IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 55380/2014

26/1/18

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

26/01/2018 ....
DATE SIGNATURE

MOLEKI M N **PLAINTIFF**

And

ROAD ACCIDEN T FUND **DEFENDANT**

JUDGMENT

KHUMALO J

[1] The Plaintiff, a petrol attendant, has instituted an action for compensation against the Road Accident Fund ("the Fund") ("the Defendant") as a statutory insurer, responsible in terms of s 17 of the Road Accident Fund Act 56 of 1996 ("the RAF Act"), as amended, claiming payment for damages he alleges to have suffered as a result of personal injuries he sustained on 12 August 2013 in a road accident that occurred along the R573 near KwaMhlanga in the Mpumalanga Province.

[2] A motor vehicle with registration numbers FVY 536 GP ("insured vehicle") driven by Nkabu Isaac Lekgoro ("insured driver") collided with the Plaintiff who alleges to have been a pedestrian at the time.

[3] According to the averments in his particulars of claim the injuries he sustained are the fracture of the right pubic rami, an open fracture proximal left tibia which has resulted in him suffering a disfigurement of a scar on his left leg and is no longer able to engage himself in strength-demanding work, prolonged standing, walking, and lifting of heavy weights. It all resulted in him suffering a temporary to a total disability from 12 August 2013 the date of accident to 31 August 2013.

[4] Consequently he claimed an amount of R850 000.00 for the total damages he suffered which amount was constituted as follows:

[4.1]	General damages	R600,000.00
[4.2]	Estimated future medical expenses	R150, 000.00
[4.3]	Estimated past and future loss of income	R100,000.00
	TOTAL	**R850,000.00**

[5] On 16 June 2016, six months before trial, the Plaintiff amended its particulars of claim in respect of the amount of damages. The total amount was amended to R1 917,802.00 made up as follows:

[5.1]	General Damages	R600,000.00
[5.2]	Past Medical Expenses	R25,000.00
[5.3]	Future Medical Expenses	R300,602.00
[5.4]	Past loss of Income	R74,400.00
[5.5]	Future loss of Income	R917,800.00
	TOTAL	**R1 917,802.00**

[6] Mr Kgwale appeared for the Plaintiff and Mr Mongweki for the Defendant. The parties have settled the merits. The Defendant conceded to 100% liability of Plaintiff's proven or agreed damages. The issue of quantum in respect of future medical expenses has also been settled with the Defendant agreeing to furnish the Plaintiff with an undertaking as envisaged in s 17 (4) (a) of the RAF Act. The parties agreed to delay the issue of general damages which was postponed sine die. As a result only the issue of Quantum in respect of past and future loss of earnings proceeded before the court. The Defendant is resisting this claim.

[7] It was indicated on behalf of the Plaintiff that the evidence that was going to be adduced was that of the Plaintiff and his Orthopedic Surgeon and Industrial Psychologist. The Defendant was going to consider its position with regard to leading oral evidence of any of their expert witnesses at the end of the Plaintiff's case. Furthermore there were joint minutes of both parties' experts that the parties agreed they were going to rely upon that

were tendered in evidence. The joint minutes and the individual reports of the Orthopedic Surgeons, Dr P T Kumbirai for the Plaintiff and Dr A L Vlok for the Defendant. Also the joint minutes of the Occupational Therapists('OT's), S Moagi for the Plaintiff and T Matsape for the Defendant. A report by the Plaintiff's Industrial Psychologist (ÍT') Dr K C Kgosana, actuarial calculation of the damage amount by Munro Actuaries, hospital records and RAF Form were also handed in.

[8] Plaintiff's testimony was that his left leg and hip were fractured in the accident. As a result he experiences a lot of pain and can no longer work like before. His performance has dropped. He is still employed at Khutsong Service Station as a petrol attendant. Before the accident he worked very well and was commended by his employer for his good work, but he is no longer that good due to the pain he feels when he is executing his duties. His work entails walking up and down but due to pain he cannot do that as often as he used to. After the accident he used two (2) walking sticks (crutches) in order to elevate the legs and **was now using one crutch but he still was not coping at work**. He was still working only because his employer is feeling sorry for him. Being a petrol attendant was the only work that he has ever done and can do. Although he receives complains about his work he continues to work for survival because he has got to keep the candle burning.

[9] He confirmed under cross examination that though he received a complain **about his work, he was never threatened**. He said he was forcing himself to continue working since the employer is sympathetic. **When he was at home he was getting his pay**. The employer was contacted to get permission for him to stay. The employer also never called him to tell him of any other intention about him. **Every year they get an increase which he got and his salary has not been cut**. The employer is so sympathetic. **It was put to Plaintiff that he did not tell the Industrial Psychologist that he is employed sympathetically**. **He said he only told them that he cannot work properly as it is tough**. It was furthermore put to him that nobody from his employer told the health practitioners that he was under that kind of employment. Also that he heard about sympathetic employment from the Occupational Therapist who had come up with it in the joint report.

[10] In re-examination he was asked to confirm that he did tell the Industrial Psychologist that he was hired on sympathetic basis. The Plaintiff closed its case. The Defendant also closed its case.

[11] Mr Kgwale brought the attention of the court to what is reported in the joint minute of the OT's that: The Plaintiff returned to work **two months post accident**. The physical demands of his pre and post accident occupation falls within the parameters of light to medium physical demands as he presented with functional capacity to handle sedentary to light physical demands. He therefore does not meet the demands of his pre and post occupation as a petrol attendant as he now has reduced dynamic mobility, standing and walking endurance. His residual physical capacity would affect future job prospects and lead to restrictions of job freedom. He is presently sympathetically employed and if it happens that he losses this job, he may struggle to find ideal employment mainly due to the physical restrictions, lack of experience in administration occupations and the need for reasonable accommodation. They say he may find it difficult to obtain gainful employment which falls within his residual physical capacity and vocational skills in the open labour market in the future, deferring further opinion to the Industrial Psychologist.

[12] Mr Kgwale also made reference to the report of Dr M C Kgosana ("Kgosana"), the IP where she states that: the available information indicates the residual abilities of the Plaintiff post accident. He **managed, post-accident to return to his pre-accident job** as a petrol attendant. He has been employed ever since till to date in 2016. Both the Orthopedic Surgeons and the Occupational Therapists noted that he is not **capable of coping with his duties**. This implies that **the continuous participation in the role is likely to aggravate his condition**. His situation is worsened by the fact he is not undertaking any medical to ameliorate his challenges. In summary its noted that **the accident had deleterious effect on the claimant's ability to earn an income.**

[13] **In addition Kgwale noted that the information** confirms that Plaintiff has no capacity to do the same job. He reiterated Dr Kgosana's report that the Plaintiff reported **that he was absent for three months and was paid but not his full salary**, accordingly suffered loss of income due to the accident. He **is currently employed in his pre-accident employment, albeit with some limitations.**

[14] Mr Kgwale hence argued that Plaintiff has capacity to do only the same job for a sympathetic employer. It would be difficult for him to earn anymore.

[15] He thereafter referred to the Actuarial Report that refers to his loss of income at pre-injury to be an amount of R213 500, post injury to be R139 100 and therefore to amount to R74 400. For future loss of income pre injury R1 462 300 post injury to be an amount of R 544 500.00 and therefore **the future loss to amount to R992 200**.

[16] Kgwale suggested a contingency of 20 % to be applied on the gross loss of income, arriving at an amount of R1 169 840.00. He also suggested that the most is a 35 % contingency that will then amount to R959 755.00 if Plaintiff taken as unemployable.

[17] Mr Mongweka on the other hand pointed out that according to Moagi and Matsape, the OT's report, the Plaintiff has been employed as **a petrol attendant since 1997**. He has been in the same job for over 14 years when he was involved in an accident in 2013. Even though there is physical demand mentioned about his job there is no reference to **sympathetic employment or early retirement** in the **joint Minute** by the Orthopedic Surgeons.

[18] Mongweka also highlighted that the Plaintiff was only away **from work for a period of two months** during which period he alleged to have been paid by the Department of Labour when he was paid by his employer. **The difference between what was paid to him and his salary was actually a mere R562.00 per month.** If it is multiplied by two for the months he stayed away, the shortfall amounts to **R1124.00** which is his past loss of earnings. The calculation of loss of earnings for two months to be R74 000 is not backed up by evidence.

[19] He argued that he has considered the report of both joint minutes of the Industrial Psychologists ("IT") and the Occupational Therapists (ÖT").

[20] The fact that Plaintiff is said to can be employed for sedentary to light work was according to him of concern as well and to be noted that the position taken by the Occupational Therapists about the sympathetic job was not corroborated, as the information was not requested or verified with the employer. The OT's also deferred to the

Industrial Psychologist to deal with Plaintiff's unemployability whose opinion is that Plaintiff's present physical capacity meets the physical requirement of sedentary, light with some aspects of lower level of **static medium types** of work category. He said he recognizes that the physical strength required for his pre and post accident occupation **as a petrol attendant falls within the parameter of light type of work category, however requires prolonged standing and frequent walking**. Also the conclusion that his physical capacity does not fully match the physical requirements of his pre-accident occupation.

[21] Defendant's Counsel further argued that Plaintiff's assessment was also only done in 2016 and with no follow up, The calculations are also not properly done. The remuneration he lost was for 2 months. Evidence of the Plaintiff and the report of the OT not supported by the Orthopedic Surgeon who had supported a loss of earning of 5% since he is not unemployed. Past loss of R1124 should therefore be considered and thereafter 10% on a future loss on an injured income, concomitant with the exact injury. Pre and post accident injury should be the spread to R 146 230.00 + Actual loss less 5% capacity, looking at R147 354 uninjured.

[22] The Defendants therefore noted that it is reported that Plaintiff's career and income would have progressed if the accident had not happened, in 2013 earning R4 050 per month increasing at age 50 in August 2019 to a semi-skilled worker (upper earning R136 300 per year compared to R48 600.00 per year). He argued that the calculated loss of R74 000.00 cannot be justified. Plaintiff s evidence though was that he received an increase every year and never a cut to his salary, **a positive progression**. His statement contradicts his report to the experts that his salary stayed the same at R4050.

ANALYSIS

[23] The primary object in respect of a claim **for *Lex Aquilia*** is to restore the Plaintiff's patrimony, and, as far as possible, to place the Plaintiff in a position he or she would have been in had the delict not been committed: *Standard General Insurance Co Ltd v Dugmore* 1996 (1) SA 33 (A) 41, 1996 4 All SA 415 (A) 418. Therefore in considering whether the Plaintiff is entitled to be compensated for a past loss of income, actual pecuniary loss of earnings is what is referred to. The question of him receiving a salary during his absence at work and the exact amount of his salary at the time is as a result significant. The amount awarded therefore must do justice to the parties, and must reflect the interest of both the Plaintiff and the Defendant. As the compensation is in relation to an inability/disability to have made an income or earned the salary, one must ascertain whether any loss has in fact been suffered; see *Rudman v Road Accident Fund* [2002] 4 All SA 422 (SCA), 2003 (2) SA 234 (SCA). In reference to Voet (9.2.16) this interesting statement in regard to loss of income was made that:

> "Where damages have to be compensated, only **direct loss** is taken into consideration, and not damages flowing from a new supervening cause, even though the direct loss permitted such new loss to operate.

[24] It has been confirmed that Plaintiff was paid his salary for two months, that is the period when he was at home. He had alleged to Kgosana and Moagi and some of the experts to have received a payment of half his salary from the Labour Department. On the other hand in his evidence in chief he testified that w**hen he was at home he was getting**

his pay. He also was at home for two months not three as he had reported to them. This means by November 2013 he was back at work. Under the circumstances the court finds that Plaintiff did not suffer a loss of income albeit, a possible shortfall of R1124.00 (also uncertain) for the two months. In *Van Heerden v African Guarantee & Indemnity Co Ltd* 1951 (3) (CPD) 730, it was held that 'as the payment was made as wages and was not due to the supervening of a new cause, such as charity, that Plaintiff did not suffer a loss of wages and could not recover the amount claimed.'

[25] The issue the court needs to then determine, is the amount of future loss of earnings. It is Plaintiff 's testimony that his left leg and hip were fractured in the accident and as a result he cannot work as he used to do due to the pains. After the accident he used two (2) walking sticks in order to elevate the legs. **He was now using one crutch when he testified but even then he said he still was not coping at work. The same was also reported to the Occupational Therapists and the Industrial Psychologists. It is however to be noted that the report of Moagi was that in March 2016 when he went for the consultation, even though he still reported to be using one crutch when in pain he did not come with any. In considering the effect of the injuries to his functionality this fact has to be taken into account.**

[26] **Although I cannot find Plaintiff to be a bad witness, he however tends to exaggerate his situation, ameliorating facts trying to be convincing of his entitlement to what he is claiming from the Defendant, which effort was unnecessary.** It must be taken into account that he is not a person who can be excused for lack of erudition. He has a Grade 12 qualification and is 47 years old therefore would appreciate the difference between overstating facts and reality.

[27] Crucial facts relating to the nature and extent of the effect of the injuries to his employment were uncertain when evaluated on his evidence. He had, inter alia, told Kgosana that he works shifts because his leg aches more. But even prior the accident he worked shifts and therefore that condition of his employment not related to the accident. The issue of an unaltered salary since 2013 was also left in doubt. In his testimony he confirmed that he has been getting a raise every year and has never had a salary cut. The information he reported to the health practitioners was that he has never had a raise since 2013. Hospital records indicate that his annual salary at the time of accident, that is August 2013 was +- R36 000.00 compared to the monthly income of R4050.00 he alleged to have been his salary since then until the date of trial. His salary slip of September 2013 indicates a net salary of R3 266.23 which is likely what he was earning at the time, progressing to R4050.00 by 2016.The court will take into consideration that the actuarial calculations have been made on the latter salary based on unclear and unverified information. It also put the matter of the shortfall in his past loss of income and the whole calculations of his future loss of income into question.

[28] This is therefore crucial information the verification of which was necessary. The correct information could have been established and or verified easily by a phone call to his employment but it was not done except for one attempted call by Kgosana and the employer was branded unavailable. It is not indicated how such a conclusion that the employer was unavailable could have been made from a single phone call. No allegation is

made that they were advised as such by his employment. The information could have been verified by other senior people in his employment not necessarily his employer.

[29] The Plaintiff's failure to lead such evidence is fundamental. Verification could have not only brought certainty with regard to the factual situation at his employment but also clarified the not so clear-cut decisive fact about whether Plaintiff is in a sympathetic employment and how much his performance had been affected by the accident. It remains unlikely that he would not have been threatened up to today since going back to work in 2013 if he has been working as he alleges.

[30] It is significant that Moagi, the OT reported that Plaintiff presented himself without the use of a crutch but also that he walked without a gait, even though he observed that his walking endurance was to be negatively affected by the reported left knee pain. The pain was found to be moderate and that he presented with adequate muscle strength to actively engage in light types of workloads. He was able to execute all work dynamic postures however restricted when hopping and crouching he also squatted symmetrically. He was able to maintain sitting, standing and walking endurance in tasks and presented with **functional physical endurance in light workloads. The physical strength of his occupation falls within the parameter of light type of work category and requires prolonged standing and frequent walking.** Its reported that his work entails filling up the petrol, checking oil and tyres, cleaning the windscreen, giving customers change, so nothing in his work involves carrying heavyweights or weights per se. The chances of him getting better was not ruled out by Moagi stating that **considering the current work environment and the injuries Plaintiff sustained, he is of the opinion that with suitable strengthening of left leg and biokenetic intervention it is likely that his physical capacity might improve. The assessor had then recommended that Plaintiff receives recommended optimum treatment and rehabilitation which he was not undergoing, to maximise his quality of life. The report concludes that should he lose his current job he may struggle to find an ideal employment mainly due to his physical restrictions, taking note of Dr Kumbirai that he estimates his decrease in work capacity in such jobs at is 5%.**

[31] Mr Kgosana, as referred to by Defendant's Counsel also took note that the pain Plaintiff complains about in his pelvic and leg will limit his choice of occupation and therefore he would be vulnerable and compromised in jobs which require prolonged standing, walking and lifting of heavy weights as they will exacerbate his pain. He reported that this would affect future job prospects and lead to restrictions of job freedom. He estimated his decrease in work capacity in such jobs at 5 % as well calculating his whole person impairment at 7%. Mr Vlok echoed the same sentiments.

[32] The opinion should be balanced against the fact that Plaintiff has testified that he has never been threatened at his job. The employer also never called him to tell him of any other intention about him. **Every year they get an increase which he got and his salary has not been cut**. The alleged diminishing of his capabilities would be expected not to have affected his employment in a way for the 3 years post the accident. Consequently the fact that it has not, should be considered positively with regard to the probabilities of him finding the same job if he loses his job. Mr Kgosana also acknowledged that Plaintiff would have probably stayed in the same job market until retirement age. He had noted that he might be vulnerable to early retirement having been affected by the accident since it has

been reported that the continued employment in the job will exacerbate or worsen his condition expediting the time out of the labour market. Moreover if he loses his job he might be unemployed for a very long time. I consider that a neutral factor since he may find the job in the same sphere but it does not mean that it will not lead to early retirement. The latter scenario would be justifiably considered if it has been ascertained if indeed the Plaintiff is employed in a sympathetic position, to calculate the loss suggesting the normal post accident contingency to be used. The actuarial calculation has reasonably taken the retirement age to be 62. Kgosana has suggested contigency under this head that the normal post accident contingency be used.

[33] Dr Vlok, the Orthopaedic Surgeon was consulted by the Plaintiff on 25 May 2015 to whom he reported that he was a passenger in the vehicle that was involved in an accident. **He noted that Plaintiff has a normal gait** and a decreased movement in the left knee and subtle loss of movement in the left ankle. No crutches are mentioned. Despite his complains relating to the left leg the Plaintiff has been able to meet the physical demands of his work up until the date of consultation. He is of the opinion that he will able to continue to do so. Further surgery he required might cause him further pain and suffering, although with promise of improvement as suggested by Moagi.

[34] Matsape the Occupational Therapist saw the Plaintiff on 5 October 2016. He reported that Plaintiff was discharged with crutches which he used for 6 weeks after the accident. He noted that Plaintiff is currently using one. He recorded that hips and left knee and right ankle and ankle joints movements were within normal range with good muscle strength. He however presented limited ROM of the left knee and reported pain in the left knee and ankle. He said the Plaintiff was walking with abnormal gait due to injured right knee and ankle. Plaintiff reported to him severe pain when walking or standing for more than an hour or lifting heavy objects. His pain classified as 1% 1WP moderate. According to the tests he must be able to undergo sedentary type of work but he did not meet his pre and post accident requirements of his work, changing positions more often when sitting. Reporting pain after standing for 20 minutes. Plaintiff told Matsape he was working with 1 crutch.

[35] Matsape also refers to the Plaintiff having been an educator at Mmakuba Primary School and that he resigned at the time of accident intending to work part time. He noted from other reports that he had full range of the movement of the left knee presenting mild pain. He took into account Vlok's comment that Plaintiff does not fall under the serious injury on WPI Score of 6 % nor does he qualify for the narrative test. He indicated that according to the dictionary of Occupational Titles, **a petrol attendant falls within the medium type of occupation**. He concluded that based on his test results he falls under the sedentary type of job and therefore his injuries will affect his competency in the labour market and that he is sympathetically employed. He however also concluded that it is his opinion that with successful treatment and reasonable accommodation, Plaintiff will continue with his job until normal retirement age of 60 years, deferring the loss of earnings to IP specialists.

[36] **Kgosana** also noted in the report that the Plaintiff was **44 years old** at the time of accident earning **R4050 monthly** and R48 600 per annum **as a petrol attendant** which earnings were between the MQ and the UQ of semi-skilled employees. He could have

progressed to the UQ OF the scale at the age of 50 (Koch 2015). From the age of 51, his earnings would have stabilised and he would have probably **retired at the age of 60 -65, depending on the policy of the employer and his health**. The report **refers to a follow up discussion with the claimant's employer on the 23rd of May 2016 about which its said the attempt to do so failed as the employer was not available**. Its said working for a sympathetic employer should he have his kind of job, it will be difficult for him to earn more.

[37] An award of damages for the loss of a claimant's earnings or earning capacity is intended to allow him to enjoy financial benefits equal to the quantum of the earnings potentially to be lost by him; see Windeyer J, **in *Bresatz v Przibilla*** [1962] HCA 54; (1962) 36 ALJR 212 **(HCA) at 213** stressed that each case depends upon its own facts. According to the Judge *"all 'contingencies'* are *not adverse"*: All *"vicissitudes"* are not harmful.

[38] Indeed the circumstances of cases differ and this is a very important consideration. Taking all the circumstances of the Plaintiff as narrated in the health and medical specialists reports and hospital records, specifically also the issue of his actual past loss of earnings and the fact that he did receive an increase as he has confirmed every year during his testimony on the date of trial. His salary was according to his salary slip of September 2013 an amount of R3 226.23 which is collaborated by the recordal in his hospital documents of a salary of R36 000 per annum, that in 2016 there was a progression to R4050.00 and the uncertainty regarding the possibility of him staying in his job until retirement or of being fired and not finding a similar job or any other job, I am of the opinion that using the calculations of the actuary, the calculation on his past loss of earnings should be disregarded and on the remaining amount of R917 800 of future loss of earnings, a contingency of 30% be applicable.

[38] It must be also be borne in mind that the amount of any discount varies according to the circumstances of each case. Evident is that the rate of the discount cannot be assessed on any logical basis because the assessment, in the main, is arbitrary and depends on the trial Judge's impression of the case. (See: ***Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) at 614F and *Van der Plaats v South African Mutual Fire and General Insurance* Company Ltd 1980 (3) SA 105 (A) at 114-115)**.

[39] In the result the following order is made:

1. The Defendant is held liable for 100% of the Plaintiff's proven or agreed damages as agreed between the parties.

2. The Plaintiff's claim for loss of past earnings is dismissed;

3. The Defendant is to pay the Plaintiff a sum of R642 460 (Six Hundrend and Forty Two Thousand Four Hundrend and Sixty Rand) for future loss of earnings.

3. The issue of the quantum of damages relating to general damages suffered by the plaintiff are hereby separated from all other issues in this matter and will be determined at a later stage

4. In respect of the claim for future medical expenses, the Defendant is ordered to deliver to Plaintiff, within reasonable time, an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, wherein the Defendant undertakes to pay to the Plaintiff 100% of the cost of future accommodation in a hospital or a nursing home or treatment of, or rendering of a service or supplying of goods to Plaintiff pursuant to the injuries Plaintiff sustained in a motor vehicle accident which occurred on 12 August 2013, as agreed and after the costs have been incurred and on proof thereof .

5. The Defendant to pay the Plaintiff's costs of suit to date with interest thereon at the rate of 15.5% per annum calculated from date after *allocatur*,

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Plaintiff:	**KGWALE**
Instructed by	**LESOMO ATTORNEYS**
	Tel: 012 771 2433
	Ref: LES/RAF/006
On behalf of Defendant:	**MONGWEKA**
Instructed by :	**TAU PHALANE ATTORNEYS**
	Ref; Ms K T Mahlangu/NR/RAF