Plaintiff's expert reports were admitted as evidence. No witnesses were called to give oral evidence and the plaintiff's counsel relied on the stated case.

EVIDENCE ON THE CLAIM FOR GENERAL DAMAGES

- [5] Plaintiff claims that he has suffered a non-pecuniary loss in the amount of R450 000.00. The counsel for Plaintiff relied on the stated case to prove the amount claimed for general damages. He submitted that the plaintiff is qualified to be awarded the damages because of the following reasons:

5.1 On 23 July 2018 the Clinical Psychologist, Kobus Truter, assessed the plaintiff for serious injuries. He reported that the plaintiff qualifies for serious injuries because he was exposed to intense trauma, resulting in the death of his wife who was four (4) months pregnant and has suffered psychological damages. The expert opines that the plaintiff suffered severe depression, schizoid personality, avoidance personality, anxiety, dysthymia, alcohol dependence, and PTSD. He qualified the plaintiff in terms of the narrative test.

- [6] The Occupational Therapist reports that the plaintiff was diagnosed with mood disorder of depression and Post-traumatic stress disorder. The experts reports that, post-accident, the plaintiff complains of lower back pain, neck and upper back and shoulder pain and chest pain.
- [7] In the joint minutes of the Psychiatrists, the experts confirmed that the plaintiff suffers from Major Depressive Disorder directly related to the trauma of losing his wife and son during the accident.
- [8] The Clinical Psychologist commented as follows “in the RAF4 document, (subparagraph 5), reference is made to a serious injury in terms of the narrative test as including the loss of a foetus. The expert concludes that the plaintiff’s psychological condition, mood disorder, depression, Post-traumatic Stress Disorder (PTSD) and a panic disorder contribute to 15% whole person impairment”.
- [9] The Psychiatrist(Dr Matjane) which was appointed by the plaintiff, completed RAF 4 assessment form indicating that the plaintiff has severe long- term mental disturbance or disorder and he has 10% WPI. The expert concludes that the applicants qualify for Serious Injuries Assessment under the narrative test.
- [10] The plaintiff’s counsel submitted that the court must rely on the expert's report which has qualified the Plaintiff’s WPI under the narrative test. To quantify the amount claimed, the counsel relied on two comparative cases, Swartz v Road Accident Fund 2010 6 QOD J2-74 (ECP) and Harcourt NO v Road Accident Fund 2000 5 QOD B4-29 (NCD).

EVIDENCE ON THE CLAIM FOR FUTURE MEDICAL EXPENSES

- [11] The injuries sustained by the plaintiff have been outlined in the plaintiff uncontested reports compiled by Clinical Psychologist(Dr. Kobus Truter), Occupational Therapists(A Rossouw and S Maree) and a Psychiatrist(Dr. Leon A). The experts confirmed that the plaintiff consulted over a period of approximately eight (8) months as a result of his treatment-resistant depression and PTSD and he used antidepressants up to 2016. The experts report that after 17 years of the accident the plaintiff has been rendered psychologically vulnerable,

and relapses may occur from time to time. It is further reported that the plaintiff has not come to terms with the death of his wife, he has ongoing grief and he will benefit from long-term psychological treatment.

EVIDENCE ON THE CLAIM FOR LOSS OF INCOME OR EARNING CAPACITY

[12] Plaintiff claims past loss of earnings in the amount of R 876 259.00 and Future loss of income in the amount of R 1662 327.00. He

relies on the experts' reports to prove the above claim. The relevant evidence submitted by the plaintiff in support of his claim is the Industrial Psychologist report dated 08 August 2017 and the addendum Industrial Psychologist report dated 7 February 2019, the Occupational Therapist report dated 19 July 2017 and the addendum Occupational Therapist report dated 7 February 2021. The plaintiff's damages is quantified by the actuarial reports that are admitted as evidence.

Pre- accident

[13] The Occupational Therapist and the Industrial Psychologist reports that pre-accident, from 2002 to 2010 the plaintiff was self-employed at Novico and his main business was to procure and supply office stationery. The experts reported that the plaintiff classified his work as frequent light with frequent standing, walking, driving and medium work demand in load handling. The industrial Psychologists reported that the plaintiff indicated that he was earning an income of -+9000 to 10 000 per month before the accident however no statements or records were produced by the plaintiff.

Post-accident

[14] The Industrial Psychologist and the Occupation Therapist reported that the plaintiff has been employed as a tax consultant by his mother from 2011-2017). The Industrial Psychologist reported that from 2006 to 2011 he worked as a property Development Specialist with an income of R12 600 to 15 000.00 per month, no evidence of income was submitted. In 2012 the plaintiff earns a monthly salary of R21 337.00 per month. The salary was confirmed by the letter from the plaintiff's employer. In the addendum report for the assessment done on the plaintiff in 2019 and 2021, the experts reported that the plaintiff was still employed as a tax consultant and a bookkeeper. It is reported that, post-accident, the plaintiff did not return to work for two months and he lost his business a year after the accident.

Loss of earning capacity

[15] The Occupational Therapist reported that pre-accident, the plaintiff is performing constant sedentary work with occasional light work in driving, walking and standing. It is reported that post-accident, the plaintiff is performing work in an accommodative work environment under his mother's constant support and supervision The above expert indicate that the plaintiff works from home and he does not work fixed hours. His duties are to review financial records, to computes taxes owed by clients, research tax law and calculate the amounts on the returns. The expert indicates that cognitively and psychosocially plaintiff is

not coping with the demands of his own occupation and he would not be able to run his own business or to work without his mother's

supervision.

[16] The Occupational Therapist identified the plaintiff's post morbid problems and reports that the plaintiff suffers from intensive and long-standing symptoms of depression, hopelessness and lack of drive. In 2017 assessment the expert found that the plaintiff was not coping with a full day job. The expert state that the plaintiff needed to lie down to rest and work with intervals, he lacked concentration and did not have the determination and energy to perform the repetitive work demands of bookkeeping. It was reported that the plaintiff had recurrent headaches, neck pain and lower back pain. The plaintiff reportedly has complaints of wide-spread pain without origin. Ms Povey, the plaintiff;s mother is of the opinion that the plaintiff would not be able to manage the tax consulting and bookkeeping business independently.

[17] Based on the evaluation by the Occupational Therapist, the plaintiff experiences continual residual physical limitations and restrictions following the emotional trauma that he continues to endure following the accident. The expert concluded as follows: "He currently does not meet open labour standards for basic or executive cognitive or psychosocial demands of employment. His earning capacity is significantly compromised mostly as a result of impaired psychological functioning. It would be reasonable to note that as a long period of time has passed since the death of his wife and unborn son, and no improvement has been noted, that he has been rendered psychologically vulnerable and his psychological prognosis should be

considered as guarded".

EVALUATION OF EVIDENCE

[18] Loss of earnings(past and future)

The Industrial Psychologist reports that pre and post-accident, the plaintiff earned an income while he was self-employed and when he was employed by his mother. The plaintiff did not provide bank statement, financial records or affidavit which confirms the information relating to his income. The plaintiff had an opportunity to provide evidence during the re-assessment in 2019 and 2021 however his claim remains short of the necessary evidence.

[19] In 2017 the Clinical Psychologist assessed the plaintiff and recommended that the plaintiff undertakes a psychotherapeutic treatment. In the addendum report dated 14 June 2021 the Clinical Psychologist opines that the plaintiff will stand to benefit from the recommended long-term psychotherapeutic treatment. The experts indicate that with Psychological intervention

it will be reasonable to expect that the plaintiff will be able to positively participate in all aspects of his daily living to full effect especially with regards to his physical abilities and psychological abilities allowing him to fulfill all the roles in his life and experience quality of life.

- [20] 17 years later, the experts report that the plaintiff still has to undergo treatment that will improve his medical condition. There is no evidence that the plaintiff headed the advice of the experts hence the expert still stands by the recommendations. The conclusion by the expert on the plaintiff's earning capacity is irreconcilable with the comments the expert made regarding the medical benefits that will improve the plaintiff's quality of life and physical mobility of the plaintiff.
- [21] The Industrial Psychologist opines that if the plaintiff loses his current employment, for whatever reason, he will not be an equal competitor for alternative employment. As a result, he will be at risk of experiencing longer than expected periods of unemployment. The exact risk and financial value of such longer than expected periods of unemployment can however not be predicted reliably. It is therefore recommended that this be dealt with utilizing a higher than normal post-accident contingency percentage. This conclusion is based on speculations that are far-fetched considering the overall evidence regarding the employment status as well as the working conditions of the plaintiff. The postulations that he might face longer periods of unemployment are misplaced because the plaintiff's has maintained his employment for 17 years since the accident and his employer is his mother who is accommodative and sympathetic towards the plaintiff's shortcoming.
- [22] The plaintiff ought to prove that the patrimony of his estate has been diminished or compromised as a result of the sequelae of the accident. This principle was well captured by Jones AJA. in the case of *Rudman v Road Accident Fund* (370/01) 2002 ZASCA 129, the experts reported that before the accident, the plaintiff was performing medium to light duties and his duties were sedentary and he was self-employed. After the accident, the plaintiff perform medium to light-duty and he is been accommodated in a sedentary work.
- [23] Secondly, Based on the experts speculation that the plaintiff would probably have continued to function in a self-employed capacity for the remainder of his career does not mean that he would have been in the better financial position than he is in currentl. The plaintiff's claim for past loss is not convincing as he himself was not sure of the personal income. consequently, the calculations are based on speculations as there are no actual amount or figure provided by the plaintiff nor the evidence to support his claims of income. .
- [24] From the overall evidence, I find that the plaintiff's injuries do not necessarily translate into a reduction of earning capacity causing loss. The plaintiff has not proven any reduction of earnings,

and the probability of leaving or his mother dismissing him is unlikely. The possibility of him losing a job does not exist. It is important to note that the final analysis of an award for damages cannot be based upon speculation. The basis for the award must be supported by evidence. The plaintiff's injuries do not automatically qualify him for an award of loss of income. Every claim for damages or loss must be proven and the plaintiff bears the onus of proof.

- [25] The plaintiff has obtained the Actuarial calculations for the projected future and past loss of income. Mr Minnaar calculated the past and future loss of earnings based on the postulations made by the Industrial Psychologist. I have indicated that the Postulations by the Industrial Psychologist are unrealistic as they are based on speculations that are not supported by evidence. Although the actuarial report was admitted as evidence, the calculations serves no purpose as the information which the actuary is not
- [26] I find that the inconsistent and unsupported evidence in the reports are disabling in order to make a proper and a legally sound analysis of the evidence. The lack of evidence from the plaintiff and the plaintiff's mother has disadvantaged the plaintiff claim of loss of earnings. My approach to the opinions and remarks by the plaintiff's Industrial and Occupational Psychologist is guided by the principles laid down I n the case of Michael & another v Linksfield Park Clinic (Pty) Ltd & another [2002] 1 All SA 384 (A) para 34).The court said that, the facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militates against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. CORAM: Howie, Farlam JJA and Chetty AJAconcludes that, an expert opinion which lacks proper reasoning is not helpful to the court.
- [27] In the case of Glenn Marc Bee v The Road Accident Fund (093/2017)
- [2018] ZASCA 52 (29 March 2018). The court said that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning". I have applied the same principle in my analysis of the Industrial Psychologist and Occupational Therapist opinions and recommendations.

CONCLUSION

- [28] I am satisfied that the plaintiff is entitled to a claim for general damages. That the amount R450 000 as proposed by the plaintiff's counsel is a fair and reasonable amount considering the injuries or damages suffered by the plaintiff.
- [29] The plaintiff failed to make out a case for past and future loss of income. There is no evidence before me that the plaintiff earned the amount claimed. The Industrial Psychologist also remarked on the lack of evidence which supports the plaintiff's claim of

past lost of earning by stating the following: “Mr Povey reported that he earned +_R9000.00 to R10 000.00 per month however he has no financial statements or records that could confirm the amounts. It is noted that the writer attempted to impress upon Mr Povey as well as his mother the importance of factual evidence, however they indicated that the company was liquidated a long time ago and due to the time lapse since the accident, most documents were lost or destroyed”.

[30] The quantification of loss of earning capacity is also based on the estimated amounts which are not justified by factual evidence. I find that the letter from the plaintiff's mother who is the plaintiff's employer does not suffice as evidence to proof the plaintiff's damages. Despite the re-assessment that was conducted by the Industrial Psychologist in 2019 and the Occupational in 2021, the plaintiff failed to provide evidence to the expert to support his claim.

[31] There is no evidence that his patrimony was diminished due to loss of earning capacity resulting from his injuries and consequently he has failed to prove any entitlement to be compensated in respect of these heads of damages.' This claim is not justified and it therefore stands to be dismissed.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

1] The defendant is ordered to make payment of R 450 000.00(FOUR HUNDRED AND FIFTY THOUSAND RANDS)

2] The defendant is ordered to provide the plaintiff with an undertaking in terms of Section 17(4) of Act 1996 for the payment of costs for future medical and hospital expenses and any other reasonable medical

expenses to be incurred as a result of injuries sustained by the patient in the motor vehicle accident that occurred on 15 August

2004.

3] Plaintiff's claim for loss of earnings is dismissed.

4] The defendant is ordered to pay High Court costs on party and party scale.

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JT LESO

Acting Judge of the High Court

Date of Hearing: 18 August 2021

Judgment

Delivered: 18 January 2022

For the Plaintiff:

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