

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

CASE NO: 31563/2014

13/2/2018

Not Reportable

Not of interest to other judges

In the matter between:

MBONGISENI UBISI

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PETERSEN AJ

[1] The plaintiff instituted action against the defendant for damages suffered as a result of injuries he sustained as a pedestrian in a motor vehicle collision that occurred on the 24th of December 2012 at approximately 20h00pm at Mdlala Trust, Tonga between a motor vehicle with registration number [...] driven by the first insured driver and a motor vehicle with unknown registration number and himself.

[2] The issue of liability (merits) has been resolved in favour of the plaintiff with the defendant undertaking to pay 80% of plaintiff's proven or agreed damages. The defendant has further given a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the future medical and related expenses of the plaintiff. An agreement has been reached on amount of R450 000 for general damages. The issue of contingencies to be applied to past and future loss of income remains in dispute. The actuarial report of the defendant is accepted as the basis for arguments on contingencies.

[3] The submissions on the issue in dispute is premised on the joint minutes of the Occupational Therapists (E Theron and R Kuku), the Industrial Psychologists (HT Kraehmer and CJ Nel); and the Orthopaedic Surgeons (Dr Booyse and Dr Blignaut).

[4] There is clear discrepancy between the information reported to the Occupational Therapists and the Industrial Psychologists on the plaintiff's level of education. The Occupational Therapists note that the plaintiff passed Grade 11, whilst the Industrial Psychologists note that he whilst he failed two grades at school, he obtained grade 12 in 2011 at the age of 20. I accept, however, that the plaintiff made available his Senior Certificate to Kraehmer and that should be accepted as the true factual reflection. Pre-morbid the plaintiff was employed by Ilishlangu Sokuvikela Business Enterprise, his uncle's business. The plaintiff supplied conflicting information to the Industrial Psychologists on what he earned at the time, claiming earnings of R750 and R1500 per month respectively; reporting to Kraehmer that he resigned his position as general worker at the business prior to the accident following a dispute with his employer; and he was therefore unemployed at the time of the accident whilst reporting to Nel that he was still working as a general worker at the time the accident occurred. Kraehmer moves from the premise that if the plaintiff was indeed unemployed at the time of the accident, it should be accepted that, given his age, he was still within the initial expected period of unemployment (usually two to three years), which is usually associated with matriculants. The industrial psychologists agree that in an uninjured state, the plaintiff would initially have secured employment in the informal sector of the labour market, probably towards the end of 2013, as was the case post-accident.

[5] The occupational therapists note that the plaintiff has previous experience in the open labour market as a general worker, making bricks, as a car wash assistant and as a barman, with some experience as a taxi driver, general farm worker and road maintenance worker. The positions required light and medium to heavy physical capacity. He was not able to cope with walking and standing for long hours; performing medium to heavy work and the long hours of continuous driving. Post- accident he would be expected to comply with work demands requiring sedentary physical capacity and aspects of light physical capacity, provided standing and walking to a significant degree is not required. As a result of his injuries, he is at a disadvantage with regards to competitiveness and choices of suitable work in the open labour market and would need reasonable accommodation. The occupational therapists note that according to Dr Blignaut, he is of the opinion that even after successful surgery *he does not think* that plaintiff would be able to compete or secure work in the open labour market. (my emphasis.)The industrial psychologists similarly note that Dr Booyse agrees with Dr Bliganaut on this score.

[7] The resilience and tenacity of the plaintiff post-accident is noteworthy and certainly admirable, if one considers his eagerness to work in the face of adversity and notwithstanding conflicting information supplied. According to Kraehmer the plaintiff reported that he was unable to work for 4 months, where after he searched for employment, remaining unemployed for some 10 months (until October 2013). Nel was informed that he remained unemployed for some 5 months following the accident until he secured employment at Mtunzini Bar and Lounge, earning R800.00 per month, until he resigned 7 months later in December 2013. Kraehmer was informed by the plaintiff that he was employed by Big Time Bar as a bartender in November 2013 and worked in this capacity for approximately two years. His employer at the time confirmed that he earned R800 per month (R9600 per annum) and approximately R200 per month (R2400 per annum) from gratuities. His income at that time was in accordance with his expected earnings in the informal sector. Nel was informed by the plaintiff that he was employed by the Big Time Bar from January 2014 to June 2015, earning R800 per month. At this point it should be clear that information reported by the plaintiff to the industrial psychologists regarding his employment history is

contradictory.

[8] The plaintiff reported to Kraehmer that he was employed by an unknown employer on a short, fixed-period contract from December 2015 to March 2016 to build a "walkway" where he earned R5000 per month. To Nel he reported that he was employed by an unknown construction company as a general worker from July 2015 to March 2016, but could not recall his income for the said period. During this period until at least October 2016 he is also reported to have worked as a bartender at Big Time Bar once again, as a car washer and a gardener. In November 2016 he worked as a taxi driver earning R1800 per month until at least the end of April 2017. Until at least October 2017, the plaintiff worked amongst others, as a gardener or builder on a part-time basis until he returned to Big Time Bar where he to date works as a bartender earning R800 per month.

[9] The industrial psychologists agree that the plaintiffs residual pathology has curtailed his career options and he will be an unequal competitor in the open labour market and he will be constrained to his current capacity in the informal sector. They further agree that exact financial impact associated with, amongst others, the risk of prolonged periods of unemployment, whilst not capable of reliable prediction merits a recommendation that significantly higher than normal post-accident contingency deductions be applied. They embellished in this view by the opinion of Dr Blignaut and that of the occupational therapists which leaves little room to move.

[10] Premised on the aforementioned, there is a dispute between the parties regarding the contingencies to be applied to future loss of income. The difficulty in quantifying the monetary value of loss in claims of this nature is succinctly stated in *Terblanche v Minister of Safety and Security and Another* at paragraph [14]:

The difficulty with claims of this nature is generally not so much the recognition that earning capacity constitutes an asset in a person's estate, but rather the quantification of the monetary value of the loss of earning capacity by a trial court. Each case naturally depends on its own facts and circumstances, as well as the evidence before the trial court concerned.' (my emphasis)

[11] It is submitted on behalf of the plaintiff that the contingency deduction on the value of income but for the accident should be 10% rather than 20% premised on a submission that the plaintiff was unemployed pre-morbid. This submission does not take account of the fact that whilst the plaintiff gave conflicting accounts to the industrial psychologists on his pre-morbid employment, he was gainfully employed in various capacities. I can therefore see no reason why the 20% contingency utilised by the actuary is not reasonable. On the value of income having regard to the accident it is submitted that a higher than usual contingency of 70% be applied, considering the opinion of Dr Blignaut, the defendants expert, with whom Dr Booyse concurs that even after surgery he does not think that the plaintiff will be able to compete or secure work in the open labour market. The plaintiff has shown resilience on the objective facts, albeit conflicting at times by seeking employment unconstrained by his medical deficits. The Industrial Psychologists are in agreement a significantly higher post-accident contingency should be applied. The actuary applied a 35% contingency deduction to the post-accident earnings. In the ordinary course that in itself is significantly high. To my mind, having regard to the totality of the facts, a fair percentage would be 50% in this context.

[12] I am satisfied that the calculations with the contingencies applied by the actuary based on the evidence is otherwise sound in respect of the pre-accident earnings, and that the calculation premised on the non-corporate sector as postulated by Ms Nel is appropriate. With due regard to the reasons stated above, a fair award that the plaintiff is entitled to should be calculated as follows:

General damages	R450 000.00
Past Loss of Income	R42 178.00
Future Loss of Income	R563 000.00
Total	R 1 055 178.00

[19] In the result I make the following order, which is set out in the Draft Order marked "X" as incorporated in this order as follows:

1. The Plaintiff is entitled to 80% of his proven/agreed damages.

2. The Defendant pays to the Plaintiff the amount of R450 000.00(Four Hundred and fifty thousand rand) as general damages, R42 178.00(Forty two thousand one hundred and seventy eight rand) as past loss of income and R563 000 (Five Hundred and Sixty Thousand Rand) as future loss on income by Paying into the Plaintiff's Attorneys Trust Account with account number [...] at Standard Bank White River.

3. The Defendant will furnish to the Plaintiff an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996, to pay the costs of the future accommodation of the Plaintiff in a hospital or nursing home, or treatment of or rendering of a service to him or supplying of goods to him arising from the injuries sustained by him in a collision which occurred on 24 December 2012 after the costs have been incurred;

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, to date subject thereto that such costs shall include the following:

4.1 The costs of Plaintiff's counsel;

4.2 The costs of all medico-legal, actuarial, addendum and joint reports served by the Plaintiff, as well as such reports furnished to the Defendant or its Attorney or in the Defendant's possession, including the costs of any investigations requested by the relevant expert;

4.3 The qualifying fees of the experts referred to in paragraph 4.2 above;

4.4 The reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties;

4.5 The costs of all necessary witnesses and or Plaintiff who attended Court.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

APPEARANCES

For the plaintiff: Adv. G Lubbe

Instructed by: Schutte De Jong Inc

For the defendant: Adv. K Mhlanga

Instructed by: Diale Mogoshoa Inc

Date heard: 12 February 2018

Date of judgment: 13 February 2018

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

On this the 12th day of February 2018 before the Honourable Ledwaba, DJP, in Court 8E

Case no: 31563/2014

In the matter between:

MBONGISENI UBISI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

AFTER HEARING COUNSEL THE COURT MAKES THE FOLLOWING ORDER

1. The Plaintiff is entitled to **80%** (eighty) of his proven/agreed damages;
2. The Defendant pays to the Plaintiff the amount of **R 450 000-00 as general damages and R42178 as part of R563 000-000** by paying into the Plaintiff's Attorneys Trust Account with account number [...] at Standard Bank White River, the total amount of **R1 055 178.00.**
3. The Defendant will furnish to the Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 to pay the costs of the future accommodation of the Plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him arising from injuries sustained by him in a collision which occurred on 24 December 2012 after the costs have been incurred;
4. The Defendant shall pay the Plaintiff's taxed or agreed party and party

costs on the High Court scale, to date subject thereto that such costs shall include the following:

- 4.1 The costs of Plaintiff's counsel;
- 4.2 The costs of all medico-legal, actuarial, addendum and joint reports served by the Plaintiff, as well as such reports furnished to the Defendant or its Attorney or in the Defendant's possession, including the costs of any investigations requested by the relevant expert;
- 4.3 The qualifying fees of the experts referred to in paragraph 4.2 above;
- 4.4 The reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties;
- 4.5 The costs of all necessary witnesses and or Plaintiff who attended Court.

BY THE COURT

REGISTRAR

FOR PLAINTIFF: SCHUTTE DE JONG INC (D6678)
ADVOCATE G LUBBE - 082 783 0411

FOR DEFENDANT: DIALE MOGASHOA INC
ADVOCATE K MHLANGA- 079 235 56030