



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

CASE NO: 2021/55615

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised:
Date: <u>09/10/2023</u> Signature: 

GONYE SIMBARASHE LLOYD

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MALUNGANA AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 09 October 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 09 October 2023

Introduction

- [1] This is an action in which the plaintiff, aged 35, claims damages for personal injuries suffered by him when he was allegedly thrown out of a moving motor vehicle on the 17th of June 2020. He sustained a left talonavicular dislocation/subtalar joint injury with an open wound. The injury was treated surgically, K wires were inserted and then removed at about six weeks post surgery. He mobilised with the aid of crutches for almost six months.¹ The nature and extent of the plaintiff's injuries will be dealt with in detail later in this judgment.
- [2] Following the Order of Senyatsi J issued on 3 May 2022, this matter came before me by way of default judgment.² Despite failing to file opposing papers, the defendant was legal represented by Mr Ngomane from the State Attorneys' office. The only oral evidence led was from the plaintiff himself. There was also no oral evidence adduced by expert witnesses. The plaintiff relied on their reports as well as their confirmatory affidavits which formed part of the record.
- [3] It is trite that in civil matters the duty rests upon the plaintiff to adduce evidence to persuade the Court to find in his favour. The distinction between the burden of proof and evidentiary burden has been explained by Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534 (A) at 548 A -C as follows:

"As was pointed out by DAVIS, AJA, in *Pillays v Krishnaa and Another*, 1946 AD 946 at pp.952 – 3, the word onus has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on a particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In *Brand v Minister of Justice*

¹ Medico-legal report by Dr. Geoffrey Reed, Plaintiff's Orthopaedic Surgeon. Case lines 004-1.

² Order by Senyatsi J. Case lines 007-1

and Another, 1959 (4) SA 712 (AD) at p.715, OGILVIE THOMPSON,JA, called it "the overall onus." In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerlegginglas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another*, 1939 AD 16 at p. 28; *Marine and Trade Insurance Co. Ltd, v Van C der Schyff*, 1972 (1) SA 26 (AD) at pp.37-9.)"

Evidence

- [4] The plaintiff testified as follows: On Wednesday the 17th of June 2020 he was being conveyed as a passenger at the back of his manager's bakkie. While so being conveyed he noticed through the back window of the vehicle that his manager was busy talking on his mobile phone. As the vehicle approached the curve of Potgieter road at a high speed he was flung out of the bakkie, and landed 800 metres away from the road. He called up one of his fellow workmates who then alerted the driver of the bakkie about the incident. After a while and when he was being removed to the hospital by an ambulance, the driver returned to the scene. He was removed to Southrand hospital for treatment. There was nothing further he could do to avoid the accident. He described his injuries as an injury to lower limbs and head.
- [5] Regarding his employment, he testified that at the time of the accident he was working as a security guard for Sandeka Security Services. He earned a monthly salary of R3500.00. He returned to his employment in May 2021, and was transferred to a place far away from where he previously lived. This is the reason he quit his job. During his off days he would do garden services to augment his income. His salary as a garden man would vary between R2000 and R2500. He earned R2500 from Suzan, and R2000 from Isaak where he is lodging. The R500 goes towards the rental, so he is left with R2000.00. He complains of pains when he stands for a long time especially when he is assigned a duty which requires standing. His highest qualification is form 4 from Zimbabwe.

- [6] Counsel for the defendant, questioned the plaintiff about where he landed after being flung out of the vehicle. He testified that he fell about 800 metres from the scene of accident, and it took the driver of the bakkie 30 to 45 minutes to return to the scene. The person who assisted him called the ambulance which took him to Southern Rand hospital. Thereafter he was transferred to Charlotte Maxeke hospital. Asked whether the person who assisted him could be the one who informed the paramedics that he jumped out of the moving car, he replied that he did not know. He further denied that he jumped out of the moving vehicle.
- [8] During argument counsel for the plaintiff submitted that there is a nuance difference between the evidence adduced by the plaintiff and what is contained in the accident report. In the accident report it is stated that the insured driver swerved to avoid hitting the pavement, whilst the plaintiff on the other hand testified that the driver was talking on the phone when he was thrown off the vehicle at the curve of the road. He further submitted that the plaintiff would not have been flung out of the car unless the driver of the vehicle was negligent.
- [9] The argument by counsel for the defendant is that the hospital records indicate that the plaintiff jumped out of a moving car, injured his leg and knocked his head. The defendant also built an argument on the fact that the accident report and the statement on the occurrence of the accident were only attended to 10 (ten) months after the accident. In advancing this argument he placed reliance on the guidelines in evaluating evidence set out in *Stellenbosch Farmers Winery Group Ltd and Others*³

[10] Negligence

The test for negligence was formulated by Holmes J.A in *Kruger v Coetzee* 1966(2) SA 428 (A) as follows:

³ 2003(1) SA 11 (SCA).

"For the purpose of liability *culpa* arises if-

(a) a *diligens paterfamilias* in a position of the defendant-

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and
- (ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

[11] Insofar as the first requirement is concerned, it was the plaintiff' evidence that he was flung out of the bakkie driven by his manager. The defendant submitted in this regard that the hospital record indicated that he jumped out of the moving. The plaintiff, however, denied this assertion standing by his evidence that he was thrown out of the bakkie whilst the driver was busy on the while negotiating a curve of Potgieter's road. It is not clear as to who gave the paramedics or the nursing staff of the hospital the information pertaining to the occurrence. There is no evidence to corroborate this assertion. Let me say something about the defendant's conduct in this regard. It has all the human and financial resources to investigate the circumstances of this case. It is statutorily bound to investigate the circumstances of the claim within a specified period upon receipt of the claim. What did it to do, it sat back and rests on its laurels instead of investigating the merits of this case. Even if I were to accept that the hospital records are what they purport to be, reliance cannot be placed on the content thereon without any one to speak to the content thereof.

[12] As pointed out in *Pillays*, cited *supra*, once there is a dispute in the course of the trial the burden of adducing evidence in rebuttal may be transferred. In this case the defendant bears the burden to adduce evidence to combat the plaintiff's evidence. In the absence of such evidence there could be no reason

to reject the plaintiff's evidence. He testified in an honest and truthfully manner throughout the proceedings. In failing to reduce the speed while approaching the curve I find that the insured driver was negligent, and his negligence had resulted in the injuries sustained by the plaintiff. To answer the last leg of negligence as articulated in *Kruger* cited *supra* there was nothing the plaintiff could have done to avoid the accident. Having reached the conclusion that the plaintiff has discharged the evidentiary burden of proof laid down in *South Cape Corporation (supra)*, I now proceed to consider the quantum.

Quantum

- [13] According to Dr Geoffrey Read who examined the plaintiff for his orthopaedic injuries sustained in the accident, the plaintiff has ongoing pain and tenderness over his left ankle and loss of subtalar movement. His confirmatory affidavit of the report appears under case lines 015-1. He further opines that the plaintiff will in future require long term conservative treatment for the symptom emanating from his left ankle and hindsight region. This treatment would consist of analgesics, anti-inflammatories, muscle relaxants and physiotherapy. In addition he will require talonavicular foot surgery, and an orthotic for his left shoe, the costs of which are detailed in his report.
- [14] Lowinda Jaquire, the occupational therapist, noted in her report⁴ as follows (para.6):

“Job description:

- The claimant was employed as a security guard at Satenga Security Services.
- He was placed at Chelsea Complex which is a residential complex.
- He was one of five security guards.
- He worked both night shift and day shift.
- He worked six shifts per week, either from 06.00 -18:00-16:00.

⁴ Case lines 004-21

- On day shift, he was tasked with access control at the entrance gate and checking visitors in and out of the gate.
- He was required to patrol twice every hour. One round took 15 minutes to patrol.
- There was a chair to sit as it was a busy complex, he was sitting often.
- On night shift, his duties were patrolling also twice an hour. He sat in the guard room when he was not patrolling.
- He was remunerated R3500 per month.
- He was also working as a part-time gardener on his off days and after shifts.
- He worked three times per week.
- He was remunerated R800 per month by Susan and R1500-R2000 by Isaac.
- The claimant is currently employed as a part time delivery driver at SF Logistics.
- The company manufactures sanitizers among other items and of which the claimant has to perform deliveries.
- The offices are situated in Kebler Park.
- He is being contacted once or twice a week to perform deliveries.
- He delivers to Southgate and Mondeo.
- He is being paid R26/box to deliver.
- He often delivers approximately fourteen boxes per week.
- He has to load and offload the boxes by himself.
- He drives a manual Mazda Rustle bakkie.
- He earns an average of R225 per week.
- The claimant is currently employed as part-time security guard at NNK.
- He is placed at Legmondeo Residential complex.
- On day shift, he is required to perform access control at the entrance gate.
- On the night shift, he is required to patrol the perimeter which takes 40 minutes to complete.
- There is one guard working per shift.

- He works three shifts a week. He works twelve hour shifts. He works both shifts or day shifts.
- He is being remunerated R3000 per month.”

[15] The occupational therapist described the plaintiff's injuries as left ankle fracture and head lacerations. She notes in her report that the plaintiff experiences pain in his left ankle when standing for a prolonged periods and driving longer than three hours. The pain is aggravated by cold weathers. He no longer does the running. She recommends 8 sessions of occupational therapy for his rehabilitation following the surgery recommended by Dr Read. This will cost about R800 per hour.

[16] The plaintiff was also examined by his Industrial Psychologist, Ms Michelle Hough.⁵ In her report the Industrial Psychologist states that the plaintiff completed security Grades C,D and E at Satenga Security in 2014. He is, however, not registered with PSIRA. The plaintiff also holds Code 10 South African driver's license. The plaintiff commenced his job as a Grade C security guard at Satenga. According to the letter from Satenga, the plaintiff earned a basic income of R3 520 per month. He was rarely required to work overtime. He also worked as a part-time gardener three times per week. As a gardener he earned R800 per week from Ms Suzan, and reportedly earned an average of R1750 per month depending on what he was required to work either from Ms Suzan or Mr Isaac's home. He was absent from work for 12 months after the accident, and only returned to work in May 2021. He received a full salary from Satenga Security for June 2020, and R1000 per month for July and August 2020. The remainder of his absence was unpaid. He currently works for NNK Security as a Gate-Man since June 2021. He earns R3000 per month. He also works for SF Logistics as a driver, delivering approximately one to two times per week.

⁵ Medico-legal report by Michelle Hough- Industrial Psychologist. Case lines 004-42

- [17] Ms Hough opined that the plaintiff's would have continued working as a Grade C Security given his training as a security guard. In the same vein he would have continued working as a part-time gardener. As a Grade C,D or E Security Guard he could have earned on par with the statutory determined Security Guard wages, currently an inclusive income of approximately R94 286.88 per annum. Alternatively as Code 10 driver, the plaintiff would have opted for a job as a delivery driver earning approximately R5 127 per month. Salaries of a driver according to the Salary Explorer range from R4 980 to R14 600 per month. The median of earnings indicated for semi-skilled workers is about R88 000 per annum according to Dr Robert Koch's Quantum Year book of 2021.
- [18] Ms Hough further stated that the injuries sustained by the plaintiff had rendered him moderately disabled. She accepts the physical presentation noted by Dr Read that he will remain moderately disabled. She agrees with Dr Read's observation that he will require sedentary work that does not place excessive strain on his left hindfoot region. Michelle also opines that the plaintiff may continue working in his current capacity provided that he refrains from partaking in work which may exacerbate his symptoms. She concludes that his educational qualifications and limited scope of employment have reduced his chances of obtaining suitable employment. Regard being had to the recommended surgery, the plaintiff can be regarded as unemployable for practical reasons, probably within the following 5 to 10 years.

General damages

- [19] Turning now to the issue of quantum value of the plaintiff's claim. It is convenient, at the onset, to first deal with the subhead of general damages. The plaintiff himself had deposed to physical *sequelae* of his injuries. His evidence was impressive and credible. It is apparent from the oral and documentary evidence placed before me that the plaintiff would suffered severe pain and later discomfort following the injuries he sustained in the accident, and thereafter there would have been period of further severe pain after the K wire surgery. He still experiences pain and discomfort in his ankle

during cold weather and in the morning, especially if he stands for a prolonged period of time. He stopped running as a result of persistent pain. The overall picture therefore is that he can no longer partake in most sporting and recreational activities that exert pressure on his ankle.

- [20] In advancing the plaintiff's claim for general damages, counsel for the plaintiff submitted that the Court should be guided by the awards in the following cases: *Howard v Road Accident Fund* (19053/2010) [2011] ZAGPPHC151 (30 May 2011); *Es v Road Accident Fund* (36448/2011) [2014] ZAGPPHC 650 (22 August 2014) and *Union and South West Africa Insurance Co Ltd v Humprey* 1979 (3E5) QOD 58(A). He contended that the fair and reasonable amount for general damages would be R450 000. In the *Es*, the plaintiff who was 29 years old had sustained multiple fractures comprising a *Pilon fracture of the right ankle, soft tissue injuries of the left ankle and foot; a fracture of the 3rd metatarsal*. She was awarded the amount R250 000.
- [21] Apart from the decisions referred to above, I have had regard to *Mpondo v RAF*, [2011] JOL 27508 (ECG) in which case the plaintiff sustained multiple soft tissue injuries, fracture of the base of femoral neck and trimalleolar fracture of the right ankle. She was admitted to the ICU with a number of procedures being performed on her. The Court had to consider an appropriate compensation for general damages. She was awarded an amount of R550 000 as general damages.
- [22] In *Mntwaphi v Road Accident Fund* JOL [2018] 39770 (ECP), the plaintiff who sustained a degloving injury to the right proximal aspect of the lower leg and fracture of the right ankle in an accident was awarded an amount of R150 000 as general damages. I also had regard to *Sefatsa v Road Accident Fund* [2020] JOL 47184 in which this Court awarded the plaintiff an amount R350 000 for general damages. In the latter case, the plaintiff sustained a bimalleolar fracture of the right ankle. More serious in this case is that the plaintiff would still undergo future surgery recommended by his orthopaedic surgeon. The inhibiting effect that these injuries have had on his activities, recreation and other social pleasures are a substantial loss. The best must be

done on all the facts of the case to arrive at an amount which may afford the plaintiff some solace for the hurt he had suffered and will continue to suffer as well as the discomfort. Taking into account all these cases including the ones in which more generous awards were made, I am of the view that the amount contended by the plaintiff's counsel of R450 000 is a proper figure under the present head.

Past and Future Loss of earnings

[23] With regard to the head of loss of earnings: There is evidence that the plaintiff had been working as a security guard and gardener when he was injured in the accident. He has no formal qualification and he is heavily dependent on his physical ability to make a living. From the evidence he was a very energetic young man being able to do two jobs without rest. On the evidence he was absent from work for a period of 12 months. He experiences pain if he has to stand for a long time. His other job as delivery driver involves loading and offloading. He is urged by the relevant experts to refrain from any job or activity which will exert pressure to his symptoms. The industrial psychologist opines that the plaintiff will be rendered unemployable in the open labour market in the next 5 to 10 years time. On the evidence as a whole I find that his disability goes to the very root of his working ability relative to the earning as a security guard or delivery driver whichever way one may prefer.

[24] The monetary value of the plaintiff's loss of income is quantified in the actuarial report by Munro Forensic Actuaries.⁶ A 10% contingency deduction was applied to the past loss and 25% contingency deduction was applied to the future income post- morbid. The capital value of his loss has been calculated as follows:

Uninjured Earnings	Injured Earnings	Loss of Earnings
Past R 258 600	174 500	
Less 10%	10%	
Contingencies		

⁶ Case lines 004-98

	R 232 740	157 050	R 75 690
Future	R 1 953 400	530 200	
Less	17%	25%	
Contingencies			
	R1611 555	397 650	<u>R 1213 905</u>
TOTAL LOSS OF EARNINGS			<u>R 1289 595</u>

[25] In *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 114C-D [also reported at [1984]] 1 All SA 360 (A) – ED], Nicholas JA said:

“In case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an ‘informed guess’, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s ‘gut feeling’ (to use the words of appellant’s Counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 920.)”

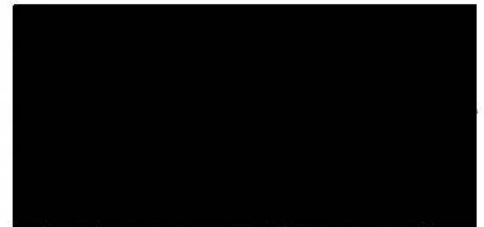
[26] I have no basis to reject the actuarial calculations and the contingencies applied therein. This brings the plaintiff’s loss of earnings to R1 289 595. In the light of the foregoing considerations plaintiff’s damages are computed as follows:

(a) General damages for pain and suffering, disability and loss of amenities of life	R450 000
(b) Past and Future Loss of earnings	R1 289 595
Total	<u>R1 739 595</u>

[27] Default Judgment is accordingly granted for the plaintiff for:

1. Payment by the defendant to the plaintiff of the amount of R1 739 595 within 180 days.

2. Interest shall accrue on such outstanding amount at the rate of 10,75% per annum calculated from 14 days of this order to date of final payment;
3. The defendant shall provide the plaintiff with a certificate in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for costs of the future accommodation in hospital or nursing home or treatment or rendering of a service or the supplying of goods (of medical or non-medical in nature) to the plaintiff arising out of the injuries sustained by him in a motor vehicle accident on 17 June 2020.
4. The defendant shall pay the plaintiff's taxed or agreed costs, including costs of the experts who compiled the necessary affidavits in support of the plaintiff's claim.



P H MALUNGANA

Acting Judge of the High Court
GAUTENG LOCAL DIVISION, JOHANNESBURG

Heard on: 02 June 2023

Judgement delivered on: 09 October 2023

APPEARANCES

For the Plaintiff: Adv. A Louw

Instructed by: Kruger and Potgieter Attorneys

For the Defendant: Mr. Ngomane

Instructed by: State Attorney, Johannesburg