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UNION AND NATIONAL INSURANCE CO. LTD. v. COETZEE.

(APPELLATE DIVISION.)

1969. *September* 8; *November* 18. VAN BLERK, J.A., OGILVIE THOMPSON, J.A., WESSELS, J.A., JANSEN, J.A., and RABIE, A.J.A.

Negligence.—Bodily injuries sustained.—Damages.—Assessment of.—High award for loss of amenities of life.—When Appeal Court will interfere.—Principles applicable.—Plaintiff's voluntary change of occupation after the injury.—Assessment of damages for loss of earning capacity.—Principles applicable.

In an appeal by an insurance company against the *quantum* of an award for bodily injuries which had been granted to respondent in a Provincial Division it was contended, *inter alia*, that the award for loss of amenities of life was too high and should be reduced.

Held, on the evidence, that the award was undoubtedly high, but that the necessary misdirection or excessiveness, such as would lead to a reduction, was absent.

Sandler v. *Wholesale Coal Suppliers, Ltd.*, 1941 A.D. 194 at p. 200, applied.

Held, further, however, that the award for loss of earning capacity should be reduced.

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Appeal against a decision of the Cape Provincial Division (VAN ZYL, J.). Facts of no importance are omitted.

L. A. Rose-Innes, for the appellant: There is a complete absence of sufficient evidence of any loss of earnings to date or in the future, and respondent failed to satisfy the *onus* to prove facts relevant in connection with the *quantum* of his damages. *Van der Westhuizen* v. *Du Preez*, 1928 T.P.D. at p. 49; *Goldie* v. *City Council of Johannesburg*, 1948 (2) S.A. at p. 920; *Moehlen* v. *National Employers' Mutual*, 1959 (2) S.A. at p. 320; *Naidoo* v. *Auto Protection Insurance Co. Ltd.*, 1963 (4) S.A. 798; *Corbett & Buchanan*, p. 237 to p. 245. Cf. the cases not appearing in the Law Reports, but which are referred to in *Corbett & Buchanan*, p. 74 note 2. The Court should not have awarded any amount in respect of future loss of income, because that has not been proved. In any case, the general damages awarded in respect of pain and suffering, loss of income, disability and loss of amenities of life was out of proportion high if the nature of the injury sustained and the consequences thereof are taken into account.

W. Vivier, for the respondent: The Trial Judge has a wide discretion in respect of general damages, to award such damages as he may consider fair and reasonable in the particular circumstances of a specific case. *Swart* v. *Provincial Insurance Co. Ltd.*, 1963 (2) S.A. at p. 633; *Parity Insurance Co. Ltd.* v. *Van den Bergh*, 1966 (4) S.A. at p. 478H. The Court of Appeal will accordingly not interfere unless it appears that the Trial Judge did not take relevant circumstances into considera-

tion, or took into consideration irrelevant circumstances, or if the amount of damages is excessively high or low. *Sandler* v. *Wholesale Coal Suppliers Ltd.*, 1941 A.D. at pp. 199-200; *Frodsham* v. *Aetna Insurance Co. Ltd.*, 1959 (2) S.A. at p. 282C-G, *Sigourny* v. *Gillbanks*, 1960 (2) S.A. at pp. 555-556, 588; *Bruwer* v. *Joubert*, 1966 (3) S.A. at p. 388E-F. In connection with the amount of damages awarded under the sub-heading "future loss of income" attention is directed to the fact that in cases like the present, from the nature of things, it is not possible or proper to make an award on the basis of a mathematical calculation. This fact, however, does not prevent the Court from making an award although the amount in such a case will necessarily be a rough estimation "an estimation rather than a calculation", *Sandler* v. *Wholesale Coal Suppliers Ltd.*, *supra* at pp. 198-199, or as stated: "an

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informed guess", *Anthony and Another* v. *Cape Town Municipality*, 1967 (4) S.A. at p. 451B-C; "necessarily be a mere estimate", *Phil Morkel Ltd.* v. *Lawson and Kirk*, 1955 (3) S.A. at p. 257E; must be made on an arbitrary basis, *Wells et Uxor* v. *Shield Insurance Co. Ltd.*, 1966 C.P.D. (reported in Corbett and Buchanan, The *Quantum of Damages* at p. 653). See further *Turkstra* v. *Richards*, 1926 T.P.D. at p. 283; *Oosthuizen* v. *Thompson and Son*, 1919 T.P.D. at p. 130; *Whitfield* v. *Philips and Another*, 1957 (3) S.A. at p. 345; *Pitt* v. *Economic Insurance Co. Ltd.*, 1957 (3) S.A. 284; *Palmer* v. *S.A. Mutual Fire and General Ins. Co.* (1964 D. & C.L.D., reported in *Corbett and Buchanan*, p. 327); *Burns* v. *Dollar and Dollar*, (1953, S.R. reported in *Corbett and Buchanan* at p. 246).

With reference to the criticism directed by the Trial Judge at respondent's calculations, attention is further directed, on authority of cases like *Sandler* v. *Wholesale Coal Suppliers Ltd.*, *supra* at p. 198, *Oosthuizen* v. *Thompson and Son*, *supra* at p. 130, to the fact that the Court does not receive much assistance from the calculations placed before it, or the fact that the figures mentioned by plaintiff are regarded as too high by the Court, does not prevent the Court from making an award although direct lower figures have not been placed before the Court as a basis for the lower award. On the authority of *Phil Morkel* v. *Lawson & Kirk*, *supra* at p. 257F-G (it is averred—Eds.) that this is not a case where respondent neglected to place the necessary evidence before the Court—it is indeed the appellant who neglected to place evidence before the Court.

With reference to the value of comparisons with awards in other cases, see *Capital Assurance Co. Ltd.* v. *Richter*, *supra* at p. 908; *Marine and Trade Insurance Co. Ltd.* v. *Goliath*, 1968 (4) S.A. at p. 334B-D.

Rose-Innes, in reply.

Cur. adv. vult.

Postea (November 18th).

JANSEN, J.A.: On 17th July, 1964, the respondent (hereinafter called the plaintiff) was injured in a motor collision. Injuries to his left ankle and left shoulder were evidently permanent and in June, 1968, he sued appellant (hereinafter called the defendant), an insurer of one of the vehicles in terms of the provisions of Act 29 of 1942, in the Cape of Good Hope Provincial Division for damages. At the ensuing hearing in February, 1969, defendant did not deny liability, but only placed the *quantum* of damages in issue. On the evidence adduced by plaintiff (defendant closed his case summarily) the Court made the following award:

"(i) Medical and hospital expenses still outstanding	R14
(ii) Future medical and hospital expenses	R750
(iii) Future loss of income	R9,000
(iv) Pain and suffering	R1,200
(v) Permanent disability and loss of amenities of life coupled with the disablement of plaintiff's left shoulder and ankle ...	R5,000
	R15,964."

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From this amount was deducted R746.67 which plaintiff received in terms of the Workmen's Compensation Act, 30 of 1941 for 17½ per cent permanent labour disability and judgment was given in favour of plaintiff in the amount of R15,217.33. Against this the defendant now appeals. He, however, only contests the awards under items (iii) and (v).

Before dealing with defendant's submissions it is desirable to give a summary of plaintiff's bodily disability as result of the original injuries and also the prospects of improvement or deterioration. In regard to the shoulder the Trial Court found the following:

"The shoulder is injured in the limb: partly dislocated. The joint of the collar-bone and shoulder-blade is also damaged, with the result that the two bones no longer join straight but at an angle and this causes a visible little knob where the joinder takes place . . . He (plaintiff), however, suffers further inconvenience from these injuries: if he sleeps on his left shoulder during the night it is uncomfortable (stiff and sore) the next morning, the shoulder feels moderately weak and is painful when a heavy object is lifted. Ordinarily speaking, however, the shoulder is reasonably good and strong. The possibility that in future plaintiff will have more trouble from these shoulder injuries and will have to receive medical treatment for that is extremely unlikely."

As regards the ankle it is clear that early in 1967 the plaintiff had to undergo "reconstructive surgery of the lateral ligament" and that then an attempt was also made to "effect arthrodesis of the inferior tibio fibular joint". The resultant condition, as disclosed at the time of trial is described by the Trial Court as follows:

[The Honourable Judge dealt with the evidence and continued as follows.]

The Trial Court, therefore, accepted that at the time of the trial the plaintiff's mobility was curtailed, that the curtailment will grow worse, that within due course he will have to undergo at least one operation which will immobilise him for approximately eight months, and

that even thereafter the curtailment of mobility will be considerable. These findings, as such, are not questioned by the defendant.

As mentioned before only the award of damages under the following items is contested:

"(iii) future loss of income" and

(v) permanent disability and loss of amenities of life coupled with the disablement of plaintiff's left shoulder and ankle."

The question immediately arises whether there is not a measure of duplication—whether the "disability" under item (v) does not actually also include "loss of income" under item (iii). On analysing them it is, however, obvious that the award under item (v) only refers to loss of amenities of life, viz. those resulting from permanent disability. The award of the Court *a quo* follows the wording of plaintiff's particulars of claim and in the context it appears that it was plaintiff's intention to state under this item how much he claimed

"for disability in regard to amenities of life"

as opposed to what he claimed

"for disability in regard to earnings coupled with a statement . . . of the estimated future loss)",

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as required by Rule of Court 18 (10). It is clear from the particulars which plaintiff later furnished in respect of his "future loss of income": it is alleged that the amount claimed under this head

"(is) an estimation of the loss of income which the plaintiff will suffer on his farming activities for the rest of his life, and which is caused by the *curtailment of his earning capacity as result of his disability*".

(the italics are mine). That the Court *a quo* understood item (v) as limited to "disability in regard to amenities of life" also appears clearly from the judgment.

[This part of the judgment was quoted by the Honourable Judge and he continued as follows.]

As a matter of fact the defendant is now not averring any overlapping. It is only submitted that the amount of R5,000 is excessive in respect of the loss of amenities of life and should be reduced. Undoubtedly the award is high, but interference on appeal will only take place if certain requisites are satisfied (*Sandler* v. *Wholesale Coal Suppliers, Ltd.*, 1941 A.D. 194 at p. 200). In my opinion the necessary misdirection or excessiveness is not present to such an extent as to warrant a reduction. Apart from the considerations mentioned by the Court *a quo* (in the passage quoted above) there is still e.g. the fact, which was certainly not overlooked that the curtailment of plaintiff's mobility over the years in itself, without considering any participation in sport, would lead to diminished amenities of life.

In regard to the "future loss of income" the amount claimed is, as already mentioned,

"an estimation of the loss of income which the plaintiff will suffer on his farming activities and which is caused by the curtailment of his earning capacity as result of his disability".

At the time of the trial and since the middle of 1966 the plaintiff was a banana farmer. His evidence amounted to an attempt to indicate that

his disability hampered him as banana farmer and to show a connection between the impediment and the determinable loss of income from the banana farming. The trial Court approached this evidence as follows:

[The evidence was quoted and the Honourable Judge continued as follows.]

In effect the approach of the trial Court amounts to this that it must be accepted that the plaintiff

"as result of his injury farms less effectively and therefore makes less profit",

that the amount of the loss was difficult to ascertain, but that in the circumstances an estimation could be made, an estimation which the Court made and fixed at R9,000.

The nature of the defendant's attack on this is that the information is insufficient for even an estimation ("informed guess"); alternatively that the Court's estimation is in general too high and that in particular the Court assessed the plaintiff's impediment too high and with the estimation the Court made an error in calculation. The alleged error referred to is in connection with the capitalisation of R250 per annum at 3½ per cent over a period of 30 years. It is not denied on behalf of plaintiff that actuarially calculated the amount is R4,598 and not "just over R9,000".

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That plaintiff's mobility is diminished and will be further diminished is clear. A particular bodily disability does not necessarily cause a reduction of earning capacity or always a reduction of equal magnitude—it depends, *inter alia,* on the type of work against which the disability is measured. The loss of the first joint of the left little finger may be insignificant in connection with the earning capacity of the cashier, but fatal for the pianist; equally so a stiff ankle for a cashier against that of a ballet-dancer. That complainant's type of incapacity and his loss of mobility would adversely affect his labour capacity and accordingly his earning capacity as farmer and more particularly as banana farmer was accepted by the Court *a quo* and in view of the evidence that cannot be denied.

But in the present case the plaintiff was not a farmer when he was injured. He was then a part-time employee of the Department of Forestry and a student at the Forestry College at George. He was then 20 years of age and in his last year of a two-year course. As a result of the injury he could not "completely participate" in the activities of his studies. He could, for instance not perform the necessary field work in connection with the subject, surveying. Probably as a result of this disability he failed the subject. Notwithstanding this he started to work full-time for the Department of Forestry at Stormsrivier in the beginning of 1965. He found however that as a result of his injury he could not properly cope with the "practical" part of his work and he then applied for another post at a Government Nursery where he could walk less. Before he could take up the post, the plaintiff's

father bought a farm where plaintiff started farming with bananas after having resigned from the Public Service.

A voluntary change of work after an injury does not necessarily entail that in order to determine the earning capacity the resultant disability must be measured against the new and not against the original work. In this way the cashier with the stiff ankle could hardly unreasonably insist on becoming a ballet-dancer after the injury and then advance his disability for ballet-dancing as evidence of the loss of earning capacity. It is indeed the case that in determining the loss of earning capacity the circumstances prevailing at the time of the accident must be taken as premise. This does not however mean that the injured's reasonable or probable prospects of promotion or improvement of his position must be left out of consideration. The loss of earning capacity of the student who studies surveying and who in his final year, during a vacation works as a shop assistant to earn pocket money, and whose mobility is ended by an injury, would be measured according to his prospects as surveyor and not only as shop assistant.

In view of these considerations it can now be considered whether the fact that plaintiff was not a farmer when he was injured excludes the occupation of farmer as suitable criterion for determining the loss of earning capacity. At the time of the collision plaintiff was a prospective forester in the Public Service, but certainly his future was not

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only dependent on the Public Service. With forestry qualifications the private sector offers attractive prospects and farming will be seriously considered if the opportunity arises. Even at the time of the collision the opportunity to farm could have been foreseen as a reasonable possibility. The plaintiff says, however, that until his father bought the farm in question "I did not know, or we had no idea that one day we would be able to farm", but plaintiff and his brother were the only sons of an apparently wealthy father, residing at Louis Trichardt who had a saw-mill and was interested in farming and who bought two other farms in the lowveld apart from the farm in question—the first he had already bought in November, 1964.

In view of the aforegoing plaintiff's loss of mobility can indeed be tested against the occupation of farming to determine whether his earning ability was reduced. Even if the occupation is viewed more generally than that of a banana farmer, the necessity of mobility remains—even if it is only to exercise proper supervision. It may be mentioned here, e.g. that where Dr. van der Merwe would assess the plaintiff's disability after the prospective arthrodesis at 30 per cent, he took the plaintiff to be "a general farmer". Judging on the occupation of farmer the plaintiff did indeed suffer loss of earning capacity.

How, however, is a money value to be attached to it? An accurate calculation is out of the question. As regards an estimation ("informed guess"), it is submitted (as already mentioned) that the information is

even too scanty for that. This, however, appears to be the type of case *par excellence,* where notwithstanding even the most extensive study of the determining factors the fundamental uncertainties will remain such that any so-called calculation will eventually be nothing more than an estimation. In the particular circumstances of this case an estimation on the available information, although scanty, is in my opinion, not excluded.

The trial Court's estimation of R9,000 is based, *inter alia* (as conceded), on the erroneous capitalisation at R250 per month (*sic*). Indeed a global estimation of R9,000 is also mentioned in the judgment, but this is probably not to be disassociated completely from the process of capitalisation. If that is the case, and the capitalisation is corrected, then the trial Court's estimation is really R4,598. This estimation is, however, clearly based on the evidence in connection with the running of a banana farm. Without more ado, consideration of banana farming would not be wrong. Even if the matter is approached on the basis of a forward view as from the moment of the collision, the consideration of specific types of farming, including banana farming, to determine the value of supervision, would not be excluded. Sight can, however, not be lost of the fact that banana farming apparently requires extraordinarily intensive supervision—more than in the case of general farming which was accepted as a reasonable prospect of improvement of occupation in the case of the plaintiff. It appears that the trial Court did not take this consideration into account. If it is indeed taken into account, then it must, in my opinion, lead to a reduction of the trial Court's estimation. That the fundamental uncertainties make any exact calculation of damages impossible has already been stressed. It does, however, appear to me that in the present case under item (iii), on the available evidence, an estimation of R3,000 would be nearer reality.

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In view of the above it follows that the global amount of damages awarded by the Court *a quo,* viz. R15,217.33 must be reduced to R9,217.33. As regards the accompanying order of costs, the parties requested that if the result of this appeal should entail a reduction of damages the question of costs should stand over for later consideration.

In my opinion the appeal succeeds with costs and the order of the Court *a quo* must be amended to read as follows:

"1. Judgment is given in favour of plaintiff in the amount of R9,217.33 damages;
2. The costs of the trial are reserved."

VAN BLERK, J.A., OGILVIE THOMPSON, J.A., WESSELS, J.A., and RABIE, A.J.A., concurred.

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