IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Date of hearing: 8 March 2017

Date of judgment: 23 March 2017

Case number 82593/2014

In the matter between:

MOSEFE VINCENT MAMAGOBO Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

BRENNER, AJ:

1. The material issue for adjudication in this personal injury case is the claim by the plaintiff, Mosefe Vincent Mamagobo ("Mamagobo"), for past and future loss of income.

2. On 18 March 2016, the defendant, the Road Accident Fund ("the RAF"), conceded full liability on the merits, for the negligence of its insured driver, in a motor vehicle collision on 19 March 2012, in which Mamagobo was injured in a head on collision between two vehicles, in one of which he was a passenger. Mamagobo was born on 22 September 1985. He was 26 at the date of accident and 31 at the date of this trial.

3. An order was made on 18 March 2016, in terms of which the RAF agreed to pay general damages of R1 200 000, furnish an undertaking for 100% of future medical expenses under section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the RAF Act"), and to pay his legal costs. The claim for past and future loss of income was postponed for hearing on 8 March 2017.

4. At inception, it was recorded that Mamagobo's claim for past medical expenses was abandoned as the wee had paid the service providers, and that the RAF had accepted that any further claim against the wee would not be factored into any calculations for loss of income.

5. The parties agreed to the introduction into evidence of all expert reports and joint minutes of experts, being the neurosurgeons, orthopaedic surgeons, occupational therapists and industrial psychologists. Both parties had agreed to defer to the expertise of one actuarial firm, namely, Munro Forensic Actuaries ("Munro").

6. The parties were at issue on Mamagobo's probable career path pre- accident. Mamagobo had matriculated in 2002 without a university exemption. He had rematriculated in 2003 with an exemption. From the records, (confirmed by witness van Rensburg, referred to below), Mamagobo had spent three years (from 2005 to 2007) to complete a two year theory component of a three year diploma in animal production, at the Technical University of Tshwane. He had not completed the one year practical course to qualify for the diploma. He had failed to secure a position with an employer in the agricultural industry to complete the practical course. He had given up with completing the diploma after two unsuccessful attempts to secure a job with the department of Agriculture in Limpopo and the Irene Institute.

7. It was common cause that Mamagobo was employed at Spill Tech from circa March 2011 as an assistant technician involved in cleaning roads which had suffered chemical spills, working a five day week, earning RSOO per week with no additional benefits. He had returned to work for about one month but was then asked to leave and had remained unemployed since then.

8. Both neurosurgeons, Dr Nkuna and Dr Okoli, had agreed on neurocognitive and neuropsychological impairment and on a 30% whole person impairment factor resulting from cognitive disorder. Longevity was unaffected.

9. The orthopaedic surgeons were at variance about the sequelae of the orthopaedic injuries: Dr Read for the RAF calculated a 2% WPI with no longterm serious impairment while Dr Kumbirai for Mamagobo calculated a 7% WPI with serious longterm impairment.

10. The occupational therapists Mr Ncwane and Ms Eksteen deferred to the industrial psychologists concerning Mamagobo's pre and post accident job opportunities and loss of income. They agreed that:

> *"Mr Mamagobo has sustained a loss in physical capacity as a result of the accident, which has affected his job choices and work opportunities. His present neurocognitive profile has also affected the level of work he will be suitable for in the future. Added negative aspects related to employment will be his increased vulnerabilities pertaining to him sustaining his performance over a full work day as well as any mood disorders associated with his condition."*

11. Both industrial psychologists engaged by the parties had agreed that Mamagobo had been rendered "functionally unemployable" in the open labour market because of the accident. They also agreed that:

> *"should he have remained employed in the non-corporate sector of the labour market, his income would likely have progressed to the upper quartile earnings of semi-skilled workers (2016: R143 000 per annum), to be reached at approximately age 45. In this sector, he would probably also have received an annual bonus equivalent to 2-4 weeks wages and he may also have belonged to a provident/pension fund towards which his employer would probably have contributed between 5%-10% of his basic salary."*

12. The parties agreed to the introduction into evidence of the expert reports of industrial psychologists Natalie Brink ("Brink"), for Mamagobo, and Cecile Venter

("Venter") for the RAF, both of whom testified. Two lay witnesses, Willem van Rensburg ("van Rensburg"), a lecturer at TUT, Mamagobo's cousin, attorney Max Mokgashane, testified for Mamagobo. Mamagobo did not testify. It was deemed unnecessary, by virtue of the nature of his injuries, and in particular, the brain injury, to appoint a curator ad litem to represent his interests.

13. Via their experts, it was agreed that Mamagobo suffered the following injuries as a result of the accident:

a. A severe diffuse traumatic head injury, with right temporal lobe contusion, bilateral subdural haemorrhage and hydrocephalus emonse;
b. A fracture of the left clavical;
c. A fracture of the left scapula.

14. Van Rensburg, who had been employed as a lecturer by the Technical University of Tshwane ("TUT") since 1 April 1990, confirmed Mamagobo's record. He could not recall Mamagobo personally. Having regard to Mamagobo's results in the theoretical exams, he described him as an average student. TUT did not proactively secure practical placements for students but gave lists of prospective employers to students on request and held an open day for students to meet prospective employers. Van Rensburg confirmed that, if Mamagobo had returned to TUT to attempt to complete his practical, he could still have graduated with the diploma despite the passage of time between completion of the theoretical course. He mentioned one example of a student who had finished the theory ten years previously but was admitted back to complete the practical. The majority of placements, around 90%, were currently with the private sector at present.

15. Brink testified that three pre-accident scenarios could be postulated, namely:

a. Scenario 1: Mamagobo would have remained in the semi-skilled labour market, with income progressing to R143 000 per annum to be reached at 45;
b. Scenario 2: Given his Matric and completion of the theory component of his diploma, he was capable of above average cognitive application and after 3-5 years in the noncorporate sector, he would have found employment at the lower

quartile of Paterson A3 with an annual guaranteed package progressing to Paterson B4 at a career ceiling of about 45 years of age; only 25% of the labour force moved to the formal sector;

c. Scenario 3:If an opportunity had arisen, he may have completed his diploma, leading to potential employment in animal husbandry the animal products industry, research and development. From about 30 he would have earned an income equal to Paterson B2, lower quartile, progressing to Paterson B3 lower quartile, with a guaranteed package, progressing to Paterson BS and then Paterson C3 at age 50.

16. In Brink's view, scenario 1 was the most unlikely, given Mamagobo's matric exemption, his three year theory results, and his general motivation to better himself. The gist of her evidence was that scenario 2 was the most likely of the three.

17. Mamagobo's cousin, Mokgashane, ("Mokgashane"), a distant cousin of his, had lived with Mamagobo in Marble Hall and had attended the same high school. He confirmed that Mamagobo's uncle was a teacher. This uncle had apparently paid for Mamagobo's studies at TUT. Mokgashane had studied for his LLB degree with the aid of a bursary and was currently employed as an attorney.

18. In the view of the RAF's expert, Venter, the description of Mamagobo's line of work even with a matric exemption, could competently remain that of a semi-skilled labourer. Had Mamagobo been as motivated in animal husbandry as suggested by Brink, he could have approached businesses in the agricultural sector, even without the practical requirements for the diploma in place, simply to get his foot in the door.It is axiomatic that the animal husbandry sector has been in existence for centuries past. in her view, scenario 1 was the most likely, the incomplete diploma counting for nothing, especially considering the choice of business sector.

19. She initially discounted the likelihood of scenario 2 owing to the loss of employment experience for four years post the partly completed diploma and eight years post matric amidst the competitiveness in the market place. The past track record of Mamagobo did not justify scenario 3. She accepted, however, that career potential was one of the various factors which should be taken into account in the overall enquiry.

Under cross- examination, however, Venter was willing to concede that scenario 3, with a guaranteed package, might have occurred, had Mamagobo completed his diploma, but persisted in favouring the greater likelihood of scenario 2.

20. In argument, Counsel for Mamagobo abandoned a claim for loss of income on the assumption that he would have completed his diploma, but on the basis that he would have entered the formal corporate sector, graduating from casual labour to Paterson A3 in October 2017 and Paterson B2/B3 in October 2030 at 45.

21. This amounted to R2 931 035,00 per the calculations of Munro. To arrive at this figure, Munro had made a 5% contingency deduction on past income uninjured and 15% on future income uninjured. Counsel for the RAF submitted that, applying appropriate deductions, the correct figure should amount to R2 098 545, primarily because the enquiry as to potential earnings had to be based on inferences made from the proven facts.

22. On a totality of the evidence, a higher contingency deduction should be applied to post morbid earnings. This is because it was a proven fact that Mamagobo lost his motivation to complete the practical side of his animal husbandry diploma and did not see fit to try to obtain employment in any animal-related industry post his two rather half hearted attempts to find an employer to complete his practical component.

23. Mamagobo's cousin confirmed that the former's uncle had paid for the theory side of the diploma. There was no evidence to controvert the inference from this that the uncle would have been willing to subsidise the practical component if Mamagobo secured the practical with an employer who declined to subsidise or pay him.

24. This attenuated motivation in general is evidenced further by his choice of work in a sector entirely unrelated to animal husbandry, namely that of semi-skilled casual labour at a weekly wage, this after being unemployed for three years.

25. accept that the calculation is not premised on his obtaining a diploma but rather on his entering the formal corporate sector. This notwithstanding, Iam entitled to take cognizance of Mamagobo's general lack of drive and ambition, particularly since 2008.

He entered the work place eight years post matriculation, compromising his competitiveness even further. Mamagobo's expert, Nel, mentioned that it was statistically proven that only 25% of the labour force moved to the formal sector.

26. Mamagobo's reduced motivation would in all likelihood have impacted on his prospects of competing amongst the 25% who succeed in transferring to the formal corporate sector.

27. A contingency deduction of 30% on future loss of income on Munro's scenario 1 calculation, which imports entry into the formal corporate sector, is justified and accommodates the various factors relevant to what would constitute a reasonable loss.

28. Based on Munro's report dated 8 March 2017, the overall loss of income comes to R158 080,00 for past loss, at a 5% contingency, and R2 283 610,00 for future loss, at a 30% contingency, equating to R2 441 690,00. This constitutes adequate compensation for past and future loss of income.

29. The losses fall below the loss limit in the RAF cap in terms of section 17(4A)(b) of the RAF Act.

30. An order is granted in terms of the draft order marked "X".

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANN ESBURG
22 March 2017

Appearances

Counsel for the Plaintiff:	Advocate JPJ du Plessis, assisted by Advocate A van Niekerk
Instructed by:	KR Nthulana Inc Attorneys
Counsel for the Defendant:	Advocate H Vermaak

Instructed by: Diale Magoshoa Attorneys

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Before Her Ladyship Ms Justice Brenner
On 9 March 2017

22/3/2017
CASE NO: 82593/2014

In the matter between :

VINCENT MOSEFE MAMOGOBO Plaintiff

And

ROAD ACCIDENT FUND Defendant

DRAFT ORDER

Having heard the parties the Court grants the following order

1. It is recorded that a court order had previously been granted in this matter on 18 March 2016, which order dealt with matters pertaining to merits, liability, an undertaking in regards to future medical related costs and a capital amount in regards to general damages. This court order is attached hereto marked "M1";
2. In addition to the amounts to be paid by the defendant in terms of the previous court order, in respect of past and future loss of earning and earning capacity, the defendant is ordered to pay the amount of R 2 441 690,00 (two million four

hundred and forty one thousand six hundred and ninety Rand), to the Plaintiff's Attorneys of Record, Nthulana Attorneys, by way of payment into Nthulana Attorneys' trust account with the following details:

ACCOUNT HOLDER:	KR Nthulana Attorneys
BANK NAME:	First National Bank
BRANCH:	Pretorius Street
BRANCH CODE:	250655
TYPE OF ACCOUNT:	Trust Account
ACCOUNT NUMBER:	62494731203

3. The aforesaid capital amount will not bear interest unless the Defendant fails to effect payment thereof within fourteen calendar days of the date of this Order, in which event the capital amount will bear interest at the rate of 10.25% per annum calculated from and including the fifteenth calendar day after the date of this Order to and including the date of payment thereof.
4. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs, into the abovementioned account, for the instructing attorneys, which costs shall include, but not be limited to the following:
   4.1. The cost occasioned by the employment of senior counsel;
   4.2. All reserved costs to be unreserved, if any;
   4.3. The costs of obtaining all expert medico legal-, actuarial, and any other reports of all experts which were furnished to the Defendant and/or its experts and for which notices in terms of Rule 36 were served;
   4.4. The reasonable taxable qualifying, preparation and reservation fees of all experts, if any;
   4.5. The reasonable traveling - and accommodation costs, if any, incurred in transporting the Plaintiff to all medico-legal appointments, or that of the experts having to consult the Plaintiff at his house, subject to the discretion of the Taxing Master;
   4.6. The reasonable cost of an interpreter's attendance at court and at the medico-legal appointments for translation of information, if any;
   4.7. The costs attendant upon the obtaining of payment of the amounts referred to in this Order.
5. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed party and party costs:

5.1 The Plaintiff's Attorney shall serve the Notice of Taxation on the Defendant's Attorneys of Record;

5.2 The Defendant shall be allowed 7 (seven) days from date of settlement or of taxation within which to effect payment of the agreed or taxed costs; and

5.3 Should payment not be effected within the aforementioned period, the Plaintiff will be entitled to recover interest on the taxed or agreed costs at the rate of 10.25% per annum calculated from and including the day after the date of settlement of the costs or of taxation, to and including the date of final payment thereof.

6. The nett proceeds of the payments referred to above, after deduction of costs in accordance with the fee agreement between the parties ("the capital amount"), shall be payable by the Plaintiff's Attorneys to the account of the Trust referred to in paragraphs 9 to 12 of the previous court order, once created.

7. Until such time as the professional Trustee is able to take control of the capital sum and to deal with same in terms of the Trust Deed, the Plaintiff's Attorneys of Record:

7.1 Are authorised and ordered to invest the capital amount in an interest bearing account with a registered banking institution in terms of Section 78(2A) of the Attorneys' Act, 53 of 1979, to the benefit of the Plaintiff, pending the finalisation of the Trust;

7.2 Shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the Court, subject to paragraph 7.3 hereunder; and

7.3 Are authorised to make any reasonable payments to satisfy any of the Plaintiff's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim.

BY ORDER

REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Before His Lordship Mr Deputy Justice President Ledwaba
On 18 March 2016

CASE NO: 82593/2014

In the matter between:

VINCENT MOSEFE MAMOGOBO Plaintiff

And

ROAD ACCIDENT FUND Defendant

Having heard the parties the Court grants the following order by agreement between the parties:

1. It is recorded that the Defendant has conceded merits and liability towards the Plaintiff for the payment of 100% of the Plaintiff's proven or agreed damages;
2. The quantum of the Plaintiff's claim pertaining to loss of earnings and earning·capacity is separated in terms of Rule 33(4) and is postponed to 8 March 2017;
3. The Defendant is ordered to pay the general damages in the sum of amount of R1,200,000 (one million two hundred thousand RAND) ("the capital amount") to the Plaintiff's Attorneys of Record, Nthulana Attorneys, by way of payment into Nthulana Attorneys' trust account with the following details:
   ACCOUNT HOLDER: KR Nthulana Attorneys
   BANK NAME: First National Bank
   BRANCH: Pretorius Street
   BRANCH CODE: 250655
   TYPE OF ACCOUNT: Trust Account
   ACCOUNT NUMBER: […]

4. The aforesaid capital amount will not bear interest unless the Defendant fails to *effect* payment thereof within fourteen calendar days of the date of this Order, in which event the capital amount will bear interest at the rate of 10.25% per annum calculated from and including the fifteenth calendar day after the date of this Order o and including the date of payment thereof.
5. The Defendant is ordered to furnished an. Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation or nursing home or the treatment of or the rendering of a service or the supplying of goods to him arising out of injuries sustained by him in the motor vehicle collision of 19 March 2012, in terms of which Undertaking the Defendant is obliged to compensate the professional Trustee referred to below in respect of the said costs after the costs have been incurred either by the Plaintiff or by the professional Trustee or by any party on behalf of the Plaintiff and on proof thereof.
6. The aforesaid undertaking will include the costs of the creation of a trust, and the costs of the professional Trustee (including the costs of the professional Trustee's furnishing of security) but limited to the costs applicable in respect of a *curator bonis* in terms of the provisions of the Administration of Estates Act 66 of 1965;
7. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs, into the abovementioned account, for the instructing attorneys, which costs shall include, but not be limited to the following:
    7.1 The cost occasioned by the employment of counsel, a senior counsel
    7.2 All reserved costs to be unreserved, if any;
    7.3 The costs of obtaining all expert medico legal-, actuarial, and any other reports of various experts which were furnished to the Defendant and/or its experts and for which notices in terms of Rule 36 were served;
    7.4 The reasonable taxable qualifying, preparation and reservation fees of all experts, if any;
    7.5 The reasonable traveling - and accommodation costs, if any, incurred in transporting the Plaintiff to all medico-legal appointments, or that of the experts having to consult the Plaintiff at his house, subject to the discretion of the Taxing Master;
    7.6 The reasonable cost of an interpreter's attendance at court and at the medico-legal appointments for translation -of information, if any;

7.7 The costs attendant upon the obtaining of payment of the amounts referred to in this Order.

8. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed party and party costs:

   8.1 The Plaintiff's Attorney shall serve the Notice of Taxation on the Defendant's Attorneys of Record;

   8.2 The Defendant shall be allowed 14 (fourteen) days from date of settlement or of taxation within which to effect payment of the agreed or taxed costs; and

   8.3 Should payment not be effected within the aforementioned period, the Plaintiff will be entitled to recover interest on the taxed or agreed costs at the rate of 10.25% per annum calculated from and including the day after the date of settlement of the costs or of taxation, to and including the date of final payment thereof.

9. The nett proceeds of the payments referred to above, after deduction of costs ("the capital amount") in accordance with the. f13e agreement between the parties and both counsels fees and the costs of experts, shall be payable by the Plaintiff's Attorneys to a Trust to be created within 12 (twelve) months of the date of this Order, which Trust will:

   9.1 Be created on the basis of the provisions as more fully set out in the draft Trust Deed attached hereto marked "A";

   9.2 Have, as its main objective, the controlling and administering of the capital amount on behalf of the Plaintiff; and

   9.3 Have, as its professional Trustee, **JEANNE HELEN RABIE,** with powers and abilities as set out in the draft Trust Deed attached hereto marked **"A".**

10. Should the aforementioned Trust not be created within the aforementioned period of 12 (twelve) months, the Plaintiff is directed to approach this Court within 1 (one) month thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilised in favour of the Plaintiff

11. Until such time as the professional Trustee is able to take control of the capital sum and to deal with same in terms of the Trust Deed, the Plaintiff's Attorneys of Record:

   11.1. Are authorised to invest the capital amount in an interest bearing account with a registered banking institution in terms of Section 78(2A) of

1he Attorneys' Act, 53 of 1979, to the benefit of the Plaintiff, pending the finalisation of the Trust;

11.2. Shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the Court, subject to paragraph 11.3 hereunder; and

11.3. Are authorised and ordered to make any reasonable payments to satisfy any of the Plaintiff's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim.

12. The appointment of the professional Trustee will be subject thereto that the professional Trustee furnish security to the satisfaction of the Master of the High Court.