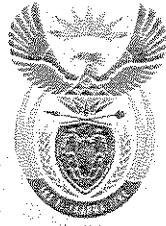


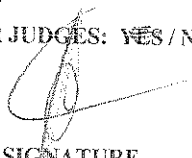
ATTENTION: MR JP RUDD

[PAGES: 19]



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE 14/11/2011	SIGNATURE 

CASE NO: 3175/2009

DATE: 10 October 2011

IN THE MATTER BETWEEN

T DE BRUIN

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

INTRODUCTION

- [1] The plaintiff instituted a claim against the defendant by virtue of section 17(1) of Act 56 of 1996 based on the sole negligent driving of Mr B A

Tucker (the insured driver). The plaintiff is claiming damages in the amount of R1 912 265.13.

- [2] When the trial on merits and quantum commenced, as it was requested by the parties counsel, I ruled that, for convenience sake, the parties will first lead evidence on the merits and thereafter lead evidence on quantum.
- [3] On the merits the plaintiff testified and called one expert witness Prof G. Lemmer whose expertise and academic qualifications as a reconstruction expert were not an issue. The defendant called one witness, the insured driver.

COMMON CAUSE FACTS

- [4] The following facts are common cause between the parties:
- 4.1) On 13 November 2007 at approximately 10:30 in Foundry street at Klerksdorp the plaintiff was the driver of a Suzuki motorcycle with registration number FSD 996 NW (the Suzuki) which was involved in a collision with a Ford bakkie with registration number THX 719 GP (the insured vehicle) which was driven by the insured driver.
 - 4.2) The weather was clear and the accident happened on an unmarked dry tarred road as shown in pages 19, 21, 22, 23, 24, 25, 26, 27 of the photo album in bundle 1 which was handed to the Court.
 - 4.3) Where the collision occurred is a built up industrial area in which delivery trucks also operate.

SUMMARY OF THE PLAINTIFF'S EVIDENCE ON MERITS

- [5] The plaintiff is 52 years old and is a minister of religion at NG Kerk Meiringspark (the church). He testified that he has been driving in the area where the accident happened for some years as he has been a resident in Klerksdorp for approximately 25 years.
- [6] On the date of the collision he was from a shop which is about 100 metres from where the accident happened. He was driving in Railway avenue and at the 90° turn to the right, he joined Foundry street.
- [7] He was wearing a full helmet and the head light of the Suzuki was on. After turning into Foundry street as he was traveling at a speed of about 50km/h.
- [8] He said there was a truck parked on his left hand side and he noted the insured vehicle approaching from the opposite direction. He specifically said (i) he saw the right indicator of the insured vehicle turning on, (ii) the insured vehicle came to a standstill on its lane next to the centre of the tarred road opposite the entrance leading into the premises of Builders Market structure on the right side. (iii) When he was approximately 20 metres from the stationary insured vehicle, the insured vehicle unexpectedly turned right across his lane of travel. (iv) He immediately applied brakes and attempted to swerve to the left to avoid the accident. (v) His right knee collided with the right head-light of the insured vehicle which was mobile and caused a dent on the petrol tank of the Suzuki. (vi) After the accident the Suzuki and himself landed about 2 metres away from where the insured vehicle came to a standstill as shown on the rough sketch in page 10 of the merits section in bundle 1. (vii) The insured driver approached him as he was still on

the ground, and told him that he was sorry and would see him at the hospital.

EVEDENCE OF PROFFESSOR LEMMER

- [9] He said in considering the sketch plans and the evidence of the plaintiff in court he thinks the plaintiff's estimation of seeing the insured vehicle at a distance of 20 metres must be incorrect if he was travelling at a speed of approximately 50km/h. He estimated the distance to have been about 30 metres away when the insured driver commenced moving into the path of the plaintiff. In explaining why he estimated the distance to have been about 30 metres is because at a speed of 50km/h a reasonable stopping distance would have been about 14 metres. Calculations were made on the basis that normal reaction time is 1.5 seconds.
- [10] In my view, the mathematical calculation of the distance also depends on the exact speed that was driven by the plaintiff immediately prior to the collision. It should be noted that the plaintiff's speed and distance was just an estimation.
- [11] The proffessor further said based on the common cause facts that the plaintiff's Suzuki came to a standstill about 2 metres away from the insured vehicle, is a clear indication that the plaintiff was driving at a low speed, otherwise the Suzuki after the impact, as based on the estimation of the Suzuki as described by the insured driver, would have came to a rest at a far longer distance.

EVIDENCE OF THE INSURED DRIVER

- [12] The insured driver testified that as he intended turning into Builders Market, he reduced his speed to turn to the right. There were 2 trucks, which had trailers similar to the one shown on photo 57 of the photo album which had parked on his left side. Another truck with a trailer had parked on his right side and there was a vehicle in front of him which continued driving in the same direction he was facing.
- [13] He then stopped, and switched on his right indicator. He looked for oncoming vehicles and there was none. He also looked at his rear view mirror and there were no vehicles behind his insured vehicle. When he slowly executed a turn to the right, he looked again for oncoming vehicles and suddenly noticed a motorbike (the Suzuki) for the first time which was about 30 metres away from him. He immediately stopped the insured vehicle after encroaching for about 1metre into the lane of oncoming vehicles.
- [14] He further said when the insured vehicle came to a stand still, the Suzuki braked hard and tried to swerve, unfortunately his knee bumped the right front part of the insured vehicle.
- [15] During cross-examination he said when he brought his vehicle to a standstill before executing the right turn into Builders Market, he did not see any oncoming vehicles. From the point where he stopped to the corner of Foundry Street and Railway avenue and it was a distance of about 90 metres. He stopped for less than a second. After moving for approximately a metre when he executed a turn to the right he noticed the oncoming Suzuki for the first time at a distance of about 30 metres.

- [16] The insured driver further confirmed the plaintiff's version that after the accident the Suzuki and the plaintiff landed at the positions reflected as A and B respectively on the rough sketch on page 10 of the merits bundle. According to him they landed about 3-4metres away from the insured vehicle.
- [17] When the insured driver was confronted with the contents of his statement attached to the insurance motor accident claim form (see page 143 of the bundle) he could not explain why he stated therein that he noticed the approaching Suzuki speeding from around the corner.
- [18] Importantly, the insured driver conceded that the accident was caused by his negligence.
- [19] After the insured driver's evidence the defendant closed its case.

EVALUATION OF THE EVIDENCE

- [20] In evaluating the two mutual destructive versions before court the principles mentioned in *National Employers Gen Insurance Co Ltd v Jages 1984 (4) Sa 432* are important. A plaintiff can only succeed if '*he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version..... is therefore false or mistaken and falls to be rejected.*'
- [21] I will also consider the credibility of the witnesses in determining whether the plaintiff has managed to discharge the onus on him and if apportionment is applicable herein.

- [22] Having regard to the facts which are common cause and the evidence of Prof Lemmer I am satisfied on considering the whole conspectus of the evidence that the plaintiff's version is more probable than that of the insured driver.
- [23] The fact that the plaintiff and the Suzuki did not land far from the insured vehicle after the impact is, in my view, a clear indication that the plaintiff was not driving at a high speed as the insured driver suggests or testified.
- [24] The plaintiff was in my view a credible witness and his estimation of the speed and the distance were not unreasonable.
- [25] The plaintiff observed the insured vehicle when it approached, indicated and stopped. He was driving at a reasonable speed. He did not expect that it would execute a turn and move into his lane of travel. When the insured vehicle turned he did not have enough time to brake and swerve to avoid the collision.
- [26] The insured driver conceded that he was negligent. It is clear in my view that he did not keep a proper look out. He could even tell if the head-lamp of the Suzuki was on or off.
- [27] The high speed of the Suzuki that he mentions does not tally with the facts present after the accident.
- [28] I cannot find any negligence on the part of the plaintiff in causing or by failing to avoid the accident.
- [29] I find that the insured driver was the sole cause of the collision.

QUANTUM

[30] Before I delve into the amounts claimed by the plaintiff, I will commence with, the summary evidence presented and the necessary background facts I consider important for the proper appreciation of the amounts to be arrived at.

[31] The plaintiff testified and called two witnesses, Mr Tiger Coetzee and Ms Esmé Noble, an industrial psychologist. The defendant did not call any witnesses. The parties legal representatives further agreed that the medico-legal report of the experts and their joint minutes be admitted as evidence.

PLAINTIFF'S ACADEMIC BACKGROUND AND SALARY

[32] The plaintiff was born on 2 January 1959. He obtained his Bachelor of Arts degree at Potchefstroom University (now known as the North west University Potchefstroom Campus). He obtained his Bachelor of Arts degree in theology at the University of Pretoria in 1982. In August – October 1991 he completed a Diploma in Child Evangelism. In 1992 he completed the Marriage Guidance and Counseling Course in UNISA.

[33] He has been a minister at the church since September 1986 and now earns a salary of R381 457 per annum which includes bonus, medical aid, pension fund, cell phone and accommodation allowances.

[34] The plaintiff said his duties at the church included the following:

- (i) Conducting two Sunday services.
- (ii) Preparing for Sunday services during the week, except on Fridays when he would take a day off prior to the accident.

- (iii) Visiting church members.
- (iv) Attending meetings.
- (v) Conducting marriage counseling and baptisms.

[35] He said since the accident the pace of his work has slowed down and is now forced to work till late and on Fridays and he is under a lot of pressure. Sometimes he cannot concentrate on his job and he is forgetful. He thinks in two to four years time there is a 60% chance that he may be told to resign. He cannot cycle anymore and cannot walk for a distance more than 1 km. He still feel some pain and cannot sit for a long time.

MR COETZEE'S EVIDENCE

- [36] Mr Coetzee, who has been a member and chairperson of the management committee of the church for eight and four years, respectively, testified that the committee plays a vital role in the appointment and dismissals of ministers of the church.
- [37] The church used to have two ministers but due to financial constraints one minister was retrenched about eight years ago and the plaintiff remained as the only minister.
- [38] He said the plaintiff, prior to the accident, suffered from depression as he was going through a divorce and the church suspended him for some time.
- [39] He further said since the accident his performance has deteriorated, there are some members who left the church because the plaintiff is no more attending to youth activities properly and the house visits are no more regular. There are complains and dissatisfaction among church members about how he executes his duties. However he said there are no formal complaints against him and he thinks the plaintiff will not last

for more than two years as a minister of the church unless his execution of his duties improves. In his view, if the plaintiff loses his job, it would be difficult for him to be appointed again as a minister by another church.

PLAINTIFF'S INJURIES

[40] The plaintiff suffered the following injuries when the collision occurred:

- 39.1 a compound fracture of his right ulna;
- 39.2 a fractured dislocation of his right hip with a laceration of the proximal end of the right lower leg, involving the peroneal nerve.

[41] The plaintiff received the following treatment:

- 41.1 a debridement of his open wounds;
- 41.2 an open reduction and internal fixation of the right ulna;
- 41.3 an open reduction and internal fixation of the right acetabulum;
- 41.4 after complete healing the internal fixates were removed from the right ulna;
- 41.5 a skin graft for skin coverage over the right lower leg was done. This operation was complicated by sepsis, which was derided and treated conservatively; and
- 41.6 a result of severe pain, a total hip replacement was done in 2008.

[42] The plaintiff presently has the following complaints:

- 42.1 lower back ache;
- 42.2 a painful right hip;
- 42.3 a drop foot deformity of his right foot;
- 42.4 a tremor in the right lower leg/foot; and

42.5 a painful scar of his right lower leg with swelling distal to the right lower leg.

[43] Ms Noble, the industrial psychologist, said based on the evidence of Mr Coetzee she thinks there is a possibility that the plaintiff may be dismissed at the age of 55.

[44] In the particulars of claim the plaintiff claimed as follows:

i) Past medical, hospital- related expenses -	R223 198,13
ii) Future medical expenses -	R200 000
iii) Loss of earnings/earning capacity -	R989 067
iv) General Damages -	R 500 000
Total	<u>R1912 265,198</u>

[45] The amount of R223 198,13 for the past medical expenses is not an issue between the parties and parties further agreed that future medical expenses would be catered for with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996.

[46] The defendant's counsel submitted that the plaintiff failed to prove that he suffered any patrimonial loss of income and the claim in respect of future loss of earnings/work capacity should be dismissed. In the alternative he argued that based on the consultations of Ms Noble and the report of Dr Birrell regarding the two years retirement period the plaintiff's loss of income can at most be the amount of R376 714.

[47] The defendant's counsel further submitted that Mr Coetzee is speculating when he states that the plaintiff may loose his job.

LEGAL PRINCIPLES & EVALUATION OF THE CLAIMS

[48] The applicable principal in determining whether a plaintiff has suffered patrimonial loss was correctly enunciated in *Rudman v Road Accident Fund 2003 (2) 234 (SCA)* as follows:

"In my opinion, the learned Judge in the Court a quo has not misdirected himself in his understanding of these authorities or in his application of the law to the facts. His judgment correctly emphasizes that where a person's earning capacity has been compromised, 'that incapacity constitutes a loss, if such loss diminishes the estate' (Rumpff CJ in the above quotation from Dippenaar's case) and 'he is entitled to be compensated to the extent that his patrimony has been diminished' (Smalberger JA in President Insurance Co Ltd v Mathews). (The emphasis is from the trial Judge's judgment). In his view, Rudman's disability giving rise to a diminished earning incapacity was proved, but the evidence did not go further and prove that his incapacity constituted a loss which diminished his estate.

*I believe that this conclusion is correct. The fallacy in Mr Eksteen's criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed give rise to pecuniary loss. Thus, in *Union and National Insurance Co Ltd v Coetzee*, which is referred to in the passage quoted*

above from Dippenaar's case and which deals with a lump sum award for loss of earning capacity, Jansen JA makes the point that

“'n (b)epaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdievermoë mee nie of altyd 'n vermindering van gelyke omvang nie dit hang ook af van die sort werk waarteen die gebrek beoordeel word.”

[49] In my view, proof of patrimonial loss does not necessarily mean that the plaintiff must prove actual loss of salary when the case is heard. If there is evidence or facts showing that the plaintiff is nevertheless required to put in more effort and suffer some hardship in his employment due to the accident which may possibly cause him to loose his job, the aforesaid may be considered in determining whether the claim for future loss of earning capacity exists or not, see the unreported case of Deysel, *Rian v Road accident Fund Case No, 2483/09 South Gauteng High Court judgment of Bizos A J (Deysel Case) on par 24 of page 6.*

[50] In par 27-28 of the Deysel case the court said:

“I am therefore of the opinion that a claim for loss of income is effectively a quantified claim for loss of earning capacity and that a claim for loss of future earning capacity cannot be made without the proof and quantification that is found in its resultant loss of future income.

The judgment of the Supreme Court of Appeal quoted above confirm my reasoning behind the relationship between a claim for loss of earnings and a loss of earning capacity. The one cannot exist without the other. Therefore, any patrimonial claim of this kind requires:

- a) *A loss of earning capacity as a result of a damage causing event; and*
- b) *An actual patrimonial loss of income as a result of the abovementioned loss of earning capacity. In which case, either the one or the other may be claimed for the same amount."*

[51] *In casu* the evidence of the plaintiff and Mr Coetzer indicate that the plaintiff's performance influenced his patrimony because there is a possibility that he could loose his job. The defendant led no evidence to contradict the said possibility.

[52] On this aspect of whether the possibility exists or not that the plaintiff may loose his job, I have also seriously considered the fact that the plaintiff has been working as a minister of the church for about 28 years including a period of approximately four years after the collision earning the same salary, however, because of the fact that he can no longer perform some of his duties as he used to and that there are complaints by some church members, the possibility still exists that he may loose his job. Such a possibility can, in my view be dealt with by applying the appropriate contingencies.

[53] I am forced to accept that there are facts showing the probability that the plaintiff will not be able to perform his job until the age of 63 or 65 because of the injuries sustained when the collision occurred even if he has been trying hard for about four years after the accident. The plaintiff testified that there are limited churches for him to find another job.

[54] The plaintiff has, in my view discharged the onus of proving that there is a possibility that he may suffer a loss or reduction of his earning capacity.

- [55] Dr Birrel in his report states that he foresees the plaintiff retiring at the age of sixty three and he estimates that the plaintiff will have 20-25% disability in performing his work. I interpose the mention at this opinion of Dr Birrel is not contested by the defendant nor did the defendant submit any evidence to the contrary.
- [56] The plaintiff's and Mr Coetzee's evidence that the plaintiff may retire at the age of approximately fifty five is not based on any medical opinion.
- [57] It should be kept in mind that despite the difficulty that the plaintiff said he is experiencing, the church kept him in employment for the past four years.
- [58] No evidence was presented to show that there are pending disciplinary actions against the plaintiff or that he has been issued with some warnings. There is further no evidence that there has been ongoing discussions in the board meetings regarding this, no one is tasked with investigation and the employer has not referred him for medical observation/examination to ascertaining need for early retirement or boarding.
- [59] The plaintiff has, in my view, failed to prove that the injuries sustained caused him loss of earning capacity and from age fifty five he would not be working. There is no evidence that the quality of his preaching and the standard of his counseling has deteriorated.
- [60] I do appreciate that the plaintiff may not physically attend to the youth activities as he used to and that he now performs his duties with some difficulty. However, such pain that he is now experiencing may well be catered for by the amount of general damages that will be awarded.

[61] Mention must be made that there was no evidence was led regarding any collateral benefits that will ensure as a direct result of the accident in question. I therefore will not make pronounciation regarding the same.

[62] For the aforesaid reason, I think scenario one on the actuarial report handed to the court is applicable. I think applying 20% contingencies on the value of income but for the accident and 40% contingencies on the value of income now that the accident occurred would be appropriate.

[63] The amount of loss of earnings will be calculated as follows:

Value of income, but for the accident, R 2984744 less 20%

Value of income, now that the accident occurred, R 2608 029 less 40%,
i.e.

	R 2387795.20
less	R1564817.40
	<hr/>
Total	R 822977.80
	<hr/>

GENERAL DAMAGES

[64] The defendant's counsel referred me to 6 cases in C & B of the people who sustained similar injuries and submitted that an amount of R250 000 would be appropriate.

[65] The plaintiff's counsel referred me to about 8 cases to consider in a fair and adequate compensation to the plaintiff. He submitted that an amount of R650 000 would be appropriate. General damages cannot be

calculated based on pure mathematical principles. The court should always exercise its discretion based on injuries sustained by the plaintiff and, of course, having regard to other decided cases for guidance.

[66] Having regard to the plaintiff's age, the nature of the injuries sustained I think an amount of R400 000 for general damages is appropriate.

[67] I therefore make the following order:

1. The defendant shall be the sum of R1 446 175,93, made up as follows:

- | | | |
|-------|-----------------------------------|-------------|
| (i) | General damages - | R400 000 |
| (ii) | Past medical expenses - | R223 198,13 |
| (iii) | Future loss of earning capacity - | R822 977,80 |

to the plaintiff's attorneys, Adams & Adams, in settlement of the plaintiff's claim, which amount shall be payable by direct transfer into their trust account, details of which are as follows:

Nedbank

Account number :160 431 8902

Branch number :198765

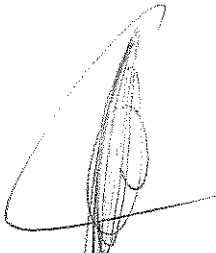
Pretoria

Ref: DBS/JPR/S839/08

2. The defendant must furnish the plaintiff with an undertaking in terms of Section 17(4)(a) 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 on proof thereof, resulting from the accident that occurred on 13 November 2007.

3. The defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include the following:
 - 3.1 The fees of Senior Counsel, inclusive of his full reasonable day fees for 9, 12, 13 and 14 September 2011 together with the preparation of plaintiff's heads of argument;
 - 3.2 The reasonable taxable costs of obtaining all expert / medico-legal and actuarial reports from the plaintiff's experts which were furnished to the defendant;
 - 3.3 The reasonable taxable preparation and reservation fees, if any, of the following experts of whom notice have been given:
 - 3.3.1 Dr DA Birrel
 - 3.3.2 Ms T Brown
 - 3.3.3 Mr M Du Plooy
 - 3.3.4 Dr B White
 - 3.3.5 Mrs K Havenga
 - 3.3.6 Mrs E Noble
 - 3.3.7 Mr GW Whittaker
 - 3.3.8 Prof G Lemmer
 - 3.4 experts together with the trial proceedings, subject to the discretion of the Taxing Master;
 - 3.5 The above costs will also be paid into the aforementioned trust account.
4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:
 - 4.1 the plaintiff shall serve the notice of taxation on the defendant's attorney of record;

- 4.2 The plaintiff shall allow the defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;
- 4.3 Should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 15.5% on the taxed or agreed costs from date of allocator to date of final payment.
5. The Prof G Lemmer, Ms E Noble, Plaintiff and Mr Tyger Coetzee are declared necessary witnesses.



A P LEDWABA

JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 9 September 2011

FOR THE PLAINTIFF: Adv JA Meyer SC

INSTRUCTED BY: Adams & Adams Attorney's, Pretoria

FOR THE DEFENDANT: Adv L Uys

INSTRUCTED BY: Mothle Jooma Sabdia Inc, Pretoria

JUDGMENT DELIVERED: 14 November 2011