

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022/12455

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

[Redacted Signature]

SIGNATURE

07/03/2024
DATE

In the matter between:

MALIBONGWE SINETHEMBA GILI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

WEIDEMAN AJ:

BACKGROUND

- [1] The Plaintiff, Malibongwe Sinethemba Gili, an adult South African male, 30 years old, has instituted action for injuries which he sustained in a motor vehicle accident as a pedestrian.
- [2] The accident occurred on 11 February 2021 near Main Road, Kyalami, Johannesburg, when a vehicle driven by the insured driver collided with the plaintiff as he crossed a roadway.

ISSUES IN DISPUTE

- [3] Liability was previously settled on a 70/30% apportionment in favour of the plaintiff.
- [4] The issue in dispute is therefore the quantum of the plaintiff's claim.
- [5] The plaintiff indicated that he wanted to present his evidence by way of affidavit and an application in terms of Rule 38(2) was moved and granted.

QUANTUM

- [6] The plaintiff's claim, as per the particulars of claim consists of the following:
 - 6.1 Past hospital and medical expenses.
 - 6.2 Future hospital and medical expenses.
 - 6.3 Past loss of income.
 - 6.4 Future loss of income.
 - 6.5 General damages.
- [7] The plaintiff's injuries are summarised as:
 - 7.1 A head injury.

7.2 Whiplash injuries to the cervical and lumbar spines.

7.3 A crack fracture of the left side of the coccyx.

- [8] When the matter was called, I was advised that the claim for past hospital and medical expenses is not being pursued any further, also given the Compensation Commissioner's involvement and who would be responsible for any accrued hospital and medical expenses.
- [9] Similarly, the claim for past loss of income was no longer in dispute as the plaintiff did not suffer any actual past loss of income.
- [10] The claim for future hospital, medical and ancillary expenses will be met by the defendant by the tendering of a standard Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act apportioned in accordance with the settlement of liability, to the extent that the medico-legal reports filed of record do in fact confirm that the plaintiff will require future treatment.
- [11] The defendant did not accept the plaintiff's entitlement to non-pecuniary damages and the quantification of the claim for general damages is therefore not before me and will be postponed *sine die*.
- [12] That leaves only the claim for future loss of income/impairment of earning capacity. In this regard reference is made to the various medico-legal reports only as far as it is necessary to cryptically confirm their final analyses in respect of future employability.

- [13] According to the medico-legal reports the following appears to be relevant in respect of the claim for loss of income:

13.1 As per the orthopaedic surgeon the plaintiff sustained soft tissue injuries to the cervical and lumbar spines. Dr Marin recorded that the plaintiff would require time off work for treatment but that with successful treatment, his productivity will increase. He was further of the opinion that the plaintiff will be able to work to normal retirement age of sixty-five.

13.2 The neurosurgeon, Dr Bounbou-Poati, believed the plaintiff sustained a mild traumatic brain injury, i.e. a concussion and in respect of which he had good prospects of making a full recovery. His longevity and age of retirement were not affected by the accident.

13.3 The third expert was Dr Hoffman, a plastic and reconstructive surgeon. He recorded that the plaintiff had scarring to the head and neck which was susceptible to reconstruction and improvement but that the plaintiff would always have visible scars. He expressed the opinion that the scarring would have a minimal effect on the plaintiff's productivity and that with treatment, even that will improve further. According to his report the plaintiff will be able to work to normal retirement age.

13.4 The clinical psychologist, Ms Arnold, was of the opinion that without intervention, the deficits that she found could have an impact and this could lead to unreliable work output and compromised productivity. The reverse would then also be true - with intervention it should not have any

significant impact. She believed he would be able to work to normal retirement age.

13.5 The occupational therapist, Ms Ndabambi, was of the view that the plaintiff remains suited for work in the sedentary and light categories but that he should refrain from doing medium work on a continuous basis. He was not suited for work in the heavy or very heavy categories.

13.6 The final report of relevance is that of the industrial psychologist, Ms Schoeman. She confirms that the plaintiff was injured on duty and that, according to the employer a claim had been lodged with the Compensation Commissioner. Ms Schoeman's record of her consultation with the employer appears on CaseLines at page 005-112. The employer reported to her that the plaintiff was an eager employee, always wanting to learn and that there was no discernible effect in the execution of his duties as a result of the accident, albeit that he from time to time complained of back pain. His employment was not at risk because of the injuries sustained in the accident and he did have promotional prospects. Based on the figures reflected in her report, the plaintiff remained at the same employer, earning more after the accident than he did at the time of the accident, i.e. his annual increases had not been affected by the accident. This would also be in line with the evidence that his position is not at risk. I interprets her report to be that the only anticipated problem is in the event of the plaintiff losing his current position, he would be an

unequal competitor in the open labour market. She confirms that he could work until normal retirement age.

- [14] According to the actual report (as per the table on CaseLines at page 005-140), the projected future income, pre- and post-accident is the same. The value of the percentage chance that the plaintiff will have to seek alternative employment at some stage in the future and at which stage he will be an unequal competitor, is valued at 10% of his projected total future income. This yields a figure of R733 943.

CONCLUSION

- [15] The plaintiff has no accrued loss of income, he was placed on sick leave and was paid in full by his employer. Since returning to work he has not been penalised at any stage and his income is higher than what it was at the time of the accident. The employer confirmed to the industrial psychologist that his position is not at all at risk because of the injuries sustained in the accident and that he in fact has the possibility of being promoted at some point in the future. All the expert reports are *ad idem* that he can work until normal retirement age and all are in agreement that the injuries had a minimal effect on his functioning. Where they do have an effect, the treatment recommended in their reports will result in improvement.
- [16] As a result, I have no other alternative but to dismiss the plaintiff's claim for future loss of income. There is simply no factual evidence before court that would justify any award under this head of damage. All the reports filed of record speak to the sequelae of the injuries sustained in the accident. Considering

these in the context of the factual information available suggests that there is also no quantifiable loss of employability or impairment of earning capacity.

[17] Given the content of paragraph 16 above all that the court is left with is a possibility that if he must re-enter the open labour market, at some unknown point in the future, that he might be an unequal competitor. This risk is not mathematically quantifiable, but it has a monetary value which can only be addressed by way of a lumpsum award.

[18] Taking all the available evidence into consideration it is my opinion that this risk should attract a lump sum award of R200 000.00 and which, after taking into consideration the apportionment on liability, is R140 000.00.

[19] In the circumstances I make the following order:

1. Under the heading of future loss of income, the defendant shall pay the plaintiff the sum of R140 000.00.
2. The defendant must provide the plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act to address all future hospital, medical or ancillary expenses that the plaintiff may have because of the injuries sustained in this accident, limited to 70% as per the settlement on liability.
3. The plaintiff's claim for non-pecuniary damages is postponed *sine die*.
4. The defendant is to pay the plaintiff's party and party costs, as taxed or agreed, on the appropriate scale.



D. WEIDEMAN

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was prepared by Acting Judge Weideman. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 07 March 2024.

Date of hearing: 15 February 2024

Date of Judgment: 07 March 2024

Appearances:

Counsel for the Plaintiff: Adv. A. Naidoo

Instructed by: Van der Elst Inc

Counsel for Defendant: Mrs Y. Ramjee

Instructed by: Office of the State Attorney