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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

Case Number: 1013 / 2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO

DATE

SIGNATURE

In the matter between:

T[...] M[...] W[...]

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MARAIS C AJ:

INTRODUCTION:

[1] On 10 August 2009, at approximately 15h30, along a road in Swartz, Mokopane, Limpopo Province, the Plaintiff, T[...] M[...] W[...], was involved in an accident wherein an insured vehicle, driven by an unknown driver, with registration number: FHM[...] (the “*insured driver*”) collided with a donkey cart. The Plaintiff was a passenger in the donkey cart, which was driven by an adult male known as NG Mpaneng. At the time of the accident, the Plaintiff was ten years old.

[2] The Defendant is the Road Accident Fund (“RAF”), which is a statutory body duly incorporated in terms of section 3 of the Road Accident Fund Act 56 of 1996 (as amended) (“RAF Act”) whose object is “...*the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles*”.

[3] Plaintiff submitted that as a result of the accident, Plaintiff sustained a head injury and a painful right clavicle. It is the Plaintiff’s case that because of the head injury, he will not be able to be gainfully employed in the open market. Plaintiff claims R100 000 in respect of past medical expenses; an undertaking in terms of section 17(4)(a) of the RAF Act for future medical expenses; R8 000 000 for loss of earnings and R900 000 for general damages.¹

[4] On 09 October 2023, RAF conceded 100% to the merits and rejected the claim for general damages. It further gave an undertaking in terms of section 17(4)(a) of the RAF Act for future medical expenses and offered to pay an amount of R440 713.60 in respect of loss of earnings to Plaintiff.

[5] On the same day, 09 October 2023, Plaintiff accepted the merits concession made by RAF and the undertaking in terms of section 17(4)(a) of the RAF Act. However, Plaintiff rejected the offer of R440 713.60 in respect of loss of earnings. Counsel on behalf of the Plaintiff elected not to proceed on the issue of general damages and only moved for an order by default regarding the loss of earnings.

MEDICO-LEGAL EVIDENCE:

¹ On 07 July 2023 Plaintiff filed an intention to amend its particulars of claim, in terms of rule 28 of the Uniform Rules of Court, however Plaintiff failed to file the amended pages.

[6] The Plaintiff submitted expert reports by a neurosurgeon, ophthalmologist, clinical psychologist, educational psychologist, occupational therapist, industrial psychologist, and an actuary. The evidence was presented through affidavits as contemplated by Rule 38(2). The Defendant did not file any expert evidence.

[7] According to the neurosurgeon, Prof Patrick Lekgwara, Plaintiff suffered soft tissue injury to his right eye and a mild traumatic brain injury – grade 3 concussion, which is deemed to be a loss of consciousness that the Plaintiff suffered, after the accident, which lasted for more than five minutes or post-traumatic amnesia for more than 24 hours. Prof Lekgwara confirmed that the Plaintiff had no speech difficulties, was of average intelligence and could sustain attention throughout the interview. He further confirmed that the Plaintiff's emotional status was adequate and appropriate, and that the Plaintiff did not display any nervous system problems. His muscle bulk, tone and power were normal, his spine was normal with no tenderness, and his movements were normal. His cerebellar system and reflexes were all normal, and he had no cardiovascular system abnormalities. Prof Lekgwara concluded that the Plaintiff suffered a whole person impairment of 23%, and that his injuries qualify under the narrative test as serious, in that the Plaintiff will suffer severe long-term mental or severe long-term behavioural disturbance or disorder. Further, Plaintiff had some neuropsychological problems which needed to be assessed by a clinic psychologist, and he suffered from post-concussion headaches. His longevity has not been affected as a result of the accident. His amenities of normal living were lost during the period of hospitalisation.

[8] The Plaintiff consulted Dr TT Moabelo-Monareng, the ophthalmologist, with a complaint of tearing of the right eye, which was caused as a result of the accident. Dr Moabelo-Monareng found that the Plaintiff's visual acuity in his right eye was abnormal. The intraocular pressure was normal in both eyes at 18 mm Hg. A dilated fundoscopic examination was done, and a crowded disc in the right eye was found, of which the clinical significance is unknown. Dr Moabelo-Monareng concluded that the injury sustained did not affect the Plaintiff's life expectancy and that the Plaintiff

will be able to manage his pain with chronic painkillers or may require alternative treatment such as acupuncture.

[9] Ms LD Madileng, a clinical psychologist, compiled a psycho-social and clinical functioning report. In Ms Madileng's report, she confirmed that the Plaintiff is the fourth-born child from six siblings. His three older sisters all completed grade 12. His two younger siblings are still at school. The Plaintiff attended school to grade 12 but did not complete it. The Plaintiff achieved a certificate in Agri-entrepreneur and as a Pre-chef. The Plaintiff is a known asthmatic patient on medication prior to the accident and known to be hypertensive. There is a history of epilepsy.

[10] The Plaintiff reported to both the neurosurgeon and the clinic psychologist that he had to repeat grade 2, post the accident. I will deal with this issue later in my judgment.

[11] The clinical psychologist concluded that according to the psychological assessment conducted, the Plaintiff:

"Mr W[...] presented with above average attention abilities.

His working memory and tracking abilities proved to be within the average level.

Sustained attention limitations were observed to be within the low average level though his psychomotor functioning confirmed average functioning.

The rote verbal learning abilities for Mr. W[...] were suggested by the tests to be working within the above average functioning while immediate memory was presented to be within the low average at both verbal and visual domain.

He presented with verbal fluency difficulties while his understanding of social norms and standards proved to be within the expected level.

*Mr W[...] was further found to be easily irritable with anger outburst tendencies. The injuries were found significant for head injury with the severity classified with the **mild head injury with GCS 15/15**".*

[12] Ms Tlhoriso Sepenyane is an educational psychologist. She compiled a report on the Plaintiff's cognitive, training and development, academic potential and emotional status. Her report was compiled to assist this Court in determining whether the accident had a negative impact on these constructs and whether it will have a negative impact on the Plaintiff's ability to complete his education or to be employable and be promoted.

[13] Ms Sepenyane confirmed that Plaintiff was employed in 2022 as a construction worker supervisor but resigned as the work was too physically demanding for him. He is currently employed as a security officer. The expert stated that the Plaintiff's orientation or consciousness was alert, his speech was normal, his work method was normal, and his attentive listening was normal. However, the Plaintiff's attention concentration was low. She observed no irritability. The expert opined that the Plaintiff presented with incapacities in both verbal and non-verbal functioning and that he could no longer achieve his pre-accident potential. She further opined that the Plaintiff presents with borderline clinical depression, which notably hampers the Plaintiff's optimal concentration. According to Ms Sepenyane, the Plaintiff has reached his academic threshold.

[14] Ms RNM Shonisani compiled the occupational report, and not much was gained from her report, although it is replete with contradictions. For example, Plaintiff conveyed to Ms Shonisani that he was hospitalised for two days, which is confirmed in the hospital records, but in her summary, she stated he was hospitalised for four days. Her summary further states that the Plaintiff suffered no loss of consciousness, whilst all other reports stated that the Plaintiff did lose consciousness. In certain portions of her report, she states that the Plaintiff was a 22-year-old male, and in other portions, she states he was 23 years old. The occupational therapist report thus did not assist this Court at all.

[15] Mr OO Sechudi compiled an industrial psychologist report. He postulates that if not for the accident, the Plaintiff could have matriculated in 2019 with a B-degree endorsement (NQF4) and could have studied further to obtain a B-degree of his

choice to reach NQF7. His earnings may have started from at least Median of Peterson level B4 at R267 000 as a basic salary as indicated in the Corporate Survey Earnings Guidelines (Koch, 2023). If his career progressed in a straight line, he could have earned towards the Median of Paterson level D1 of R745 000.00 per year, basic salary, until the age of 46, after which his salary would have stabilised with additional inflationary increases until the retirement age of 65.

[16] The industrial psychologist concluded that post-accident, the Plaintiff earns R5 500 per month, which is equivalent to R66 000 per year. His earnings are comparable to those of a semi-skilled worker between the Lower Quartile (R36 800) to the Median (R78 000) per year. Further, as a semi-skilled worker with cognitive and psychological impairments as well as vision challenges, the Plaintiff may not be able to sustain gainful employment over a long period. The Plaintiff's pursuit of employment will be restricted to short-term sporadic piece jobs or contractual work that may offer some financial survival with minimal wages. His restrictions will constrain the Plaintiff's wish to pursue work in the open market.

[17] Koch Consulting Actuaries CC, compiled an actuary report consisting of only one page, with an annexure. It states that Plaintiff suffered no past loss of income uninjured but suffered a past loss of income, injured of R88 582. The uninjured future loss of income was calculated at R10 653 340, and the injured future loss of income was calculated at R1 616 251. The difference in loss of income is thus calculated as R8 948 507, with no contingencies applied. No explanation was given as to how the actuary came to this figure and or which factors he took into account.

ANALYSES OF THE EVIDENCE:

[18] The clinical psychologist's report, as stated afore, does not correlate to her ultimate finding that the Plaintiff could be challenged in a work environment that requires intense attention and concentration and that the Plaintiff was observed to have poor short-term memory, displayed with limited memory recalling skills. The

psychological assessment demonstrated that the Plaintiff presented above average attention abilities and that his working memory and tracking abilities were within the average level. The rote verbal abilities of the Plaintiff proved that the Plaintiff tested above average. The tests proved that the Plaintiff only struggled with immediate memory problems within the low average level. The most significant concern detracted from this test is that the Plaintiff was easily irritable with anger outbursts. These concerns can, in my view, be treated through psychological therapy. No evidence was placed before me that it was not curable.

[19] Curiously, Ms Sepenyane, the educational therapist, did not provide information on the Plaintiff's grade 1 year. She only confirmed that the Plaintiff had to repeat grade 2 after the accident in 2009. The Plaintiff passed grade 2 in 2010. In grade 3, Plaintiff passed all his subjects and obtained level 4 (good) for Sepedi and mathematics; in English and Life Orientation, he achieved level 3 (average). The older the Plaintiff became, the more he struggled with his schoolwork. In grade 10, the Plaintiff did not achieve the requirements and progressed to grade 11. During the first term of grade 11, Plaintiff failed, and no reports were given on the second to fourth terms. Plaintiff failed grade 12 twice and then dropped out of school.

[20] No explanation was given for why the Plaintiff was ten years old, in grade 2. It is generally accepted that a child is between the ages of seven and eight when such a child enters grade 2. If the Plaintiff were indeed ten in grade 2, prior to the accident, it would suggest that the Plaintiff either failed grade 1 or was sent to school later for unknown reasons. The inference is drawn that the Plaintiff could have struggled with his concentration and memory before the accident.

[21] The occupational therapist reported that the Plaintiff entered grade 1 in 2006. In this year, the Plaintiff was seven years old. If it is accepted that Plaintiff passed grade 1 in 2006, he should have been in grade 2 during 2007, and not 2009 as alleged, when the accident occurred. The only inference that this Court can draw is that Plaintiff entered grade 1 in 2006 and had to repeat this grade three times before

he was ten years old in grade 2 in 2009 or that he repeated both grade 1 and grade 2 before the accident. This is a telltale that the Plaintiff struggled cognitively before the accident.

[22] In contrast to what the Plaintiff confirmed to the occupational therapist, that he entered grade 1 in 2006, the Plaintiff informed the industrial psychologist that he entered grade 1 in 2008. In 2008, the Plaintiff was nine years old. Again, no explanation was given why the Plaintiff only entered grade 1, at the age of nine.

[23] Similarly, Plaintiff stated to the industrial psychologist that in 2009, he was in grade 2, and it is common cause that he repeated grade 2 in 2010. The report further states that in 2016 the Plaintiff was in grade 10. It is not possible. If the Plaintiff was in grade 10 in 2016, then he ought to have been in grade 9 in 2015, grade 8 in 2014, grade 7 in 2013, grade 6 in 2012 and grade 5 in 2011. Three grades are thus unaccounted for.

[24] The industrial psychologist does not state for which profession the Plaintiff would have earned the Median of Peterson level B4 at R267 000 as a basic salary, and if his career progressed in a straight line, he could have earned towards the Median of Paterson level D1 of R745 000.00 per year, basic salary. It is accepted that different professions earn different salaries. Without an inclination as to what the Plaintiff could have or wanted to study, it is difficult to comprehend how the industrial psychologist applied and concluded that the Plaintiff could have earned the figures, as stated.

[25] The expert took no cognisance that both parents of the Plaintiff were uneducated and unemployed. According to the Plaintiff, his three older sisters matriculated (which is unconfirmed), and they are unemployed. His two younger siblings are still at school. The Plaintiff's home environment is dire. It is confirmed to be a brick-and-zinc house with five rooms and ten occupants. There is no bathroom.

The occupants use a basin. Water is collected from a tap in their yard. These are all negative factors that the expert should have considered, as it demonstrates a genetic predisposition not favourable to the Plaintiff's case.

[26] Another issue that cannot be ignored is that the Plaintiff – even though he says he struggles to concentrate and is forgetful- still obtained two certificates: one wherein he completed an internship in Agri-entrepreneurship and the second, as a pre-Chef. These are positive factors which the experts should have considered.

[27] I also have difficulty accepting the accuracy of the unsigned actuary report. As stated before, it was a one-pager with an annexure. It is marked 'certificate of value', that the certificate is only 'intended for settlement purposes' and that the 'full report will be prepared on request'. No full report was placed before me.

[28] The actuary only took one consideration into account, being that it is to be assumed that the Plaintiff will start work from July 2024, earning R267 000 per year at Median level B4, followed by even linear real increases to R745 000 per year at age 45 at Median level D1, but for the accident. Post-accident, the Plaintiff is to earn R24 000 per year from June 2019 to August 2020. Then nil until R66 000 per year from February 2023, with no further career progression, and escalating until the age of 65.

APPLYING LEGAL PRINCIPLES:

[29] In terms of section 17(1) of the Road Accident Fund Act 56 of 1996, RAF is obliged to compensate a person for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle. RAF's liability is conditional, however, upon the injury having resulted from the negligence or wrongful act of the driver. This means that a person such as the Plaintiff is required to prove such negligence.

[30] The Plaintiff was a child of ten years old, when the accident occurred. There can be no negligence attributed to the Plaintiff, as the Plaintiff was a passenger, in a donkey cart and the accident occurred during the day.

[31] The basic principle that applies in civil matters, is discussed in Schwikkard PJ (et al), *Principles of Evidence*, where the learned writer observed that:

'In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities" but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed'.²

[32] Onus was addressed in the case of **National Employers' General Insurance Co Ltd v Jagers [1984] 4 All SA 622 (E)**, where Eksteen AJP, for a full bench, held as follows:³

'...in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will

² See: 4th Ed, 2016, ch32-p 628

³ At 624-5.

accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[33] In ***Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A0)*** it was accepted that earning capacity may constitute an asset in a person's patrimonial estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the estate's value. A physical disability which impacts the capacity to earn income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the Plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.

[34] In ***Prinsloo v Road Accident Fund (3579/06) [2008] ZAECHC 193*** at para 5 thereof, it was held that *'[A] person's all-round capacity to earn money consists inter alia, of an individual's talents, skill including his/her present position and plans for the future and of course external factors over which a person has no control for instance, in casu, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss.'*

[35] I have grave concerns to accept the industrial psychologist and actuary's reports without reservations. If regard is given to the Plaintiff's family background, what has been achieved by his parents and three older siblings and their home

environment conditions, it must be accepted that pre-morbid the Plaintiff is being pitched at an extremely high level. There are no records relating to the Plaintiff's pre-school, grade R or grade 1 scholastic performance, predating the accident in question. In addition, I find it improbable that the Plaintiff could have been ten years old, in grade 2, without him having struggled academically. If it is accepted that the Plaintiff was enrolled in school at a later age, then the question must be asked: why? The only inference I can draw is that the Plaintiff already suffered from concentration and forgetfulness before the accident.

[36] Consequently, a high contingency must be applied if I accept the figures stated in the actuary report. The percentage of the contingency deduction depends upon many factors and ranges between 5% and 50%, depending on the facts of the case.⁴

[37] The importance of applying actuarial calculations and its advantages was discussed in the case of ***Southern Insurance Association v Bailey N.***⁵ The court referred with approval to the case of ***Hersman v Shapiro and Company***,⁶ where the following was said:

'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 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.

Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

⁴ See AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812

⁵ 1984 (1) SA 98 (AD)

⁶ 1926 TPD 367.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.'

[38] In the result, I have applied a 50% contingency deduction to the pre-morbid earnings and a 50% contingency for post-morbid. I am satisfied that the contingency deduction in respect of both pre-morbid and post-morbid income would be just and fair, taking into consideration all the evidence placed before me.

[39] The calculations are as follows:

Income if the accident did not occur:

Past	-	R0
Future	-	<u>R10 653 340</u>
		R10 653 340
Less 50%		<u>R5 326 670</u>
Amount:		R5 326 670

Income post-accident:

Past	-	R88 582
Future	-	<u>R1 616 251</u>

	R1 527 669
Less 50%	<u>R763 834.50</u>
Amount:	R763 834.50

[40] The nett loss of earnings is R5 326 670 – R763 834.50 = R4 562 835.50. The balance of probabilities favours awarding compensation to the Plaintiff for loss of income in the amount of R4 562 835.50.

[41] Before concluding, something must be said about the inadequate way the RAF is litigating to the detriment of tax-abiding citizens. RAF pays billions of rands each year in road accident claims. These claims could be drastically reduced if not for the delinquent manner in which third-party claims are dealt with.

[42] *In Modise obo Minor v Road Accident Fund (10329/2019) [2019] ZAGPPHC399*, at para 3.1, Davids J expressed his dissatisfaction with the Road Accident Fund, in circumstances such as the case before me, where it is clear that the Plaintiff suffered prejudice, and will continue to suffer prejudice, due to their failure to provide the Plaintiff with an undertaking, as provided for in section 17(4)(a) of the RAF Act, as soon as litigation commences.

[43] As stated in the *Modise* case, *‘This will not only benefit the injured person and fulfill some of the objects of the Act, but it will also enable a plaintiff to begin to satisfy the general onus of mitigating one’s Damages.’⁷ In that way, not only will plaintiffs and injured persons experience beneficial relief in respect of their compromised or diminished amenities of life, but they might be assisted on the road to recovery, be it by way of surgical or scar-removing procedures, or psychiatric or remedial educational therapy, to name but a few examples’.*

⁷ See: *Hazis v Transvaal & Delagoa Bay Investment Co Ltd* 1939 AS 372 as quoted in Visser & Potgieter *Law of Damages* through the cases at [24] and referred to in *Swart v Provincial Insurance co Ltd* 1963 (2) SA 630(A).

'What the RAF also apparently and persistently fails to appreciate, is that every medical or ancillary intervention rendered pursuant to the furnishing of an undertaking might have a downward impact on the eventual quantum to be awarded. Scarring can be removed, orthopaedic remedial surgery can take place, a minor might be assisted in reaching his pre-accident learning potential and the like. An injured person might be rehabilitated or re-trained so as to enable him to compete better in the labour market. This all might result in a reduction of the eventual award for damages including, in appropriate circumstances, even general damages. It is a matter of public record that the RAF is insolvent and has been for many years. The failure to take such a simple step as the furnishing of an undertaking in terms of section 17(4)(a) of the Act amounts to a dereliction of duty. In this instance, as I have already mentioned, that dereliction prejudiced a minor child, a representative of one of the most vulnerable segments of our society.'

[44] The Plaintiff's anger outbursts, concentration and forgetfulness, are all treatable through therapy and appropriate medicine. Summons were issued on 13 February 2018, and the RAF filed its plea in June 2018. From June 2018 to 09 October 2023, the RAF failed to provide the Plaintiff with an undertaking in section 17(4)(a) of the Act. They only did so on 09 October 2023. If they had done so sooner, the Plaintiff's claim for loss of income could have been significantly reduced.

[45] There is no reason why costs should not follow the result.

Accordingly, I make the following order:

ORDER:

[46] The merits are settled at 100% in favour of the Plaintiff.

[47] The Defendant shall pay to the Plaintiff the total capital amount of R4 562 835.50 (four million, five hundred and sixty-two thousand, eight hundred and thirty-five rand and fifty cents) in respect of loss of earnings or earning

capacity, together with interest at 10.5% per annum from 20 February 2018, being the date of service of the summons.

- [48] The Defendant shall furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 in respect of future medical, hospital and related expenses.
- [49] The Defendant is ordered to pay the Plaintiff's agreed or taxed costs on a party and party scale.
- [50] The Plaintiff shall allow the Defendant 14 (fourteen) days to make payment of the taxed costs.

C MARAIS
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 16h00 on _____ 2024.

DATE OF HEARING: 09 October 2023.

DATE JUDGMENT DELIVERED: _____ 2024.

APPEARANCES:

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