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**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 3062/2019

REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:YES
REVISED: YES
24/10/2022

In the matter between:

JUSTICE NDONGA SILOMBO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MASHILE J:

[1] The Plaintiff instituted this delictual claim arising in terms of the Road Accident Fund Act, 56 of 1996, as amended following a motor vehicle accident on 9 January 2019 at or along R40, between Mbombela and Barberton. The Plaintiff was a passenger in motor vehicle with registration letters and number [...] driven by his co-employee. The accident occurred during the course and scope of discharging their duties with their employer, Clover.

[2] Approximately three months following lodgement of the claim, the Defendant accepted that the insured driver and/or the owner of the vehicle was/were hundred percent the cause of the accident and conceded that it would be liable for the Plaintiff's proven damages. Thus, the matter served before this Court for determination of quantum alone merits having been settled as indicated above. The headings of damages under quantum that still required adjudication were general damages, future medical treatment, past and future loss of earnings.

[3] The Plaintiff testified on his own behalf to confirm the injuries sustained during the accident and treatment received in hospital. It is common cause among all the experts that his main injury is a fracture of the right clavicle or shoulder blade. His evidence was followed by that of four experts, Dr Kumbirai, Ms Parruque, Messrs Maritz and Boshoff, the orthopaedic surgeon, occupational therapist, industrial psychologist and actuary respectively. The evidence of these experts was not opposed making it unnecessary to delve into the intricacies thereof. That said, the evidence of Mr Maritz and Dr Kumbirai requires profound consideration.

[4] The case is unopposed. That said, it is still necessary for the Plaintiff to allege and prove his case regardless of the absence of opposition from the Defendant. The Plaintiff testified that he returned to work following a period of convalescence. He stated that he did not do any work at all as he could not perform his pre-accident duties due to a persistent pain in his right shoulder. His work consisted in carrying and delivering crates of milk at different places. The work was strength-demanding. Noting that he was not suited to perform the work that he did before the accident anymore, his employer did

not engage him but still paid him until eventually it dismissed him as a result of being unfit for the job.

[5] Dr Kumbirai testified that his conclusions derive from his interview, clinical examination and the X-Rays of the Plaintiff. The X-Rays exposed a fracture of the left clavicle, existence of surgical plate and screws implanted in his shoulder blade. He further considered clinical records from Nelspruit Medi-Clinic made available to him on behalf of the Plaintiff. Having had regard to this information, he established that the Plaintiff had sustained a fracture of his right clavicle. The fracture was treated surgically with implants, which were still embedded in his shoulder blade at the time of consultation.

[6] The other injuries pointed out by the Plaintiff appeared to have been insignificant with little or no sequelae. He testified that Plaintiff complained of pain in the right shoulder. The pain is generally worsened by lifting of heavy weights and inclement weather. Clinical examination revealed full range of motion of the right shoulder with complaints of pain on exertion. He said that this pain produced by exertion was understandable. He explained that the fracture of the clavicle involves fracturing the collar-bone, which has a direct influence on a person's ability to carry or lift weights.

[7] He added that the Plaintiff's circumstances have been aggravated by being right-handed. The Plaintiff will live with the chronic pain of his shoulder for the remaining part of his life. Although Dr Kumbirai did not know anything about the complexities surrounding the Plaintiff's dismissal or loss of work, he testified that it was logical that the Plaintiff subsequently lost his job as a Delivery Truck Assistant. Furthermore, he said, the pain in the shoulder is likely to limit the Plaintiff's choice of employment as occupations requiring heavy lifting will aggravate his symptoms.

[8] The Plaintiff will not be able to fairly participate in the open labour market as an equal competitor. Although his WPI is calculated at 6%, Dr Kumbirai was steadfast that having regard to the sequelae of his shoulder injury, the Plaintiff had sustained a

serious injury as envisaged in paragraph 5.1 (“*serious long-term impairment/loss of a body function*”) of the Narrative Test (as per Regulation 3 of the Act).

[9] Mr Maritz testified that he examined the Plaintiff with a view to compiling his report. Subsequent to his consultation with the Plaintiff he obtained collateral information from one Ms Van der Bergh who was the Plaintiff’s manager. Mr Maritz stated that Ms Van der Bergh advised him that upon the Plaintiff’s return to work after recovery from the injuries, it became evident that he could not resume his pre-accident duties in consequence of which it was resolved to accommodate him by allocating him sedentary work.

[10] Mr Maritz was advised that the Plaintiff continued to do sedentary work until he was dismissed in June 2020. Asked why the Plaintiff was dismissed, he said that Ms Van der Bergh told him that the Plaintiff took time-off from his work regularly to attend consultation with various experts for purposes of compilation of medico-legal reports. When he realised that he had run out of leave days, he falsified them to remain entitled to additional days. When Clover discovered this, they held a disciplinary enquiry, found him guilty and expelled him.

[11] Mr Maritz testified that according to pay slips provided as well as collateral information obtained from Clover, the Plaintiff was employed as a Delivery Assistant since 2008. When the accident happened, he was earning an average gross income of **R106 105.56** per annum. The amount fell within the median quartile of Paterson A2, which is for unskilled workers.

[12] According to Mr Maritz, probabilities are that the Plaintiff would have continued in the same earning category. He would most likely have reached his earnings’ ceiling at the upper quartile of the same band translating into **R128 000.00** per annum by the age of 45 without any change in job complexity. Thereafter, his earnings would have increased on an inflationary basis only until retirement at age 65.

[13] Mr Maritz stated that following the accident, the Plaintiff earned an average gross income of **R103 584.36** per annum. His overtime was substantially reduced and he also no longer received a night shift allowance. The Plaintiff reported that he was dismissed in June 2020 due to difficulty performing his duties. The expert further testified that in a telephonic interview with the employer, the employer confirmed that they were aware of the accident and were also well aware of Plaintiff's resultant physical limitations and made every attempt to accommodate him in a different capacity.

[14] Mr Maritz confirmed that the Plaintiff informed him that he remained unemployed as he had not been able to secure suitable alternative employment. Mr Maritz said that should the Plaintiff obtain employment in a similar capacity, which is unlikely, such employment will mostly be sporadic in nature with prolonged periods of unemployment in between. The Plaintiff will always be in need of accommodation by a sympathetic employer. Considering the extent of his injuries and *sequelae* thereof, Plaintiff can be considered to be technically unemployable in the open labour market.

[15] Ordinarily, evidence of an actuary derives in the main from the report of an industrial psychologist. However, in this case the initial calculations presented by Mr Boshoff were completely out of tune with those suggested by Mr Maritz, the psychologist. Mr Maritz states in his report that when the accident occurred, the Plaintiff was aged thirty-eight and was already at the median quartile earning **R106 105.00** per annum. He further postulated that by age forty-five he would be at upper quartile earning approximately **R128 000.00**. From this level, his income will not change save for inflationary increments until his retirement age estimated at sixty-five.

[16] Mr Boshoff, the actuary, commenced with the median quartile figure of **R106 105.00**. Strangely, upon the Plaintiff reaching age forty—five, which will be six years later, the figure for his upper quartile jumped to **R187 000.00**. This was extraordinary bearing in mind the figure of **R128 000.00**. put forward by Mr Maritz. Mr Boshoff attempted to explain why his figure came out different from that of the psychologist but his account remained obscure. He ultimately revised his calculations to be in line with the report of Mr Maritz.

[17] The issues that stand for determination from the above facts are whether or not, on loss of past and future earnings, the Plaintiff's loss emanates from his incapacity occasioned by the accident. If this question is answered in the affirmative, the claim ought to succeed without qualification. Conversely, if the answer is in the negative, the claim ought to be assessed on the understanding that the Plaintiff would have been continued to be accommodated longer than the date of termination of his employment with the application of higher than normal contingencies. Against that background, I proceed to evaluate the claim based on loss of past and future loss of earnings followed by assessment of general damages.

[18] The Plaintiff has sustained a serious shoulder blade injury, which has resulted in some form of incapacity. This much is noted by Dr Kumbirai in his report. Similarly, Ms Parruque too has noted in her report that from conducting tests during her consultation with the Plaintiff, he was unable to lift weight above 5 Kilograms. Both Dr Kumbirai and Ms Parruque have appropriately recommended sedentary work for the Plaintiff. Clover has from the date of his return to work acknowledged that he could not perform his pre-accident duties and accommodated him.

[19] Is the Plaintiff's loss of his employment attributable to the injuries? The answer is undoubtedly in the negative. The Plaintiff's claim is that on account of the injuries that he sustained during the accident he is unable to earn a living. The point is that following the accident, he was still able to work albeit in a different capacity. As such, his loss of employment was not as a result of the accident but rather that he falsified papers concerning his leave days. Had it not been for the falsification of his papers, it appears that Clover, which had been sympathetic by accommodating him in a different position, would have had no reason to expel him. The Plaintiff would in all probabilities still be receiving his income.

[20] The Plaintiff knew why he was dismissed but would not disclose this during his testimony in court. He wanted to give the Court the impression that he was expelled due to his incapability to execute his pre-accident duties. Additionally, at no stage did he sit idling at work and paid for nothing until the employer decided to dismiss him. His

dismissal was due to his dishonesty. The difficulty confronting this Court is that he has, for whatever reason, lost his employment. Given his situation, it is evident that he will struggle to find another employment in the open labour market.

[20] The difficulty to find employment post-accident is directly attributable to his shoulder injury. For The reasons above, the claim for past and future loss of earnings must be evaluated applying higher than normal contingencies to take account of the longer period that he could have been with his employer but for his dishonesty. With regard to the above, Counsel for the Plaintiff referred me to cases that support this approach. Firstly, in *Makuapane v Road Accident Fund*¹ the Court said the following:

“Based on the credible expert opinions presented, the finding that Plaintiff is currently in sympathetic employment was irresistible. The evidence was overwhelming. ... There were numerous decided cases in this High Court where the courts held that, even if found to be gainfully employed post-accident, victims of accidents who no longer functioned in capacities that they were employed for, were entitled to damages since they had suffered a complete loss of earning capacities.”

[21] Similarly, in *Mvundle v Road Accident Fund*², the Court stated that:

“It is trite that damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his employment situation has manifestly changed. The plaintiff's performance can also influence his patrimony, if there was a possibility that he could lose his current job and/or be limited in the number and quality of his/her choices should he/she decide to find other employment.”

[22] Lastly, in the matter of *Deysel v Road Accident Fund*, the ³court stated:

¹ (12871/12) 2015 (GSJ)

² (63500/09) 2012 (NG)

“The problem lies in the fact that the Plaintiff arrives at a final amount for loss of income not by way of actual evidence of this diminution of her estate but instead through the assumption that lowered performance automatically leads to a situation where lowered earning capacity and a lower income come into existence...The only way I could see her performance influencing her patrimony is if there was a possibility that the Plaintiff could lose her current job and/or be limited in the number and quality of her choices should she decide to find other employment.”

[23] Against this background, I agree with Counsel for the Plaintiff that the correct approach would be to calculate the future loss of earnings applying high contingencies post-accident. The reason for the high contingencies is of course that it is not known how long Clover would have been sympathetic and accommodated the Plaintiff in its employ. In line with the figures of the actuary the following are the scenarios:

Past Loss:

Pre-Morbid	R406 500	-	5%	=	R386 175
Post-Morbid	R154 300	-	5%	=	<u>R146 585</u>
Sub-Total					R239 590

Future Loss

Pre-Morbid	R2 314 500	-	15%	=	R1 967 325
Post-Morbid	R2 314 500	-	60%	=	<u>R925 800</u>
Sub-Total					R1 041 525

[24] Insofar as general damages are concerned, Dr Kumbirai has during evidence in Court and in his report established that Plaintiff's injuries qualify as serious in terms of the Narrative Test. The Defendant has not contested this as prescribed in the Road Accident Fund Act. The ninety-day period prescribed in the Regulations to the Act having come and gone without any objection from the Defendant, no dispute exists requiring the intervention of the Appeals Tribunal of the Health Professional Council of South Africa ("HPCSA"). This court is as such, entitled to assess general damages. In the result, I proceed to consider general damages below.

[25] In an endeavour to validate the correctness of the **R450 000.00** claimed for general damages, the Plaintiff has referred this court to two different but comparable cases. He maintains that the figure suggested by him would be the most suitable under the circumstances. Before considering the cases to which I have been referred, it could be wise to mention that it is trite that the utilization of previous related awards as a guide or foundation in the determination of non-pecuniary loss must be preceded by two vital principles.

[26] Firstly, only the general award and not a comparison of every detail is taken into account to determine an appropriate amount and secondly, that comparison to previous awards is not the technique of evaluating non-patrimonial damage and only serves as a trend. It cannot be used in such a way to prohibit or restrain the discretion of the Court. This is true of both cases to which I have been referred. Neither the one nor the other is exactly similar to the present but they obviously bear close similarities.

[27] In the matter of *Mlatsheni v RAF*⁴, a forty-nine-year-old Delivery Driver sustained a dislocation of the left shoulder complicated by a tear of the rotator cuff tendon. Surgery performed to repair the rotator cuff tendon. The plaintiff's left arm was immobilized in a sling for some six weeks. He was left with restricted range of movement of the left shoulder. Despite the treatment received, the plaintiff remained

⁴ (418/2005) 2007 ZAECHC 108

with chronic pain of the left shoulder. An amount of **R140 000.00** was awarded for general damages. The current value is approximately **R300 000**.

[28] The second matter is *Mlalandle v RAF* ⁵where a 51-year old Nurse sustained a fracture of the right clavicle and scapula. The injury resulted in brachial plexus paralysis in her right hand. An open reduction and internal fixation (ORIF) was performed on the clavicle. She was unable to flex the fingers of her right hand and underwent surgery, which was unsuccessful. She was off work for a year. She remained with significant loss of strength in her right hand and struggled to perform the most basic functions. For practical purposes, the right arm was of little use to Plaintiff. She was off work for a year and when she returned she was reasonably accommodated by her employer. The court awarded **R325 000.00**, which in current terms Translates into approximately **R550 000**.

[29] It is immediately obvious that while both cases bear some degree of semblance, they are nonetheless dissimilar. The Mlatsheni case is, in comparison, less serious than the case under consideration. Similarly, the Mlalandle case is more severe than the matter in *casu* especially because here the Plaintiff's right arm is not totally dysfunctional. The evidence in this case is that the Plaintiff retains the ability to lift and carry weight of up to 9 Kilograms.

[30] It appears that his case falls somewhere between the two cases but more towards the Mlatsheni case. For that reason, my sense of justice is to take the median of the amounts awarded in the Mlatsheni and Mlalandle matters, **R300 000.00** and **R550 000.00**, respectively and divide it by two. The result is that an amount of **R425 000.00** must be awarded to the Plaintiff.

[31] In the circumstances, I make the following order:

1. The Defendant is directed to pay to the Plaintiff an amount of R1 706 115.00 made up as follows:

⁵ 2010 6 QOD J2-90 (ECP)

- 1.1 General damages **R425 000.00;**
- 1.2 Past loss of earnings **R239 590.00;**
- 1.3 Future loss of earnings **R1 041 525.00.**
2. Interest on the amount of **R1 706 115.00** at the prescribed rate of interest per annum reckoned from 14 days following this order to date of payment
3. The Defendant is ordered to furnish the Plaintiff with a Medical Certificate in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, as amended.
4. The Defendant is liable for the costs of the Plaintiff.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 24 October 2022 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:

Mr Ndlovu

Instructed by:

Ndlovu Attorneys

Counsel for the Respondent:

No appearance

Instructed by:

Date of Judgment:

24 October 2022