

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

Case number: **19470/2021**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 05 March 2024

SIGNATURE

In the matter between:

VICUS VAN TONDER

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Leso AJ,

INTRODUCTION

1. Plaintiff brought an action for a claim of damages against the Road Accident fund as a result of a motor collision accident that occurred on 06 January 2020 at Walter Sisulu Street, Witbank. In this action the plaintiff claims that he suffered damages including loss of income as a result of the negligence of the insured driver.

BACKGROUND

2. For simple reading I will use the first name of the plaintiff and refer to the defendant as RAF throughout the judgment.

Vicus a 27-year-old male adult employed as a retail manager at Shoprite brought an action against the RAF for personal damages he suffered due to the accident with the insured driver. At the time of the accident, Vicus was 23 years old working as a retail manager.

3. RAF defendant the matter however it did not obtain the experts' reports, consequently reliance was placed on the plaintiff experts' reports. During the trial the counsel representing Vicus brought an application to lead documentary evidence by way of an affidavit of the experts in terms of rule 38(2) and the counsel for RAF did not object. Consequently, the application was granted and the case proceeded on paper.

EVIDENCE AND THE APPLICABLE LAW

On merits

4. Vicus testified under oath that on 06 January 2020 he was driving a motor vehicle with the registration number J[...] at Walter Sisulu Street going to work when a collision occurred between a motor vehicle with registration number X[...] driven by SJ Mphuthi and the motor vehicle driven by Vicus when the insured driver(Mphuthi) attempted to overtake the Vicus vehicle whilst he was turning. He stated that he was traveling on a road with two lines and the other lane was for the oncoming traffic. His testimony was that he slowed down when he approached the parking which was 5km to 10 km on the left, he indicated that he was turning left, he observed the oncoming traffic and he executed a left turn maneuver when suddenly an ambulance with registration number X[...] then driven by SJ Mphuthi (the insured driver) collided with his vehicle at the back. According to the witness the insured driver drove in the oncoming lane as he tried to overtake and hit his motor vehicle in the back. In conclusion, Vicus testified that there was no way he could have avoided the accident because the insured driver was driving at high speed and he did not expect any vehicle to come from the oncoming traffic because he checked first before making a turn.
5. The evidence by Vicus on how the accident occurred was not disputed by RAF counsel however 100% negligence was denied. The version was put on

Vicus that he was negligent because he failed to check his blind spot. This version was put to after Vicus conceded during cross-examination that he did not look at the back or check his blind spot because there was no need to check the blind spot because he was turning into the on the line of the oncoming vehicle. RAF counsel argued that the court should attribute 40% negligence to the actions of Vicus because he acted negligently.

6. In terms of section 17(1) of the Road Accident Fund¹ the defendant is obliged to compensate a person for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle. Here Vicus bears the onus of proof that the insured driver is the sole cause of the accident because RAF claims that he was also negligent, thereby claiming contributory negligence against him. If the court were to find in favour of RAF then the apportionment of damages claimed by Vicus should apply as provided by section 1 of the Apportionment of Damages Act².
7. In the Law of Collisions in South Africa, HB Kloppe³ writes that 'the test for apportionment of damages is the reasonable person test and the apportionment is only applicable to liability based on fault where damages is caused partly by the fault of both the claimants and the wrongdoer. Where there is no liability there can be no apportionment. The primary enquiry is to what extent the conduct of the parties deviated from that of the reasonable person under the circumstances pertaining to the case in question', here reference was made to *British Insurance v Smit* 1962 (3) SA 826(A) and *Jones v Santam* 1965(2) SA 542 (A). The proposition by RAF that the plaintiff could have seen the insured driver overtaking is plausible because of the trajectory of Vicus motor vehicle at the time of the accident as indicated on the sketch plan and according to Vicus version which indicates that Vicus had already left the lane he was traveling on to the lane on the oncoming traffic, the blind spot check would not have been necessary. It would be unreasonable to expect the plaintiff to anticipate that the insured driver

¹ See section 17(1) of the Road Accident Fund Act 56 of 1996.

² See section 1 of the Apportionment of Damages Act 34 of 1956.

³ See Isaacs and Levenson, The Law of Collisions in South Africa , seven Edition, HB Kloppe

overtaking. Vicus added that the insured driver was driving at such a high speed that he could not have stopped. Under the circumstances, I could not find any act of negligence on the part of Vicus and RAF should be held liable for the plaintiff's proven damages.

Quantum

8. The information on the RAF 1, hospital records and the pleadings records that Vicus suffered back, neck and head injuries. The other experts recorded that Vicus suffered a whiplash injury to the lumbar and cervical spine.
9. On the claim of loss of earnings the plaintiffs relied on documentary evidence of medico-legal reports by the following experts:
 - i. Dr. Dr. E. Mennen (Orthopaedic Surgeon).
 - ii. Frizelna Steyn (Occupational Therapist).
 - iii. Nicolene Kotze (Industrial Psychologist).
 - iv. Kobus Pretorius (Actuary).
10. The Orthopaedic Surgeon commented that Vicus sustained soft tissue injuries to his neck and lower back and opined that he currently suffers from pain in his neck and lower back which is exacerbated by sitting for more than 20 minutes driving for prolonged periods, standing and walking for more than 60 minutes, he cannot lift heavy objects, he cannot sleep on his back for prolonged periods or work above head level. In conclusion, the expert concluded that Vicus has reached maximum medical improvement and he does not qualify for general damages and has a 7% Whole Body Impairment.
11. According to the report by the Occupational Therapist Vicus completed grade 12, N1 certificate in motor mechanics including various in-service training certificates at work including sales, admin and fresh food certificates. He

started working three years before the accident and he returned to work one week after the accident and resumed his duties. He is ideally suited for sedentary, light and mid-range or medium work within the set parameters. His retail work is classified as light to medium work however due to the lower back pain, Steyn is of the opinion that he will probably not be able to sustainably comply with the inherent job requirements of such a job, mainly due to the prolonged periods of standing and stooping, as well as handling heavy engines and other vehicle parts.

Had the accident not occurred:

12. According to the report of Industrial Psychologist dated 3 August 2022, it is assumed that the Plaintiff will earn a basic monthly salary of R17 375.81 and an annual guaranteed package of R234 019 and total annual earnings of R317 747 of the guaranteed package calculated based on the reported payslips for December 2021 to July 2022. These earnings are linearly increased from the date of the calculation until age 45 years until June 2041 and projected with inflationary increases only until retirement at age 63 years. Contingency deductions applied: Uninjured Earnings Future 15 % off R8 254 996.00.

Having regard to the accident:

13. According to the report of Industrial Psychologist Nicolene Kotze, dated 3 August 2022, it was assumed that the Plaintiff lost out on negligible overtime of R1 662.53 during his one week of recuperation. Allowing for tax at a marginal tax rate of 26 % and for a 5 % past contingency deduction, the same implies that Plaintiff sustained a past loss of earnings of R1 169.00 Injured Earnings Future 30 % off R8 254 996.00.
14. The above calculations are premised on the basis that pre and post-scenarios are the same and the Industrial Psychologist recommended a "markedly higher" future post-morbid contingency deduction and the total Nett Loss of Earnings R1 238 249.00.

COSTS

15. I will grant the costs orders as sought in the particulars of claim because Counsel did not make submissions on the issue of costs and nothing was said on costs in the heads.

CONCLUSION

16. I am satisfied that Vicus made a case on the merits, consequently I find that the insured driver is the sole cause of the accident on 06 January 2020. RAF should be held 100% liable for the plaintiff's proven damages.
17. I agree with the calculations of the actuary in applying a spread in the contingency however I find that the spread of 15% is too high considering the fact that before and after the accident Vicus was a manager and his retail work is classified as light to medium work. He continued to work as a manager not a manual labourer lifting and carrying objects. There is less chance that the sequelae of the accident will affect his earning capacity to a large extent manager. I note that the Occupational Therapist postulated Vicus's non-suitability to comply with the inherent job requirements of such a job, mainly due to the prolonged periods of standing and stooping, as well as handling heavy engines and other vehicle parts. The chances of Vicus leaving the managerial work for manual labour seem unlikely considering the sequelae of the accident.
18. I, therefore, find that the most reasonable contingency spread is 7,5%, having applied 22,5% on pre-morbid and 30% on post-morbid total net Loss of Earnings R 619 123.09.
19. Costs will follow cause.

I HEREBY MAKE THE ORDER AS FOLLOWS:

1. The defendant is ordered to pay 100% of the plaintiff's proven damages.

2. The defendant is liable towards the plaintiff for payment in the amount of R 619 123.09(SIX HUNDRED NINETEEN THOUSAND ONE HUNDRED AND TWENTY THREE RAND AND NINE CENTS).
3. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 for payment of future medical expenses and treatment as a result of the accident of 06 January 2020.
4. The above amount is to be paid to the plaintiffs' attorney within 180(hundred and eighty days) court days from the date of this order.
5. The defendant to pay costs on High court Scale.

Leso J,
Acting Judge of the High Court,
Gauteng Division, Pretoria

The judgment was handed down electronically and by circulation to the parties and or parties representatives by e-mail and by uploading to Caseline. The date of hand down is the date when the judgment was signed

Date of Hearing: 12 February 2024

Date of Judgment: 05 March 2024

ATTORNEY FOR THE PLAINTIFF

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