

SOUTH AFRICA / JUDGMENT

Zondi v Road Accident Fund (2565/2015) [2021] ZAGPPHC 707 (26 October 2021)

[2021] ZAGPPHC 707**COURT**

North Gauteng High Court, Pretoria

BEFORE

Makhoba

CASE / FILE NUMBER

2565/2015

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****(1)****REPORTABLE:**

NO/YES

(2)

OF

INTEREST TO OTHER JUDGES: NO/YES

(3)

REVISED.

NO/YES

26

OCTOBER 2021

Case number:

2565/2015

In

the matter between: NDUMISO
THULASIZWE ZONDI
PLAINTIFF
VS
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

MAKHOBABA J

1. The plaintiff instituted an action against the defendant for damages suffered as the result of injuries sustained in a motor vehicle

accident that occurred on 30th March 2013.

2. The merits of the matter have been settled between the parties 100% in favour of the plaintiff. There is an interim payment of R500000 for the loss of earnings as per the court order dated 7th March 2018.
3. The defendant's defence was struck out. On the date of trial, the defendant was not represented and the attempt to settle the matter

did not yield any results. Counsel for the plaintiff asked the court to proceed via a video link, he addressed the court and referred to his heads of argument. No oral evidence was led. Plaintiff is claiming only for loss of future earnings.

4. The plaintiff filled the following medicallegal reports of the following experts:

4.1 Dr.P Engelbreunt – Orthopaedic surgeon

4.2 Dr Cheyip – Neurologist

4.3 T.Preininger – Neuropsychologist

4.4 M.Sisson – Clinical – psychologist

4.5 Dr Van Wijk Urologist

4.6 Dr.M.Naidoo Psychiatrist

4.7 Dr.Mthembu – Ophthalmologist

4.8 Dr. Potgieter – Plastic surgeon

4.9 Dr. Moja – Neurosurgeon

4.10 Dr. Fredericks – Disability and assessor.

4.11 N. September – Occupational Therapist

4.12 Jacobson Talmud – Industrial psychologist

4.13 G. Jacobson Actuary

5. The issue in this matter is whether after hearing counsel I should grant the amount as requested on behalf of the plaintiff by counsel.
6. It is indeed so that even though defendant is not present in these proceedings the court cannot simply grant the order as requested, the court must see to it that the requested order is in accordance with justice.
7. The evaluation of the amount to be awarded for loss does not involve proof on a balance of probabilities. It is a matter of estimation.

Where a court is dealing with damages which are dependent upon uncertain future events – which is generally the case in claims

for loss of earning capacity – the plaintiff does not have to provide proof on a balance of probabilities (by contrast with

questions of causation) and is entitled to rely on the court's assessment of how he should be compensated for his loss.

8. The parties routinely seek to assist the court in assessment of the amount payable by resort to the expertise of an actuary. This is not an obligatory approach to the quantification of damages and a court should be careful not to treat these reports as if they are scientific data and the approach directive.
9. Actuaries rely on lookup tables which are produced with reference statistics. Such statistics are derived, inter alia, from surveys and studies demonstrate that locally and internationally in order to establish norms, representativeness, means. From these surveys and studies, baseline predictions as to the likely capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff's position using various assumptions and scenarios which should properly be gleaned from proven facts.
10. The general approach is to posit the plaintiff, as he is proven to have been in his uninjured state and then to apply assumptions to his state with the proven injuries and their sequela. The deficits which arise between these scenarios if any

are then translated with reference to the various baseline means and norms. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff in both scenarios. The loss would then be calculated as the difference in earnings derived between preaccident (or pre morbid state as it is often called) and post – accident morbid state.

11. In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents and countless other factors unconnected with the plaintiff's injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of "contingency" allowances. Given the purported mathematical and percentage based inquiry of the actuarial assessment, these contingencies are expressed in percentages which are brought to bear on the mathematical reflections which have been derived from the assumptions used. In essence the platform for assessment is no more than one a technique which is offered to the court in a bid to allow it to exercise its discretion. In essence the platform for assessment is no more than one a technique which is offered to the court in a bid to allow it to exercise its discretion. This mechanism should not be understood as been prescriptive or confining of the assessment that the court is called on to make. The court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, institution, and general right thinking
12. The locus classicus as to the value of actuarial expert opinion in assessing damages is Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98(A) where Nicholas JA said the following:

"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 inexorable actuarial calculations. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or differently put the 'vicissitudes of life'. These includes 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 labor unrest or general economic conditions. The amount of any discount may vary depending upon the circumstances of the case."

13. Zulman JA, with reference to various authorities including Southern Assurance said as follows in Road Accident Fund v Guedes (611/04)

[2006] SCA18 RSA at 586587B. The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make and estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO) Courts have adopted the approach that, in order to assist in such calculation, an actuarial computation is a useful basis for

establishing the quantum of damages"

14. In *De Jongh Vs Du Pisane* 2004 (5) QOD J2103 (SCA) the supreme court of appeal reiterated that contingency factors cannot be determined with mathematical precision and that contingency deductions are discretionary.
15. The general approach of the actuary is to posit the plaintiff, as he is proven to have been in his uninjured state and then to apply

assumptions (generally obtained from the industrial psychologists) as to his state with the proven injuries and their sequela. The deficits which arise between the scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff both pre and post morbidity. The loss is calculated as the difference in earnings derived between the pre –accident or pre morbid state and post –accident or post morbid state. In this exercise, uncertainty as to departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and other factors unconnected with the plaintiff's injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of “contingency” allowances. These are applied by the court dealing with the case in order to adjust the loss to reflect as closely as possible to real circumstances of the plaintiff. This is a delicate exercise which is an important judicial function.

16. The report of the industrial psychologists is pivotal to the actuarial calculation. This is because the actuarial calculation must be performed on an accepted scenario as to income, employment, employment prospects, education, training, experience and other

factors which allow for an assessment of the likely career path preand post the injuries.

17. In the matter of *De kock vs Road Accident Fund* Case no 2237/2013 delivered on the 22nd of April 2015 in the High Court of South Africa (Gauteng Division, Pretoria) the Court once again confirmed the approach to be taken with the calculation of loss stated in paragraph 22 as follows:

“[22] In approaching claims of this nature, the courts have always had to open to it two possible approaches, namely:

22.1 either that the Judge makes a round estimate of an amount which seems to him to be fair and reasonable. That matter is entirely a matter of guesswork a blind plunge into the unknown; or

22.2 that the Judge tries to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative.

- [23] it is manifest that either approach involves guesswork to a greater or lesser extent. However, the court cannot for this reason adopt a non possumus attitude and make no award.

[24] The inherent difficulties and uncertainties therein manifest, it has generally been accepted that it is preferable to make an assessment based on actuarial calculations rather than to take a blind plunge in to the unknown.

[25] I prefer this approach.

[26] Where the actual approach is adopted, the traditional method entails a four stage process as follows;

26.2 Calculate the present value of the future income which the plaintiff would have earned but for the injuries and the consequent disability.

26.2 Calculate the present value of the plaintiff's future income, if any, having regard to the disability.

26.3 Subtract the figure obtained under 26.2 from that obtained under 26.1.

26.4 Adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies".

18. It thus stands to reason that, if these base scenarios adopted by the actuary are fallacious, the actuarial calculation is of no value to a court or to the RAF officials. If the income at date of the accident is overstated even by a few thousand rand, this will lead to a significant inflation of the proposed loss in that the calculation is exponential. Thus for example the difference between an income of R5000 per month as opposed to one of R7000 is calculated over a period of 15 years is R610 000 extra on the claim. Thus even a relatively modest claim is easily and significantly inflated by means of this ploy.

19. I am called upon to perform the delicate judicial duty in that I must decide what is the reasonable amount the plaintiff would have earned but for the injuries and the consequent disability. Furthermore, I must determine the plaintiff's future income, if any, having regard to the disability.

20. The industrial psychologist says the following ad paragraph 4.4.12

"4.4.12 Mr Zondi reported that he earned a net profit of between R 12000 and R14000 per month, for an average of R13000 per month. He reported that his average gross profit amounted to R 17 000, the difference he paid in expenses. He further reported that his expenses included petrol and staff wages for his staff members (R800 per day for six days per week)"

21. He further states that at the time of the accident he had secured a contract to build RDP houses for liqua contraction and he would have been paid about R25 000 per week. He would have received a salary of R 15 000 per week.

22. Of utmost importance to this court is paragraph 4.4.15 which reads as follows "He could not provide IRP5's or financial statements. Therefore, difference is given to factual information regarding preaccident

earnings.”

23. I am therefore of the view that the plaintiff failed to show the following to enable me to accede to his requests for loss of earnings.

23.1 He did not file any tax documents or IRP5's.

23.2 He failed to attach or file financial statements showing how much he earned and how much he paid to his workers and the tax thereof.

23.3 There is no proof that he is a qualified builder and authorized to build houses.

24. The two affidavits of Mr S Mbatha and B.Ndlovu stating that the plaintiff did erect the roof of their houses does not show on preponderance of probabilities that the plaintiff is a professional business man who builds houses.

25. In addition currently the plaintiff is the recipient of a disability grant earning R1500 per month since 2014 thus the base scenarios adopted by the actuary in my view are unreliable. I am more of the view that the actuarial calculations in this matter before me are not helpful. It is clear to this court that it will be wrong to calculate future loss of income on unreliable figures provided by the plaintiff.

26. It is not clear exactly how much the plaintiff earned since there are not any reliable records however I am prepared to accept that he did make a living and was self –employed.

27. In my view a reasonable and fair award for the plaintiffs claim for loss of earnings is two million rands (R 2000 000.00) less the interim payment of five hundred thousand rands (R 500 000.00) resulting in the amount of one million five hundred rands only (R15000 000)

in full and final settlement of the Plaintiffs claim for Loss of Earnings, payable into the Plaintiff's attorneys of record trust account with the following details:

Account Holder: Ehlers Attorneys

Bank Name: FNB

Branch Code: 261550

Account Number:[....]

28. The defendant will not be liable for interest on the above mentioned amount, save in the event of failing to pay on the due date, in which event the defendant will be liable to pay interest on the outstanding amount at a rate 7% per annum.

29. The defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court scale, subject to the discretion of the taxing master, which costs will include, but will not be limited to the following:

29.1 The reasonable taxed fees for consultation with the experts mentioned below, together with delivery of expert bundles including travelling and time spent travelling to deliver such bundles, preparation for trial, qualifying and reservation fees. (if any and on proof thereof), including the costs of all consultations (inclusive of telephonic consultations) with Counsel and/or Plaintiff's attorneys and the costs of all consultations between the Plaintiff's and Defendant's experts, as well as costs of the reports, addendum reports, joint minutes and addendum joint minutes and full day fees for court attendance (if at Court) of the following experts:

29.1.1 Dr P Engelbrecht –Orthopaedic Surgeon

29.1.2 Dr Cheyip – Neurologist

29.1.3 T Preininger Neuropsychologist

29.1.4 M Sisson Clinical Psychologist

29.1.5 Dr Van Wijk Urologist

29.1.6 Dr M Naidoo Psychiatrist

29.1.7 Dr Mthembu Ophthalmologist

29.1.8 Dr Potgieter Plastic Surgeon

29.1.9 Dr Moja –Neurosurgeon

29.1.10 Dr Fredericks Disability and Impairment Assessor

29.1.11 N September Occupational Therapist

29.1.12 Jacobson Talmund Industrial Psychologist

29.1.13 G Jacobson Actuary

30. The costs for accommodation and transportation (as per the prescribed AA rates) of the injured as well as a family member, to the medical legal examination(s) arranged by Plaintiff and the Defendant (if any).
31. The costs for the plaintiff's attorney travelling to (as per the prescribed AA rates) and spending time travel to pretrial conferences and attendance at the pretrial conference by the Plaintiff's attorney.
32. The costs for preparation of Plaintiffs bundles of documents for trial purposes, as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles and to load same on Caselines.
33. The costs for preparation of Plaintiff's bundles of documents for experts as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles.
34. The costs of Adv Jaco Bam briefed and appearing for trial, including but not limited to the following:

34.1 Preparation for Trial

34.2 Consultations with Plaintiff's attorney in respect of preparation for trial;

34.3 Drafting heads of argument

34.4 Day fee for 6 September 2021 and 7 September 2021

35. The costs of the affidavits completed by all of the listed experts in order for the plaintiff to proceed on default judgement basis.

36. The Defendant is ordered to pay the plaintiff's taxed and/or agreed party and party costs within 14 days from date upon which the accounts are taxed by the Taxing master and/or agreed between the parties.

37. Should payment of taxed costs not be effected timeously. Plaintiff will be entitled to recover interest at the rate of 7% on the taxed or agreed costs from date of allocator to date of payment.

38. There is a valid Contingency Fee Agreement signed by the Court.

39. I make the following order:

39.1 The defendant is liable for 100% of the plaintiffs proven or agreed damages.

39.2 The Defendant pay the Plaintiff an amount of R 1500 000(one million five hundred thousand rands only).

D MAKHOB

JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the Plaintiff: Advocate Jaco Bam

Instructed by: Ehlers Attorneys

For the Defendant: Non appearance

Date heard: 7 September 2021

Date of Judgment: 26 October 2021

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