



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 3177/2016

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
DATE: 21/11/19	
SIGNATURE: <i>[Signature]</i>	

In the matter between:

BAFANA ABEDNIGO SELEPE

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

KGANYAGO J

- [1] The plaintiff has instituted action against the defendant for damages and ancillary relief arising from a motor vehicle accident which occurred on the 27th June 2015 when the driver of the insured vehicle lost control and it overturned. At the time of the accident, the plaintiff was a passenger inside the insured vehicle.
- [2] The merits of this matter has been disposed of and liability on the part of the defendant has been resolved on the basis of 100% in favour of the plaintiff's proven damages. The court is called upon to determine the issue of loss of earnings or earning capacity only.
- [3] The plaintiff was called to testify on a limited issue. He testified that on the 27th June 2015 he was involved in a motor vehicle accident. He sustained bodily injuries as a result of the accident. Before the accident he had failed twice at school. However, after the accident he had failed three times. Currently he is not performing well at school.
- [4] The plaintiff was cross examined and he stated that at the time of the accident he was in grade 9 and was 19 years of age. That concluded the evidence of the plaintiff and he closed his case. Both counsel addressed the court on the merits of the case.

- [5] Counsel for the plaintiff in addressing the court has stated that the injuries which the plaintiff has suffered as a result of the accident were fracture of the right humerus, laceration on the head, had loss of consciousness and amnesia, had general body aches and also back pain. He submitted that Dr Ramokgopha the plaintiff's Orthopaedic Surgeon has found that on the nurse's notes of the 27th June 2015, she had noted that the plaintiff had sustained a lumbar spine wound. However, Dr Tladi, the defendant's Orthopaedic Surgeon was unable to pick up the lumbar spine wound.
- [6] The plaintiff's Counsel submitted that had the defendant's Orthopaedic Surgeon picked up the plaintiff's lumbar spine wound, he would have arrived at the same conclusion as that of the plaintiff's Orthopaedic Surgeon.
- [7] The conclusion of the plaintiff's Orthopaedic Surgeon is that the plaintiff has residual symptoms that will need intermittent medical treatment, that he will also be prohibited to do heavy manual labour, particularly because of the lower back symptoms and, and further that he will be able to cope with semi-sedentary occupations in future. The conclusion of the defendant's Orthopaedic Surgeon is that the plaintiff has returned to his premorbid occupational capacity and that there will be no significant effects on his future employability.

[8] The Counsel for the plaintiff has conceded that as per the expert reports, the plaintiff would not have schooled beyond grade 12, and would likely become an unskilled worker. He would therefore be more reliant on his physical abilities to secure employment. However, his physical abilities have been compromised as a result of the injuries that he had sustained. Counsel for the plaintiff submitted that in that situation a high contingency deduction should be applied.

[9] Counsel for the defendant argued that the plaintiff's version is riddled with inconsistencies and that it is the version that the plaintiff has used to come up with the calculations for the alleged loss he alleges to have suffered. Counsel for the defendant has further submitted that the report of the plaintiff's Industrial Psychologist in paragraph 6.1 state the following:

"One assumes that but for the accident Bafana could have stayed healthy and reached high school education (Grade 11/12). Thereafter, he could have been eligible for employment in the unskilled level and over time, could have progressed to positions in the low semi-skilled level. His sound capacity would have stood him in good stead in physically demanding work. His prospects are fair."

[10] Counsel for the defendant submits that the plaintiff whether the accident had occurred or not, he will remain unskilled. That according to the

defendant's Occupational Therapist report, the plaintiff has six household members, his mother who is a pensioner, two brothers, one employed the other unemployed, nephew who is unemployed and niece who is in grade 1. The plaintiff has no record of any earnings and that since most of his household members are unemployed, the possibility is that he also will be unemployed.

[11] Counsel for the defendant submits that the table of calculations of the plaintiff's actuary is based on that of the skilled workers whilst the plaintiff would have remained unskilled, and that the calculations are therefore misleading. According to the defendant's counsel, pre-morbid and post morbid are the same and therefore, the appropriate way to deal with the plaintiff's situation is to apply a spread.

[12] It is not in dispute that the plaintiff has sustained injuries as a result of the accident he was involved in. It is not in dispute that as per the expert reports, even if it was not for the accident, the plaintiff would not have schooled beyond grade 12 and would have therefore been eligible for employment as an unskilled worker. The defendant's Occupational Therapist has stated that the plaintiff will not cope with sedentary requiring high cognitive functioning and that this is not accident related. She has further stated that the plaintiff will be more dependent on his

physical abilities to secure employment in future, and that his physical abilities have been compromised by his injuries.

[13] **in RAF v CK [2018] ZASCA 151; 2019 (2) SA 233 (SCA) (1 November 2018)** at para 25 Dambuza JA said:

*"Indeed, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income. However, where loss of income has been established but proof of the quantum thereof cannot be produced in the usual manner, the courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence tendered to give effect to the finding of proved reduction in loss of earning capacity. As long as almost a century ago, in *Herman v Shapiro* the court said the following:*

'Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages.'

[14] The Industrial Psychologists of both the plaintiff and the defendant in their joint minutes both agree that the plaintiff is unlikely to compete for physically demanding work, and further that he is unlikely to compete for

work in the low semi- skilled level, like as a driver or messenger. The Occupational Therapist of both plaintiff and defendant in their joint minutes are in agreement that the plaintiff has physical limitations as a result of the accident and that he will be able to perform work task within the light physical demands.

[15] Even if it was not for the accident, the plaintiff would have competed in the labour market as an unskilled worker. The accident has rendered him to be unable to compete for heavy manual work. His physical abilities have therefore been compromised as a result of the accident and he needs to be compensated for that.

[16] The plaintiff at the time of the accident was aged 18 years 11 months and was still in grade 9. Academically, he was not performing well at school and that is not as a result of the accident, but the accident might have exacerbated the existing condition which even if the accident has not occurred he would still have competed in the unskilled labour market. At age 23 the plaintiff is still in grade 12 and not as a result of the accident but due to him struggling academically. He was never employed and has therefore no employment history.

[19] The plaintiff is now aged 23 years and still in grade 12 and not as a result of the accident but due to his existing condition of not performing well academically. He seems to have an interest in education as at age 23 is still in grade 12. He has therefore not yet entered the labour market out of his own pre-existing condition and not as a result of the accident. In my view, he has not suffered any past loss of earnings as a result of the accident, but due to his love for education even though struggling

[18] Both parties have submitted their actuarial reports. However, in my view the report that is more detailed is that of the plaintiff as in their calculations they took into consideration the joint minutes of the Industrial Psychologist of both parties. I therefore find the plaintiff's actuarial report to be more reliable.

[17] The defendant's counsel has submitted that as in the plaintiff's family there is a history of unemployment, therefore, he too there is a high likelihood that he will be unemployed. I don't agree with this submission. This is a conservative submission that belongs to the past. There are many successful people who come from poor family background where none of their family members were employed. Nowadays there are many programmes that motivates people to be successful in life and those programmes are not only meant for those who are from the well-being families.

academically. Therefore, there is no past loss of earnings that he had suffered which is as a result of the accident.

[20] Turning to the future loss of earning capacity, in my view, taking into

consideration the age of the plaintiff, that he has no history of employment, his pre-existing condition of poor performance academically and the present economic downturn which does not guarantee that he will be employed, in my view, a high contingency deduction will be appropriate. In **Bee v RAF 2018 (4) SA 366 (SCA)** it was held that the younger the victim, the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path. Therefore, in my view, a 50% contingency deduction will be appropriate under the circumstances.

[21] In my view, the following calculations are fair and adequate:

(a) Past Loss	R0-00
(b) Future Loss	R4 039 380-00
Less 50% contingency deduction	R2 019 690-00
Total Loss	R2 019 690-00

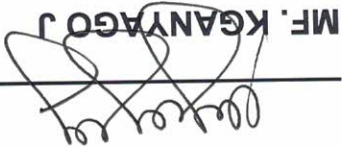
[22] I therefore make the following order

22.1 The plaintiff succeeds in his claim for compensation against the defendant.

22.2 The defendant is to pay the plaintiff the sum of R2 019 690-00 representing the plaintiff's future loss of earnings.

22.3 The defendant to pay the plaintiff's costs on party and party scale.

MF. KGANYAGO J



JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

Counsel for the plaintiff

: Adv I Mabaso

Instructed by

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: Adv TS Ngwana

Instructed by

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Date of hearing

: 14 October 2019

Date of judgment

: 21ST NOVEMBER 2019