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**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**Case number: 50133/2012**

**Date: 5 May 2015**

**Not reportable**

**Not of interest to other judges**

In the matter between:

**PC ROUX**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

**JUDGMENT**

**PRETORIUS J.**

[1] In this matter the court has to decide the loss of income of the plaintiff. This claim arises from an action against the respondent where the respondent conceded 100% liability for the plaintiff's damages as a result of a motor vehicle accident.

[2] It is common cause that the plaintiff is currently 39 years old and self-employed in the building and construction industry. The plaintiff suffered serious injuries in a vehicle collision which occurred on 8 August 2009. At the time of the collision the plaintiff was employed as a sales representative.

[3] The plaintiff suffered a minor head injury with concussion, a chest injury, a fairly severe upper limb injury, a fracture of the right clavicle, a superficial injury of the abdomen, lower back and pelvis as well as soft tissue contusions of the abdominal wall, contusion and tenderness of the costochondral junctions of the

second and third ribs, torn muscles in the right shoulder and soft tissue injuries to the neck and back.

[4] All the expert reports of the applicant and the veracity of the contents of the expert reports were admitted the day before the trial commenced. This late admission by the respondent resulted in huge costs as all the experts had to be on standby and reserved to testify at the trial. Once more the tardiness of the respondent to give timeous instructions to its legal representatives resulted in unnecessary wasted costs which are ultimately for the taxpayer's pocket.

[5] The neuropsychologist, Dr Mazabow, found that the plaintiff suffers from severe depressive mood disorder and chronic post-traumatic anxiety. According to Dr Mazabow these together with the direct effects of his chronic pain symptoms, impact on his cognitive functioning, interpersonal functioning, energy/stamina and motivation. These factors represent significant obstacles to his effective functioning in the workplace. Dr Mazabow further comes to the conclusion:

*“Further, treatment of the depression will be long-term, and the prognosis for that treatment is guarded, as discussed in the accompanying medico-legal report”*

[6] Plaintiff was an active member of society prior to the accident and had no medical conditions prior to the accident. Dr JJ du Plessis, the neurosurgeon, found that the plaintiff had suffered a minor concussion in the collision. His expert opinion is that the plaintiff suffered a loss of earning capacity of approximately 10% due to the injury to his cervical and lumbar spine. The further result of this, according to Dr du Plessis, is that the plaintiff may have to retire at the age of 63 years.

[7] Ms Heyns, the occupational therapist, came to the conclusion that:

*“Mr Roux has occupational dysfunction. He demonstrates performance component impairments related to pain, mobility/agility, balance, postural tolerances; endurance and mood. Mr Roux does not meet all the physical demands of his pre-accident job as salesman, or the heavy physically demanding work demands of his post-accident jobs as self-employed patio roof builder and currently as self-employed renovator/landscaper due to neck, back and right shoulder and upper and lower limbs symptoms. This justifies reasonable work accommodations (i.e. assistance with heavy and physically strenuous work) already implemented to reduce risk of re-injury. In addition his chronic pain and fatigue and physical limitations results in frustration and a low mood. He experiences variable concentration and reported word finding difficulty due to the distracting effect of pain and fatigue on his concentration, which requires him to apply additional mental effort and he had to adapt his work routine in an attempt to compensate for his proneness to errors.”*

[8] Her further finding is:

*“The writer gained the impression that Mr Roux’s high work ethic and diligent approach to tasks drives him to exceed himself, which takes its toll in terms of pain, fatigue and effort and he might in the process neglect his needs. His high level of drive and motivation (reportedly due to financial reasons) helps him to persist his chronic pain and physical deficits, but he could probably become a candidate for so-called “burnout” in due course.”*

[9] Dr Birrel amended his report in an addendum dated 17 April 2015 after he had considered the opinions of Dr du Plessis and Ms Heyns. He agreed with Dr du Plessis that 10% loss of work capacity should be allocated and found that the plaintiff would retire six months earlier than would have been the case had the collision, with resultant injuries, not have occurred.

[10] Dr Pearl, the neurologist, found:

*“It is my impression that the claimant suffered a mild concussive head injury with no significant neurological fallout. He does however suffer from blackouts following the accident and is currently receiving treatment for epilepsy. He has neck pain and cervical radiculopathy due to cervical spondylosis which may have been triggered and or aggravated by the accident.”*

[11] The plaintiff returned to work six weeks post-accident. He only received a basic salary during his absence, with no commission. The same applied during his time off after his shoulder surgery.

[12] The industrial psychologist, Ms Schoombee, had all the relevant expert reports available when she interviewed the plaintiff. She reports on his change of career as follows:

*“It does seem to writer, noting Client’s reports of no alternative plans at the time, expert reports available, and a 6-month period of being unemployed before starting up an own business, that the accident indeed had a direct impact on Pieter in terms of making a career change as drastic as he did (moving out of the sales and sales management areas of work in which he was settled and experienced, to a self-employment situation in unknown areas of work).*

*Considering all the information at hand, Writer has to acknowledge and support Mr Roux’s direct reports of resigning from his previous job due to accident related physical problems - the accident indeed seems to have had a significant contribution to his decision to exit the formal sector.”*

[13] The court finds that due to the collision the plaintiff made the drastic change to his career path.

[14] Ms Schoombee is of the opinion that the plaintiff’s physical and psychological functioning has

decreased resulting in decreased productivity and work capacity. According to her he is not likely to function at pre-accident levels and it is unlikely that he would generate the same income as pre-accident. I find that, having regard to all the expert opinions, that the plaintiff has suffered a loss of earnings and that his future income has been diminished as a result of his injuries sustained in the collision.

[15] The defendant had no experts, but chose to argue on the admitted expert reports of the applicant.

[16] The defendant urged the court to find no loss of income, but could not provide any expert's opinion on which to base the allegation that the plaintiff had not suffered any loss of income.

[17] In **Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98 AD** at 113F- 114A the following is stated:

*“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss.*

*It has open to it two possible approaches.*

*One is for the Judge to make a round estimate on an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.*

*The other is to try and 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.*

*It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non possumus attitude and make no award.”*

[18] In the present case there are actuarial calculations on the plaintiff's behalf. The defendant has no actuarial report to rely on.

[19] In **RAF v Guedes 2006(5) SCA 583** the court held:

*“In essence the trial court exercises a discretion, and attempts to achieve the best estimate of a plaintiff's loss: Southern Insurance Association v Bailey NO. It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damage include loss of future earning capacity (see for example President*

*Insurance Co Ltd v Mathews*). **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 an estimate of the present value of the loss which is often a very rough estimate** (see for example *Southern Insurance Association v Bailey NO*). The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. **Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just.**" (Court's emphasis)

[20] I have considered all the arguments, expert reports and decisions. It is clear that the plaintiff suffered injuries which had and has an impact on his earning capacity. All the experts, but specially the actuary, erred on the conservative side when making conclusions and calculations. Ms Schoombee, the industrial psychologist, expressed an opinion that future loss of earnings should be addressed by means of a higher contingency deduction post-accident.

[21] The actuary, Mr Whittaker, calculated the 10% loss of income on a conservative basis. He, throughout his calculations, applied higher contingency deductions. I agree with his calculations, having regard to all the facts placed before court and bearing in mind that the defendant had no expert witnesses to counter the evidence of the actuary.

[22] At the start of the hearing the past medical expenses were still a bone of contention, but after going through the items in dispute, counsel for the defendant conceded that the amount of R55 171.18 to be the correct amount. This amount will be added to the amount of R1 438 813.00, which is the calculated 10% loss of income.

[23] The plaintiff requested the court to grant costs on an attorney and client scale to show the court's displeasure at the actions of the defendant, by waiting until the last minute to admit the contents of the experts' reports. However, the fund will be mulcted with the costs of the experts, due to the defendant's negligence or wilfulness in not making decisions timeously. The excuse that the matter had been transferred to the present attorneys in December 2014 is not entertained as an excuse. It was 5 months before this trial and more than enough time for the attorneys to get instructions from the client.

[24] I therefore grant judgment as follows:

1. The defendant shall pay the sum of R1 493 984.18 (One million four hundred and ninety three thousand nine hundred and eighty four rand and eighteen cents) to the plaintiff's attorneys, Adams

and 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: [...]

Branch number: 198765 Pretoria

Ref: DBSA/WV/S825/09

2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) in respect of 100% 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 8 August 2009.

3. The defendant shall make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include, but not be limited to the following:

3.1 The fees of senior-junior counsel on the High Court scale, inclusive of counsel's full reasonable day fee for 23 April 2015 and the reasonable costs of preparation of the Heads of Argument, if any;

3.2 The reasonable taxable costs of obtaining all expert, medico-legal, addendum medico-legal and actuarial reports from the plaintiff's experts which were furnished to the defendant;

3.3 The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts to whom notice has been given, being:

3.3.1 Dr DA Birrell (Orthopaedic surgeon);

3.3.2 Dr JJ du Plessis (Neurosurgeon);

3.3.3 Ms N Heyns (Occupational Therapist);

3.3.4 Dr M Mazabow (Neuropsychologist);

3.3.5 Dr M Lebos (Specialist Surgeon);

3.3.6 Dr JC Pearl (Specialist Cardiologist);

3.3.7 Dr C Schamroth (Specialist Cardiologist);

3.3.8 Mr CJ Schoombee (Industrial Psychologist);

3.3.9 Mr GA Whittaker (Actuary).

3.4 The reasonable costs of all consultations between the plaintiff's counsel, the plaintiff, and the plaintiff's attorney in preparation for the hearing of this action;

3.5 The reasonable, taxable accommodation and transportation costs (including return flight costs, Toll and E-Toll charges on each occasion) incurred by or on behalf of the plaintiff in attending medico-legal consultations scheduled for him with all experts, consultations with the legal representatives and the court proceedings, subject to the discretion of the Taxing Master.

3.6 The reasonable costs of all consultations between the plaintiff's experts, counsel and attorney in preparation for the hearing of the action;

3.7 The defendant is liable for all costs pertaining to the hearing of the action on 23 April 2015 and the preparation for same after the pre-trial conference held on 20 April 2015.

3.8 The above costs will also be paid into the aforementioned trust account.

3.9 It is recorded that the plaintiff's attorneys of record do not act in terms of a contingency fee agreement for services rendered.

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, plaintiff will be entitled to recover interest at the rate of 9% per annum on the taxed or agreed costs from date of allocator/settlement to date of final payment.

Judge C Pretorius

Matter heard on: 23 April 2015

For the Plaintiff: Adv. JP van den Berg

Instructed by: Adams & Adams

For the Defendant: Adv.

Instructed by: Mothle Jooma Sabdia Inc.

Date of Judgment: 2015