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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: 2015/03387

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
6 March 2024	_____
DATE	SIGNATURE

IN THE MATTER BETWEEN:

TIISETSO DUBE

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SIWENDU J

[1] The court is asked to determine the quantum of general damages as well as past and future loss of income payable to the plaintiff. On 29 October 2011, the plaintiff, Mr Tiisetso Dube (Mr Dube), a pedestrian, was involved in a motor vehicle collision at Nyakane Street, Naledi. He was admitted at Chris Hani Baragwanath Hospital.

[2] Mr Dube instituted an action against the defendant, the Road Accident Fund (RAF) for a sum of R4 050 000.00 for general damages as well as past and future loss of earnings. He subsequently amended his claim for general damages to R3 500 000.00. Further, he adjusted the claim for past loss of earnings to R470 057.00 and sought R516 346.00 for future loss of earnings. In the heads of argument before the Court, he now seeks a payment of R 1 450 000.00 for general damages and a sum of R986 403 for past and future loss of earnings.

[3] In defending the action, the RAF raised a statutory defence - namely that Mr Dube's injuries were not of a serious nature as contemplated in Section 17(1)(a) of the Road Accident Fund Act 56 of 1996 (the Act), read together with Regulation 3 promulgated thereunder. The RAF alternatively sought an order for the claim to be administered in terms of Section 17(A) of the Act read together with Regulation 3, or Section 17 of the Act read together with Regulations 4 and 5. It also sought an order for an apportionment of the damages in terms of Section 1 of the Apportionment of Damages Act 34 of 1956.

[4] On 06 July 2023, the RAF settled the merits 80/20 in favour of Mr Dube, who accepted the offer on the 26 July 2023. He also agreed to the undertaking in terms of Section 17(4)(a), limited to 80% for future medical expenses.

[5] The trial proceeded based on the reports of experts employed by Mr Dube. The RAF did not file expert reports and therefore, there are no joint minutes by experts available for the Court. Mr Dube's legal representatives also elected not to call witnesses.

Injuries

[6] Experts accepted that Mr Dube sustained a head injury and a head trauma with a Glasgow Coma Scale (GCS) of 12/15. He had a laceration on the left temporo-parietal region of his scalp. He sustained an abdominal injury with intra-abdominal fluid collection but with "no visceral damage on the CT." Although the above facts are referred to in the expert reports, copies of the hospital records on which this information is based were not discovered and were not made available to

the Court. Other than in respect of the period he was admitted in Chris Hani Baragwanath hospital, it appears that the first medical examination was conducted a year after the accident.

[7] A report by a Radiologist, Dr Shapiro, dated 10 October 2012, commissioned by Mr Dube's previous attorney states that Mr Dube's pelvis was reported "...intact and has a normal symmetry. Both right and left hip and sacroiliac joints are intact and symmetrically equal. There is no degenerative change. The bone texture is normal."

[8] Dr Gantz, an orthopaedic surgeon examined him on 10 October 2012. Mr Dube self-reported that he experienced pain in the region of the scalp in cold weather and on the left buttock with prolonged walking and standing. He experienced a tenderness in the left hip and used regular over-the-counter pain medication. Dr Gantz concluded that the lacerations in the scalp although unsightly, were well healed. The scars were not a disfigurement.

[9] Dr Mazwi, a specialist Neurosurgeon, examined Mr Dube on 8 December 2022, approximately 10 years after the accident. In his opinion, the GCS 12/15 is associated with "prolonged loss of consciousness and amnesia" which is consistent with a moderately severe head injury. While noting that Mr Dube has poor memory, difficulty with concentration and post concussive headaches, he deferred the long-term monitoring and sequelae of these difficulties to a neuropsychologist. His opinion was that Mr Dube sustained a 25% WPL and qualified for general damages on the "narrative test."

[10] Dr Qubu, a specialist urologist assessed Mr Dube on 8 December 2022, also approximately 10 years after the accident. He confirmed that the blood found in Mr Dube's urine was due to an abdominal injury. Mr Dube suffered a blunt abdominal trauma "with free fluid in the pelvic cavity (about 6.2cm x 7cm c 5 cm) and haematuria on urine dipstick of 4+." He underwent a voiding cystogram but there were no results available for this procedure at the time of examination.

[11] Mr Dube's condition complicated with urine retention on 2 November 2011 after he was discharged. A urinary catheter was inserted, and he was given Panado as an analgesia. It was reported that Mr Dube has a voiding lower urinary tract symptom (LUTS) which affects his quality of life. The impairment rating is in class 1, Grade C -5%. A urethral structure must also be considered. The erectile dysfunction which affects his sexual relations is in class 1 Grade C -3%, a total urological WPI of 8%. He has reached maximum medical improvement.

General Damages

[12] Section 17 (1A) of the Act read with Regulation 3(1)(b)(ii) provides that the third party's injury must be assessed as 'serious' if it 'resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides.¹' At the hearing, these provisions were put to both legal representatives.

[13] Counsel for Mr Dube agreed that he is not entitled to pursue the adjudication of non-pecuniary damages until the RAF has assessed the injuries to determine whether they are 'serious injuries.' The concession is consistent with the decision by the Supreme Court of Appeal in the *Road Accident Fund v Duma et al.*²

[14] He nevertheless submitted that on a proper construction of Regulation 3(3) (dA),³ the Court must take cognisance of an offer made by the RAF and infer that the RAF made an election and accepted that the injuries are serious. Relying on the submissions in the RAF's heads of argument, he argued that ... "it would be a total waist of public funds should General Damages not be determined by the honorable [sic] Court on this trial date and only be determined by the honorable [sic] Court in the subsequent trial date since the Fund has already assessed the seriousness of the injuries at this stage and tendered an offer of settlement thereby acknowledging

¹ The AMA Guides is defined in regulation 1 as the American Medical Association's Guides to the Evaluation of Permanent Impairment.

² *Road Accident Fund v Kubeka and Road Accident Fund v Meyer, Road Accident Fund v Mokoena* 2013 (6) SA 9 (SCA)

³ Regulation 3(3) (dA) provides that the Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment.

that the Plaintiff indeed qualifies for General Damages and also confirming same in their submitted heads of arguments before the honorable [sic] Court. The only issue between the parties is how much the Plaintiff qualifies for General Damages and not whether the Plaintiff qualifies or not.”

The submission relied upon, made by the RAF in its heads of argument contradicts its pleaded case, which has not been amended or abandoned. As I will show below, it is not supported by expert opinion and is not supported by the underlying facts on a *prima facie* basis.⁴

[15] Although not referred to by Counsel at the hearing, I am aware of the dictum by the Full Court in *Mertz v Road Accident Fund* ⁵(*Mertz*) where the court dealt with the question of the seriousness of injuries. The question in *Mertz* was whether there was an implied acceptance of the “seriousness” of the injuries detailed in the expert reports presented by the plaintiff. The Full Court inferred the acceptance based on a deemed acceptance and an undertaking made by the RAF at a Pre- Trial Conference that it will revert by a certain date, failing which “it shall be accepted that the findings in the plaintiff’s expert reports are deemed to be admitted.” The Full Court held that:

“Regulation 3 does not expressly require the RAF to in writing accept the injuries as serious, whereas it expressly provides [s] that reasons for rejection must be in writing. The RAF is the decision-maker pertaining to accepting or rejecting the injury as serious. There is no doubt that in general where the RAF had offered an amount as compensation for general damages, without expressly informing the third party that the injury was serious, an implied acceptance constitutes that the injury was serious. Similarly, an admission that injuries are serious, contained in a pre-trial minute is an acceptance of the injuries as serious. Admissions made in a pre-trial hold the party admitting same bound thereto.”⁶ (footnotes omitted)

⁴ *Road Accident Fund v S M* [2019] ZASCA 103 at para 2.

⁵ 2023 (8A2) QOD 6 (GN)

⁶ *Mertz* above at para 29.

[16] There is no record of an acceptance of the seriousness of the injuries in any of the Pre – Trial Conference Minutes held between the parties. Furthermore, the only offer before the Court is in respect of the liability, which was settled 80/20%.

[17] The following medical facts demonstrate the prudent decision of the Court in *Duma* and why the prescribed threshold of “seriousness” which is a jurisdictional requirement,⁷ cannot be the domain of the court: Dr Mazwi opined that the GCS 12/15 is associated with prolonged loss of consciousness and amnesia which is consistent with a moderately severe head injury. On the other hand, the GCS classifies traumatic brain injury as either mild, moderate, or severe, based on the score as follows:

- Mild = GCS 13 to 15, also called concussion
- Moderate = GCS 9 to 12
- Severe = GCS 3 to 8⁸
-

[18] On the GCS, the classification of Mr Dube’s head injury fits with a moderate to mild, or at best a borderline case between the two scales. That Mr Dube had a prolonged amnesia is not supported by hospital records nor was there evidence placed before the Court. The basis for the finding that Mr Dube sustained a moderately severe head injury is not explained. Facts which support compensation based on the “narrative test,” and or Regulation are not before the Court.

[19] Dr Gantz found that the pain in the left buttock was from symptoms emanating from lower back pain unrelated to the accident. The non-specific chronic low back pain conferred a 2% WPI. He did not consider this to be a serious long-term impairment. When considered with the report by the Radiologist, the nexus between the lower back pain and the accident has not been identified or explained. Similarly with the erectile dysfunction which affects his sexual relations. It was found to be in class 1 Grade C -3%, with a total urological WPI of 8%. Although the Court accepts that Mr Dube suffered an abdominal injury, the nexus between this and the erectile dysfunction is not explained anywhere.

⁷ *Road Accident Fund v Duma et al* at para 19.

⁸ NCBI Bookshelf. A service of the National Library of Medicine, National Institutes of Health

[20] As said, Mr Dube's legal representatives elected not to call any of the expert witnesses to testify. Moreover, the new offer now relied upon was made "without prejudice". It was not one made in terms of the Uniform Rules. It is thus not before the Court. Rule 34 (10) prohibits a disclosure of an offer made without prejudice to the Court before judgment.⁹ Mr Dube's entitlement to a determination of the general damages, is postponed *sine die* until a proper assessment is made in terms of the Act and the Regulations.

Loss of earnings and capacity

[21] Next for consideration is the loss of earnings and earning capacity. The basis for the award is set out in *Deyssel v Road Accident Fund*¹⁰ that:

" Loss of income arises primarily from a loss of earning capacity, in other words, if the plaintiff loses a certain degree of earning capacity', this will show in that they will lose actual income in future. This is also true in that when a person loses income due to a damage-causing event such loss is due to a lowered earning capacity arising from the same cause of action."

...

In my view this does not mean that such plaintiff would be claiming for loss of income and not loss of earning capacity per se it is merely this loss of income that provides evidence of a loss of earning capacity, and visa-versa. Earning capacity is part of a person's patrimony, but this capacity can only be proven to have been lowered, and the damages for this quantified by proving an actual loss of income. However, when both of these losses have been shown to exist, then the claim for one is also the claim the other and they appear to be interchangeable."

[22] Mr Dube was 31 years old at the time of the accident. He completed Grade 11 but is reported to have failed Grade 12, thereafter discontinued school due to financial constraints. He did not provide information to support his qualifications.

⁹ No offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.

¹⁰ [2011] ZAGPJHC 242 (24 June 2011) at para 15 and 18.

[23] Between 2000 and 2001, he worked at Pick-n-Pay in Norwood as a cashier for a year, earning R 2000.00 a month. From 2001 to 2010, he worked as a gardener for several employers earning R 150.00 per day. From 2010, he was employed at Pick-n-Pay in Northgate as a Canteen Cook, earning R 2 266.00 per month, and a manually calculated gross annual salary of R 28 474.61.

[24] After the accident, from 2013 to 2018, he is reported to have worked at Dube's Inn as a cashier earning R 2 800.00 per month. The business was owned by his uncle who subsequently passed away. From 2018 to 2020 he obtained temporary employment as an Assistant mechanic, earning R 2 600.00 and thereafter worked at Joe's Butchery earning R 3 500.00 per month. This was classified as light and medium category of work.

[25] Some 12 years after the incident, Ms Masondo, a Clinical Psychologist assessed Mr Dube on 13 March 2023 to determine the neuropsychological effects and to determine the nature of the cognitive and social functioning impact of the accident. She found Mr Dube's thought content psycho-motor rate normal. Symptoms of Post-Traumatic Stress Disorder (PTSD), including flashbacks of the accident; distressing dreams about the accident, hyper-vigilance when travelling were identified. Mr. Dube obtained a score of 21 on the Beck Depression Inventory-II (BDI-II), which indicates experiences depressive symptoms that are moderate. Mr. Dube obtained a score of 30 on the Beck Anxiety Inventory (BAI), an indicator of moderate levels of anxiety.

[26] Ms Masondo concluded that Mr. Dube's results indicate that his short-term working memory has been negatively impacted. The measure of attention and concentration varied from being average to low average, suggesting fluctuations in attention and concentration. He will have some difficulty learning new information based on inattention and inability to self-monitor himself correctly. There were no academic records provided prior to the completion of the report. Mr. Dube's psychological difficulties are likely to improve to some extent, with psychotherapeutic intervention.

[27] Dr Tania Vermaak, an Industrial Psychologist was of the view that Mr Dube's premorbid cognitive functioning is estimated to have been average to below average. Based on Koch's Quantum Yearbook, 2011, his annual salary fell between (a) the median level and upper quartile suggested earnings for non-corporate unskilled workers; (b) the lower quartile and median level suggested earnings for non-corporate semi-skilled workers. It fell below earnings of corporate unskilled positions according to surveys by PE Corporate Service and De Loitte and Touche.

[28] She observed that Mr Dube was in the achievement phase of his career at the time of the accident, indicating that future career growth and promotional, increased earnings could have been possible. His residual chronic headaches were a risk factor which would undoubtedly impact on his comfort and ability to maintain productivity. She recommended that he be compensated for his residual symptoms, reduced functional work and earnings capacity.

[29] The findings are that Mr Dube's employment profile shows that he would have always been predisposed to work categories of the unskilled and semi-skilled labour market. This type of work was classified as medium work with unskilled cognitive demands. Progress in his career would most likely have been through straight-line increases. Evidence of the salaries at Pick n Pay were supported by pay-slips furnished to the Industrial Psychologist. If employed in the non- corporate sector, the range of Mr Dube's salary is between R34 200 00 - R 72 100 00 - R 191000 00 per annum. If employed in the corporate sector, the scale would have been in the range of R144 000 - 172 000 - 201 000. The expectation is that he would have been able to work until normal retirement age of 65 years.

[30] Ms Krowitz, an occupational therapist reported on Mr Dube's residual work capacity and employability. She concluded that Mr Dube retains the overall functional capacity to perform sedentary and light work. A full job match does not exist between the physical function and overall demands of his pre- accident job as a canteen cook, but with his most recent employment as a cashier since it involves use of arms and not ambulatory skills which have been reduced.

Computation of the Loss

[31] Mr Dube did not furnish collateral information to the Industrial Psychologist to support the assertions of the salary earned and to prove the post- morbid income. As stated by the Supreme Court of Appeal in the *Road Accident Fund v Kerridge (Kerridge)*,¹¹ the role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. The facts upon which the experts rely can only be determined by the judicial officer concerned. This problem is exacerbated by the Road Accident Fund (the Fund) which fails to properly investigate the true situation of a claimant and is content to rely on projections and assumptions of experts with no factual basis...Courts should not readily accept “the assumptions and figures provided by expert witnesses in personal injury matters without demur.”

[32] A compelling observation by Ms Masondo was that the presence of pre-existing cognitive difficulties cannot be excluded. That he failed Grade 11 is a probable indicator of the findings. The difficulty in learning new information based on inattention will likely result to him retaining employment in the similar non-corporate service sector. Pre-morbid level of education may have limited his occupational prospects.

[35] The court is not bound by the post- morbid actuarial calculations contended for. The calculation for the loss of earning capacity ought to be based on the pre-morbid loss of earnings, being the gross income of R 2 589 per month, earned as a service area assistant, canteen cook. I accept that the linear increases and ceiling up to the age of 50 should be applied to the actuarial calculations, as it is objectively justifiable, reasonable, and appropriate. In addition, an actuarial calculation which projects this income with inflationary increases until retirement at 65 years is also justifiable. The pre -morbid past loss of earnings and the post-morbid loss of earnings in the non-corporate sector is unchanged at R 1 119078.

¹¹ 2019 (2) SA 233 (SCA) at para 50.

[36] Considering the facts above and applying the principles for determining the award, as held by the court in *Southern Insurance Association Ltd v Bailey NO*,¹² the court has "a large discretion to award what the court considers right" even where the method of actuarial computation is adopted in assessing damages for loss of earning capacity. One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life".

[37] Although comparative cases are purely a guide, in *Road Accident Fund v De Bruyn*¹³ a 60% post-morbid contingency deduction was applied to a Plaintiff, who was still functioning in his pre-accident occupation and still employed. He would however not be able to sustain the postulated levels of earnings going forward. In *Kannenbergh v Raf*¹⁴ the court applied a differential of 40% in respect of a compromised Plaintiff who at the time of trial had suffered no loss and was still employed and was even promoted after the accident. The evidence was that her functions would be compromised over time resulting in a diminished earning capacity.

[38] Mr Dube has not suffered a permanent impairment of earning capacity, after the accident, given the nature of his qualification and position of employment. I accept however that he no longer retains the capacity for the work of a medium and heavy nature, which diminishes the range of employment opportunities available to him. His earning capacity was reduced to this extent, albeit in the Court's view, marginally by the accident. The Court accepts that he would have most likely remained employed at Pick n Pay or in a similar position until retirement.

[39] In this case, Mr Dube's loss of earning capacity ought to be based on the non-corporate sector, unskilled- semiskilled income of R 1 119 078. The agreed apportionment must be applied to the loss. A general contingency deduction of 35% to factor increased employment vulnerability, the extent of labour incapacity, uncertainty and possible periods of unemployment must apply to the computation of the loss and is to be computed by the parties on this basis.

¹² 1984 (1) SA 98.

¹³ [2014] ZAGPPHC 108.

¹⁴ Case No: 45549/16.

[40] In the result, the following order is made:

- a. General damages are postponed *sine die* pending a proper determination as provided by the Act.
- b. The Defendant has conceded Merits 80/20% in favour of the Plaintiff.
- c. The Defendant is to furnish the Plaintiff with an undertaking limited to 80% in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision or herein after such costs have been incurred and upon proof thereof.
- d. The computation of the loss of earnings is to be based on the pre-morbid past loss and the post-morbid loss of earnings in the non-corporate sector which is unchanged at R 1 119 078.00 as per paragraph 39 above.
- e. A general contingency deduction of 35% shall be applied to the loss, after the apportionment of the agreed liability of 80/20%.
- f. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs, including preparation costs, on a High Court scale, including, but not limited to:
 - i. The costs of counsel, including the costs of reasonable preparation.
 - ii. The costs of obtaining reports, reservation and reasonable taxable preparation fees, if any, but not limited to, the following experts:
 - aa. Dr. Dov E Gantz (Orthopedic Surgeon).
 - bb. Dr A. B Mazwi (Neurosurgeon).
 - cc. Dr Daniel Qubu (Urologist).
 - dd. X-Ray Report by Morris Shapiro.
 - ee. Dr. Alexandra Krowitz (Occupational Therapist).
 - ff. Phumelele Masondo (Clinical Psychologist).
 - gg. Dr. Tania Vermaak (Industrial Psychologist).
 - hh. Johan Sauer (Actuary).
- g. The Plaintiff shall, if the costs are not agreed, serve a notice of taxation on Defendant's attorneys of record, and shall allow Defendant fourteen (14) court days, after the **allocator** has been made available to Defendant, to make payment of the agreed or taxed costs.

h. shall be paid into Kekana Attorneys Trust Account with the following banking details within 180 days of this Court Order date:

Name: KEKANA ATTORNEYS
Bank: FIRST NATIONAL BANK
Account no: 6[...]
Branch: B[...]
Branch code: 2[..
Ref: Kekana10/2022

This judgment is handed down electronically by circulation to the Applicants and the Respondents' Legal Representatives by e-mail, publication on Case Lines and release to SAFLII. The date of the handing down is deemed to be 6th March 2024.

SIWENDU J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
JOHANESBURG

Date of appearance: 08 February 2024

Date Judgment delivered: 6 March 2024

Appearances:

For the Plaintiff: Advocate J Makhene
Instructed by: Kekana Attorneys

For the Respondent: Ms More-Tladinyane (State Attorney)