

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

CASE NO: 6444/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: YES

REVISED

DATE: 17 July 2023

In the matter between:

PATRICIA SIBONGILE MMELA

PAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Senior Judge's secretary. The date of this judgment is deemed to be 17 July 2023.

JUDGMENT

ERASMUS AI

1. This is an action for damages brought by the Plaintiff for damages arising from personal injuries sustained in a motor vehicle

collision which occurred on 11 April 2018.

2. The matter comes before me as an undefended default judgment.

3. Plaintiff claims general damages but there has been no acceptance by the Defendant that the injuries are serious, and this head of damage must be postponed. There is also no claim for past medical expenses. Before me then are the merits of the matter, future medical expenses, and loss of earnings.

The merits

4. The Plaintiff's affidavit setting out how the collision occurred was admitted in terms of Rule 38(2) and his version is as follows:

4.1 The collision occurred on 11 April 2018.

4.2 The plaintiff was the driver of a motor vehicle bearing registration letters and numbers DZ[...] which collided with the motor vehicle bearing registration numbers and letters FG[...] there and then driven by Felokuhle Petrus Nkosi.

4.3 The collision occurred at the intersection of Angola Rd and the R562 in Tembisa.

4.4 The intersection is robot controlled but these were out of order and the Plaintiff treated it as a four-way stop.

4.5 Plaintiff proceeded into the intersection and while he was crossing, the insured driver (Mr Nkosi) In an Isuzu failed to stop at the intersection, entered it and struck the Plaintiff's vehicle.

4.6 Plaintiff sustained injuries and was admitted to hospital.

5. As mentioned, the action is undefended, and the principles contained in *In South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) are apposite. Here Corbett JA noted that:

"As was pointed out by DAVIS, A.J.A., in *Pillay v Krishna 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 the 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) (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 and Another*, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., 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 ("weerleggingslas"). 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 der Schyff, 1972 (1) SA 26 (AD) at pp. 37 - 9.)

6. Thus, while the onus will always remain on the Plaintiff he has, by establishing a prima facie case, placed an "evidential burden" or put differently a "duty to rebut" upon the Defendant. In the present case the Plaintiff has managed to set out a prima facie case of negligence on the part of the insured driver. In contrast, the defendant has not discharged this duty and in the absence of any evidentiary challenge whatsoever, the Plaintiff's prima facie case must stand and harden into proof.

Quantum

7. The Plaintiff's expert reports (supported by affidavit) were also admitted in terms of Rule 38(2). The following are noteworthy:

8. Dr Peter Kumbirai, Orthopaedic Surgeon found no significant orthopaedic consequences.

9. Dr J Ntimbani, Neurosurgeon found that the Plaintiff sustained mild traumatic brain injury with an admission GCS of 14/15 and 15/15 (confused). That he had left ear and chin lacerations and a thoracic spinal cord injury, in keeping with significant blunt trauma to chest (multiple rib fracture, lung contusion and left pneumothorax) which is attached to thoracic spine column. Examination showed he has spastic paraparesis, due to thoracic spinal cord atrophy on MRI. He also sustained blunt chest trauma, lung contusion. Dr Ntimbani also found that the suffers residual memory impairment and personality changes.

10. Notably Dr Ntimbani found that the Plaintiff's quality of life had been negatively affected by chronic headache and that he is

unemployable due to paraparesis.

11. Dr. KSC Malefahlo, Cardiothoracic Surgeon stated that the Plaintiff sustained a blunt chest wall trauma following a motor vehicle accident as a passenger. He was then admitted into the hospital emergency unit and subsequently the ward. He was diagnosed with left Pneumothorax, lung contusion, multiple rib fractures and soft tissue Injury on the right arm. A pneumothorax, loss of air contained within the lung into the thoracic cavity, can cause death if not treated urgently. The patient had a surgical intervention to relieve the compressed lung, this is done under a local anesthetic and it is very painful. Lung contusion, rib fracture and pneumothorax are amongst the deadly dozen injuries of the chest. These are a group of 12 injuries in trauma known to cause death in blunt chest wall trauma. The patient sustained the three Injuries and survived due to timeous medical Interventions. He has reduced lung functions with a FEVI of 71%. The patient sustained significant impairment to the chest.

12. Morongwa Sekele, Occupational Therapist found that the Plaintiff has no dynamic strength to perform any type of work as he is unable to carry any loads from floor to waist and waist to crown. He has no residual physical capacity to match the physical demands of his pre-accident duties as a supervisor. He is limited in aspects of his pre-accident job duties that require prolonged sitting, standing, squatting, kneeling, and walking. He returned to work following the accident and he was unable to cope with the job demands which led to the resignation. Physically, he is not competitive for sedentary, light, full medium, heavy, and very heavy work. He is not suited for any type of work in the open labour market. Considering the above, the writer is of the view that he is not a fair competitor in the open labour market.

13. Babitsanang Selepe, Industrial Psychologist postulates that had

the accident not occurred the Plaintiff would have been expected to continue working as a supervisor without any limitations. It is clear that the Plaintiff relied on his physical aptitude to perform his duties. His annual income could have been expected to increase per annum, as he acquired more skills and experience.

14. Plaintiff was 41 years at the time of the accident with the grade 12 and a NS Electrical Engineering certificate. He had approximately 17 years working experience. It appears that he was at his career establishment stage. As such, with more experience and on the job training, he would have reached his career ceiling at a position graded in terms of its job complexity, responsibility, and accountability. His salary would have reached Paterson C3/C4 Median basic salary within the corporate sector at about the age of 45 years. Thereafter, his career would have been stabilised and his earnings would most likely increase through inflationary every year until normal retirement age. Ms Sekele suggests that that an actuarial calculation which applies a straight-line increase from career entry point until the earnings ceiling is reached be adopted, as this results in a decreasing pattern of real increases in earnings, with inflationary increases thereafter until retirement at age 65 years.

15. Post-accident Plaintiff returned to work in May 2018 to resume with his duties as a supervisor with the same earnings as at the time of the accident but the Doctor at his workplace declared him unfit to work and he stopped working from October 2018 until currently. He has received a temporary disability income from his work since October 2018 of +-R 9040 per month.

16. John Sauer, Actuary performed a calculation based on the basis set out by the industrial psychologist. The loss of income (past and future) in the calculation amounts to R5 582 633.00.

17. There is no reason for me to question the facts presented by the Plaintiff and the expert opinions presented. The various experts maintain a reasonable and rational relationship between fact and opinion and there is no reason for me to call them into question. It may be that the position could have been different had the Defendant properly carried out its legislated functions, appointed experts and interrogated the Plaintiff's claim. But it has chosen not to do so, and I do not have inquisitorial powers. In the absence of a lacunae, something factually outlandish or logically inconsistent in the Plaintiff's case I accept that the prima facie case set out by the plaintiff must harden in proof and that his claim is properly quantified.

18. Accordingly, I make the following order:

(1) The Defendant shall pay 100% of the Plaintiff's agreed and/or proven damages.

(2) The Defendant is to pay the Plaintiff the sum of RS 822 633.00 (Five Million Eight Hundred and Twenty-Two Thousand Six Hundred and Thirty- Three Rands).

(3) The aforesaid amount shall be paid within 180 (One Hundred and Eighty) days of this order into the Plaintiff's Attorney's trust account, details are as follows:

TRIP KGAGUDI MANASWE ATTORNEYS

Bank Name	:First National Bank
Account Number	:6[...]
Account Type	:Trust Banking Account
Branch Name	:Pretoria Church Square

Branch code

:251445

(4) In the event of default on the above payment, interest shall accrue on such outstanding amount at the prescribed rate of interest calculated from due date until the date of payment;

(5) The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act No. 56 of 1996, to compensate Plaintiff for the cost of future accommodation in the hospital, nursing home treatment of a service or supplying of good to Plaintiff from injuries sustained by the Plaintiff as a result of the accident that occurred on the 06 November 2020, after the costs have been incurred and proof thereof.

(6) The Defendant is ordered the Plaintiff's taxed or agreed High Court party and party costs, which cost shall include, but not limited to the following:

(6.1) The fees of Counsel if any;

(6.2) The cost of obtaining the following expert medico legal which were furnished to the Defendant namely;

(6.2.1) DR J NTIMANI (Neurosurgeon)

(6.2.2) DR KUMBIRAI (Orthopaedic Surgeon)

(6.2.3) DR KSC MALAFAHLO (Cardiothoracic Surgeon)

(6.2.4) MORONGWA SEKELE {Occupational Therapist)

(6.2.5) BABITSANANG SELEPE (Clinical

Psychologist)

(6.2.6) DRS MKHABELA & INDUNAH (Radiologist)

(6.2.7) JOHAN SAUER (Actuary)

(7) The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record.

(8) The Plaintiff shall allow the Defendant 14 (Fourteen) days to make Payment of the taxed costs.

(9) There is no contingency fee agreement between the Plaintiff and his Attorneys.

(10) General damages are postponed sine dies.

FOR THE PLAINTIFF: ADV. MR MAPHUTHA (083 360 1025)

TRIP KGAGUDI MANASWE ATTORNEYS (TEL: 012 342 0006_

FOR THE DEFENDANT: NO APPEARANCE