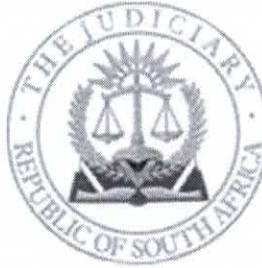


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50913/18

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

Date: 21 September 2023 E van der Schyff

In the matter between:

NKULULEKO NTULI

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Van der Schyff J

- [1] This matter was enrolled for trial on 14 August 2023. The notice of set down was served by hand on the defendant's offices. The defendant failed to appear.

- [2] Merits and quantum were in dispute.
- [3] The application to give evidence on affidavit was granted.
- [4] As for the merits, the plaintiff was a passenger in a motor vehicle. No evidence was led that indicates that the plaintiff might have been contributory negligent in any way. It stands without reason that he succeeded in proving at least 1% negligence on the part of either vehicle's drivers and that the defendant is 100% liable for all the damages suffered by him as a result of the accident.
- [5] The plaintiff was 32 years old when he was injured in the accident. He was admitted to the hospital and treated for five days. He suffered a head injury, and soft tissue injuries to his right upper limb, cervical spine, and lumbar spine. The last-mentioned injury was not documented in the hospital records.
- [6] The following experts' evidence were considered:
- i. Dr Schnaid – Orthopedic surgeon
Dr. Schnaid reports that the plaintiff's current status was that his cervical spine injury radiated into his right shoulder, his lumbar pain radiated into the right knee, and he complained of blurring vision, memory lapses, mood swings, and a phobia of motor cars. Dr. Schnaid reported that the plaintiff did not have any neurological deficit. The plaintiff manifests with cervical and lumbar pain and neurophysiological symptoms. The plaintiff would benefit from physiotherapy, although the doctor opines that the symptoms will probably be ongoing. The doctor opined that the head injury would probably significantly impact the plaintiff's mental functions and said this aspect must be deferred to a neurological expert. In Dr. Schnaid's view, the plaintiff would not be able to enter the open labour market in a physical or mental capacity.
 - ii. A. Thobejane – Occupational Therapist [OT]
The OT opines that the plaintiff is still employable in his current level of physical capacity, however, given 'presenting residual limitations and his level

of education as well as lack of formal training for most jobs, the possibility for him to secure or maintain employment is less likely'. The OT does not regard the plaintiff as a fair competitor in the open labour market. The OT indicated that the aspects relating to the head injury should be deferred to an appropriate expert.

iii. F. Chamisa-Maulana – Industrial Psychologist [IP]

The IP indicated that the plaintiff was unemployed at the time of the accident, and at the time of the assessment. She states that the plaintiff completed Grade 10. During 2016, when he was employed as a Queue Marshall for 3 months he earned R50.00 a day. The plaintiff was unemployed for almost a year before the accident occurred. The IP states that considering the plaintiff's age and level of education, he was legible to work in the informal sector working in the unskilled and semi-skilled categories. The OT opines that the plaintiff would, but for the accident, have secured employment within 1 to 2 years of the date of the accident earning in line with the lower to median earnings of unskilled workers. Progression would have stemmed from on-the-job training and workplace experience. He would have progressed reaching his career ceiling by the age of 45 in line with the median to upper earnings of semi-skilled workers. His earnings would thereafter have increased in line with inflationary increases. As a result of the accident. The plaintiff suffered a loss of earning capacity as the experts indicate that he will in all probability remain unemployed.

[7] I accept that the plaintiff will in all probability, remain unemployed after the accident. However, I find it difficult to understand on what basis the IP can be of the view that the plaintiff, who was earning R50.00 a day at the age of 31, and was unemployed for a year prior to the accident, would, in all probability, not only have secured full-time employment in the next year or two, but would have progressed in his line of work.

[8] The actuary calculated the plaintiff's loss of earning capacity as R 2 196 942.00 and provided for a 5% contingency deduction. The actuary ironically also calculated a

past loss, in circumstances where the plaintiff was unemployed at the time that the accident occurred.

- [9] I accept the evidence that the plaintiff's injuries, coupled with his level of education and age rendered him, for practical purposes unemployable. I am, however, of the view that a higher contingency deduction is justified in light of the fact that there is no factual basis for the IP's assertion that the plaintiff would have secured full-time employment and progressed but for the accident. I am of the view that a 25% contingency deduction on the uninjured future earnings' scenario will be fair to both parties considering Holmes J's warning in *Pitt v. Economic Insurance Co Ltd* 1957 (3) SA 284 (N)¹ that:

'The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.'

- [10] The amount of R1 824 643.50 stands to be awarded to the plaintiff to compensate for his loss of earning capacity.
- [11] I am also concerned about the necessity to protect the funds. Although the plaintiff was not evaluated for the impact of his head injury, Dr. Schnaid opined that the head injury impacted significantly on the plaintiff's mental abilities. I am thus of the view that it is necessary for the plaintiff's attorney to file an affidavit regarding the plaintiff's ability to deal with the money that he will receive. The affidavit was filed as requested. The attorney conferred that Mr. Ntuli is mentally capable of handling his own affairs.

ORDER

In the result, the following order is granted:

¹ 1957 (3) SA 284 (D) at 287E–F

1. The order marked 'X' dated and signed by me is made an order of court.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the plaintiff:

Adv. R. Mthembu

Instructed by:

Biyela and Associates

Date of the hearing:

14 August 2023

Date of judgment:

21 September 2023.