

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

CASE NO: 10087/21

LUCKY NDLOVU

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

This judgment has been handed down remotely and shall be circulated to the parties by way of email. Its date and time of hand down shall be deemed to be 15 April 2024

JUDGEMENT

INTRODUCTION

1. This is a claim for injuries sustained by the plaintiff as a result of the motor vehicle accident on 12 August 2018. It is alleged that the defendant conceded to the merits. I am thus required to adjudicate on loss of earnings and Future medical expenses.

2. An application in terms of rule 38(2) of the Uniform rules was dealt with in court.

Rule 38(2)

3. An application to allow the medico-legal reports and the actuarial reports, as contained in the founding affidavit, to be admitted, as evidence was made in court.

4. The experts had prior to the trial deposed to affidavits in terms of which they confirmed their qualifications and the opinions or contents of their medico-legal reports filed on behalf of the Plaintiff.

5. The respective medico-legal reports were that of Dr Mogoru the orthopaedic surgeon; Morongwa Sekele Occupational Therapist, Dr. Herbet Kanengoni Industrial Psychologist and Robert Koch an Actuary

6. Having listened to counsel and having gone through the papers therein, I admit the evidence by way of the affidavits as contemplated by Section 34(2).¹

8. Therefore I grant an order with costs.

THE MAIN CASE

Merits

9. Counsel indicated in the heads of argument that the defendant has conceded to merits in terms of the offer dated 31 January 2023. There are dashes, deletions on the offer, and no confirmation of acceptance by signature, this offer is on case line 032-1. There is no signature of the plaintiff for acceptance of the offer and this offer is silent on the merits in any event. I therefore regard the offer as incomplete

10. In light of the above, the issue of merits is still standing. For the sake of progress and justice, I am inclined to utilize my judicial powers to proceed with the adjudication of merits.

11. The merits evidence before me is; the police docket on reckless driving and culpable homicide, the claimant's section 19 (f) affidavit confirming the accident, and the ID copy of the claimant. According to the statements in the docket and the affidavit of the claimant, the car in which the plaintiff was a passenger got a tyre burst and overturned.

¹ the Civil Proceedings Evidence Act 25 of 1965 read with Uniform Rule 38(2).

12. The said car was a white Toyota Venture with registration number N[...] and was driven by one Philemon Msibi on the 12th of August 2018 at approximately 18:00 coming from Empangeni to Ladysmith in R34 road Eshowe Kwa Zulu Natal.

13. As a result of the accident, the plaintiff and other passengers sustained serious and some fatal bodily injuries and were taken to Eshowe Hospital by an ambulance

The issue to consider is whether the Defendant is liable for the injuries sustained by the plaintiff arising out of this motor vehicle accident.

14. Section 17(1) of the Act obliges the defendant to compensate third parties such as the plaintiff for any loss or damage suffered as a result of the negligent or wrongful conduct of the driver of a motor vehicle.

15. The Constitutional Court explained the position as follows²

"... the scheme insures road users against the risk of personal injury and their dependants against the risk of their death caused by the fault of another driver or motorist. It has retained the underlying common-law fault-based liability. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent."

16. In the case of **Prins v Road Accident Fund**³, Mojaelo DJP(then) stated as follows; *It is common cause that a passenger needs only to prove the proverbial 1% negligence on the part of an insured driver in order to get 100% of damages that he is entitled to recover from the fund.*

² Law Society of South Africa v Minister of Transport 2011(1) SA 400 {CC} at para (25):

³ 21261/08 (2013) ZAGPJH106

17. In this case the plaintiff was a passenger in a Toyota venture, which overturned. He suffered bodily injuries due to the wrongful act of the driver of the car in which he was a passenger. The plaintiff has thus proven a proverbial 1% negligence on the part of the driver which resulted in RAF being 100% liable for the injuries sustained by the plaintiff as a result of this accident.

Quantum

18. The court is enjoined to determine future medical expenses, future loss of earnings, and the contingency deduction applicable thereto. The claim for loss of earnings is R981 840.00(nine hundred and eighty-one thousand eight hundred and forty rands). This amount comprises R185 215 (one hundred and eighty-five thousand two hundred and fifteen rands) for past loss of earnings and R796 625.00(seven hundred and ninety-six thousand six hundred and twenty-five rands)for future loss of earnings.

19. To arrive at a fair amount of the award the court must analyze the evidence of expert witnesses which are summarised as follows;

Orthopedic Surgeon: Dr.Mogoru

18.1. He compiled a narrative report and confirmed that the plaintiff qualifies for general damages. At the time of the accident, he was 41 years old and employed as a merchandiser. However, at the time of the assessment was 45 years old and unemployed. He confirms that the plaintiff sustained a fracture of the left fibula, pelvic fracture, and head injury.

18.2. He will require future conservative treatment in the form of medical consultation, pain management, physiotherapy, occupational therapy, and biokenisis.He indicated that he complains of a painful lower leg, unable to run prolonged distances. he is forgetful and aggressive.

18.3. Past loss of earnings, he indicated that he was a merchandiser prior to the accident therefore loss of income does apply. For future loss of earnings,

the doctor indicated that he was a merchandiser prior to the accident and is currently unemployed, he said nothing further about his employability now and in the future.

Occupational Therapist: Ms Morongwa Sekela

18.4. The Plaintiff is able to perform the mid-range work with reasonable accommodation for prolonged standing, squatting, and walking. His residual physical capacity partially meets the physical demands of his pre-accident job as a merchandiser, he should be able to return to his pre-accident work. His work performance and productivity will be lower compared to his pre-accident level. because of the pain in his left leg. His work capacity is reduced following the accident however he can benefit from the intervention of physiotherapy and Occupational Therapy. She confirmed that the plaintiff did not return to his work post-accident. For future medical treatment, he will benefit from six sessions of occupational therapy.

Industrial Psychologist: Dr Kanengoni

18.5. He indicated that Plaintiff was unemployed at the time of the assessment. He completed grade 8 education with no further training. In 2012 he secured employment as a merchandiser earning R3396.90 per month. Dr Kanengoni noted that at the time of the accident, the Plaintiff was 40 years old and had not quite reached his career ceiling and earning potential He further opined that based on the Plaintiff's age, education, and work experience, the Plaintiff would have continued working in his pre-morbid occupation with options to change employers for better- paying opportunities

18.6. Plaintiff's earnings at the time of the accident (R40 762.80 per annum) fell between the median and upper quartile for unskilled non-corporate workers (R8 700 — R25 500 — R73 000 per annum).The Plaintiff would have reached his career plateau between the age of 45 and 50, earning on par with the upper quartile unskilled non-corporate workers (R21 400— R37 200 — R88 000).

Thereafter with inflationary increase to age 65 years.

Post-accident potential

18.7. Dr Kanengoni opined that Plaintiff may hold employment in the future, especially with reasonable accommodation. The Plaintiff may secure employment within 36 months (2024) at the age of 46. Earning between the lower and median quartile for unskilled workers in the non-corporate sector. Thereafter with an inflationary increase until age 65.

Actuary's Calculations:

20. Past loss:

$$R194\,963 - 5\% = R185\,215$$

21. Future income:

Uninjured

$$R1,315\,272 - 15\% = R1,117,981$$

Injured

$$R401\,695 - 20\% = R321\,356$$

Total future loss: R796 625.00

TOTAL LOSS: R981 840.00 WPI 15%

THE LEGAL PRINCIPLE

22. "It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in the consequence of another's negligence. Such damages include the loss of future earnings and/or future earning

capacity⁴. The calculation of the quantum of a future amount, such as loss of earnings or loss of earning capacity, is not necessarily a matter of exact mathematical calculation. By its nature, such an enquiry is speculative, and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate⁵

23 The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist

in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages, even then, the trial Court has a **wide discretion** to award what it believes is just⁶

24. In *Southern Insurance Association v Bailey NO*⁷, Nicholas JA stated as follows:

“Any enquiry into damages for the loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs, or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. It has open to two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non-possums attitude and make no award”.

⁴ President Insurance Co Ltd v Matthews 1992(1) SA 1 (A) at 5C-E

⁵ Eg. Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A).

⁶ (See, for example, the Baily case and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980(3) SA 105 (A) at 114F-115D)

⁷ 1984 (1) 113G at 114A; See Hersman v Shapiro & Co 1926 TPD 367 at 379 per Stratford J). (See also Road Accident Fund v Guedes 2006(5) SA 583 (SCA) at 586)”

24. The opinion of an expert witness is of paramount importance as it assists the court in reaching its decision by providing independent expert/technical analysis and opinion based on the facts pertaining to the case. *"The opinion of an expert should also be based on the accepted facts otherwise it would amount to no more than unsubstantiated speculation."*⁸

25. There is a concerning fact in the plaintiff's case which warrants remark. The plaintiff provided the report of an Industrial Psychologist, with incomplete evidence to support it. The orthopedic surgeon indicated that the plaintiff qualifies for general damages and that his injuries have a good prognosis and he made no comment about his employability. The Occupational therapist indicated that the plaintiff can lift anything below 14kg and that his work capacity is reduced following the accident, he can do sedentary work. Nevertheless, he can benefit from the intervention of physiotherapy and occupational therapy.

26. During the assessment by the Orthopaedic surgeon, the plaintiff amongst others indicated that he had a head injury. He is forgetful and aggressive however there was no investigation undertaken concerning these complaints

27. Regarding Future medical expenses, the orthopedic surgeon, and the occupational therapist confirmed that the plaintiff will require medical treatment in the future, for the injuries sustained in this accident.

28. In respect of Past loss of earnings; the plaintiff on his own accord said to the Industrial Psychologist, that his employer assumed that he had absconded from work as he had not submitted clinical notes to prove hospitalization. He indicated that even after submission of the clinical notes thereafter he was not offered his work back. He further reported in the interview that he was yet to secure alternative employment. It is recorded he was thus unemployed at the time of the assessment.

⁸ Eis v MEG: Department of Health, Northern Cape (1744/2010) [2017] ZANCHC 7 (10 February 2017)

29. There is no evidence to support the plaintiff's statement that he was employed at the time of the accident. The Industrial Psychologist said his numerous attempts with the employer to obtain collateral information were unfruitful. There is no employer's certificate, and the payslip is for March 2018 before the accident. Without such evidence, the expert opinion in this area amounts to no more than unsubstantiated speculation. Having said that, the claim for past Loss of Earnings does not pass muster.

30. There is no emphasis on the impact of the accident on the plaintiff's physical ability concerning employment from the orthopaedic side. However, the Industrial Psychologist and Occupational therapist confirm that his work ability has been impacted and they agree that he may still do the sedentary work. Hence, the plaintiff can be categorized as an unequal competitor in the open labour market when compared to uninjured counterparts. The functionality of the plaintiff will hinge on the recommended intervention by the Occupational Therapist.

31. On the Future loss of earnings, the mathematical approach enunciated in *Bailey, supra*, supported by the actuarial calculations can still be employed by this Court, given the absence of any disproving expert evidence. In the present instance. The plaintiff did furnish this court with an actuarial report.

32. In respect of contingencies, the critical authority consistently quoted is *Goodall v President Insurance Co Ltd*⁹, where the following was stated:

In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part,

...

*When assessing the damages for loss of earning or support, it is usual for a deduction to be made for the general contingencies for which no explicit allowance has been made in the actuarial calculation. **The deduction is the prerogative of the court**...."*

⁹ 1978 (1) SA (W) at 392H- 393GZ

33. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

34 It is settled law, that general contingencies cover a broad spectrum of considerations which is determined on a case basis by case. Five (5) percent and fifteen (15) percent for past and future loss, respectively have become accepted as normal contingencies. In the case of **Bee v Road Accident Fund** increased the general pre-morbid contingency deductions for future loss of earnings to 25 percent notwithstanding that the claimant in that matter was 54 years old and in the latter stages of his working life.¹⁰

35. After due consideration of the evidence available to this Court, I am satisfied that there was a future loss of earning and/or earning capacity. Resultantly, I align myself with contingency deductions as set out in the actuarial calculations. Based on the discussion in paragraphs 47 and 48 above I will apply the general contingency of 15% on the total future loss.

Order

36. Consequently, I make the following order:

- (i) The Defendant is liable for 100% of Plaintiff's proven or agreed damages
- (ii) Defendant shall pay Plaintiff an amount of R 677 131.25(six hundred and seventy-seven thousand one hundred and thirty-one rand and twenty- five cents) for Future loss of earnings
- (iii) Defendant shall furnish Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Traffic Accident Fund Act 56 of 1956 in respect of future medical, hospital, and related expenses.

¹⁰ 2018 (4) SA 366 (SCA) at para 116, the SCA,

(iv) The Defendant shall pay the Plaintiff's costs either as agreed or taxed including the costs of those expert witnesses whose reports had been delivered in terms of Rule 36(9)(b) and the costs of counsel.

(v) The payment shall be made within 14 days of this judgment into the trust account of the Plaintiff's attorney the details of which are: Nkosi Siboniso Incorporated, ASSA bank, Account number 4[...], Branch code 6[...], Reference S[...]

(vi) General damages are postponed sine dies

Malatsi-Teffo AJ

Judgement Delivered: **14/04/2024**

Plaintiffs counsel: Adv L Schreuder

Instructed by: Nkosi Siboniso Inc.

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