IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MAIN SEAT)

Appeal Case No. A 40/2023

Court a quo Case No. 310/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

28/03/2024

In the matter between:

ATTEMPT UBISI Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

This Judgment was handed down electronically by circulation to the parties and/or the parties' representatives by e-mail. The date and time for hand-down is deemed to be 28 March 2024 at 12h00.

CORAM: RATSHIBVUMO J, GREYLING-COETZER *et* PICK AJJ:

INTRODUCTION

[1] The Appellant appeals the whole of the judgment and order by Mashile J of this Division ("Court *a quo*"), who dismissed the Appellant's claim against the

Respondent. Leave to appeal was granted to the full court by the Supreme Court of Appeal on 8 June 2023, after it was refused by the court *a quo*.

[2] The Appellant's claim was one for compensation in terms of the Road Accident Fund Act, 56 of 1996 ("RAF Act"). The Appellant sought compensation in respect of future medical expenses, past and future loss of income in an amount of R 8 608 900 and general damages in an amount of R1 800 000.

[3] The Respondent did not enter appearance to defend and the matter was adjudicated upon as a trial by default.

PROCEEDINGS IN THE COURT *A QUO*

[4] In support of his claim, the Appellant tendered *viva voce* evidence by himself and sought to introduce two affidavits. The first was that of Mr Ndlovu who, according to the Appellant transported him to the hospital and assisted the South African Police Services to draw up a sketch plan. Mr Ndlovu did not witness the accident, but arrived at the alleged scene afterwards. The second was that of Ms Ngobeni, the Appellant's girlfriend at the time (Ms Ngobeni), who was in his company shortly before the alleged collision. In respect of quantum the Appellant relied on the medico-legal reports and *viva voce* evidence of six expert witnesses.

[5] The Appellant's evidence in respect of the merits was disconcertingly brief. It engaged one A4 folio of an approximately 100-page transcribed record. He testified that on 8 February 2020 and whilst walking alongside the road, accompanying Ms Ngobeni home, a white NP200 bakkie stopped right in front of them ("the insured vehicle"). When a voice coming from the vehicle asked, "*What's happening here*?" Ms. Ngobeni ran away. The Appellant started to walk back home. Initially he was walking and then started running on a tar road. The insured vehicle kept following him. Notwithstanding that he picked up the pace, the insured vehicle collided into him and ran him down. The Appellant lost consciousness; only to regained it in hospital. He testified that he had since learned that the driver of the insured vehicle was his girlfriend's husband.

[6] In respect of the quantum, the Appellant testified that he passed matric and obtained two national diplomas in policing prior to the accident and was volunteering at the Mhala Police Station at the time of the accident. He had ambitions of studying public management but did not pursue it, as after the accident his "*thinking capacity was somewhat compromised*".

[7] The Court *a quo* sought clarity from the Appellant on various issues, more particularly how the accident occurred. The necessity is evident from the constricted manner in which the evidence of the Appellant was lead. In answering the Court *a quo's* queries the Appellant testified that the insured vehicle came at him at the "*maximum of the car's speed because it was really really fast as it approached.*" He was intentionally run over by the insured vehicle which was the same vehicle which caused Ms Ngobeni to run away. This vehicle was according to the Appellant a "*white Corsa NP 200*". The driver of the insured vehicle was charged with reckless and negligent driving and the outcome of the criminal case was not known to him at the time of trial before the Court *a quo*.

[8] According to the Appellant he had an open wound to the right side of his head. He had a fracture between his right ear and his right eye and had to undergo an operation on his eye.[1]

[9] The Appellant, though his legal representative, sought to introduce the two affidavits as evidence. The manner elected by the Appellant's legal representative to achieve this, set the tone for that which then followed. The Appellant's legal representative did not lay a proper foundation for the admission of the affidavits, nor did he specifically place reliance on the rules of court or a statutory provision for the admission of the affidavits into evidence. Even after being prompted thereto by the Court *a quo,* he did not apply in terms of the Uniform Rules more particularly Rule 38(2).

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[1] Page 304 of the Record

[10] The Appellant's legal in an attempt to persuade the Court a *quo* that a Rule 38(2) application was not necessary or applicable, submitted that admission of the affidavits would save time and there being no need to call the witnesses to adduce *viva voce* evidence as their affidavits are available.

[11] Following what can be described as a 'to and fro' engagement as to the scope and application of Rule 38(2), the affidavits were read onto the record without any ruling by the Court *a quo* in terms of Rule 38(2) or otherwise. Pursuant thereto and after the Court *a quo* sought clarity as to what he was to be do with the affidavits having been read onto the record, the Appellant's legal representative's responded as follows:

" *MR TSHAVHUNGWE:* *My Lord these affidavits should be accepted as evidence in terms of Rule 38(2) My Lord…..*

…

COURT: *You want them to be admitted into evidence?*

MR TSHAVHUNGWE: *That is correct My Lord.*

COURT: *Okay, they are so admitted as EXHIBIT A and B…"*

[12] Further to this, two medical experts testified in respect of the injuries sustained by the Appellant. The remainder of the evidence is dealt with later herein.

[13] Dr Mkhonza, a Neurosurgeon, testified that the hospital records indicated the Appellant had a complex fracture on his zygomatic bone, this being the upper cheekbone just below and to the side of the eye socket. He suffered periorbital edema, being swelling under the eyes and soft tissue injuries on his lumbar spine, being his lower back . No scars as a result of lacerations or abrasions were recorded. He opined that it was possible that the Appellant fell forward and fractured his face when the vehicle hit him from behind. He further testified that the X-rays showed "no low bone fractures". The Appellant's injuries were

not unique to a motor vehicle accident. He was informed that the injuries were as result of a motor vehicle accident.

[14] Dr Molomo, a maxillofacial and oral surgeon, testified that he examined the Appellant on 17 March 2021. He noticed scars on the right lower eyelid and the brow. Perusal of the hospital records indicated swelling around the eye, and a fracture of the right cheekbone. He testified that the injuries were consistent with blunt trauma and not unique to a motor vehicle accident.[2] ,At the time of his examination the Appellant's anatomy and function has been restored.

[15] In its judgment, the Court *a quo's* held that the Appellant's legal representative improperly sought to introduce the affidavits, the introduction was not preceded by an application and was therefore inadmissible and valueless. It further found that the Appellant failed to demonstrate on a balance of probabilities that the insured driver was negligent and thus, the Appellant failed to proof his claim.

ISSUES ON APPEAL

[16] As evident from the record of proceedings, the pleaded case in the particulars of claim, the presentation of the case as a whole during the trial and preparation of the notice of appeal, lack fluency of expression. Although this was the catalyst to the end result, it should not be allowed to fuddle the true issues in this appeal.

[17] This appeal turns on whether the Court *a quo* erred in finding that the evidence sought to be introduced by affidavits was inadmissible and whether it incorrectly found that the Appellant failed to prove that the Respondent was liable to compensate him. The Court *a quo*, having come to this finding, it did not even consider the quantum of the Appellant's claim.

APPLICABLE PRINCIPLES

[2] Page 333 of the Record

The RAF Act

[18] Section 17 of the RAF Act sets out when the Respondent (and its agents) would be liable to compensate claimants.

*"**17. Liability of Fund and agents***

(1) The Fund or an agent shall-

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the <u>identity of the owner or the driver thereof has been established</u>;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

<u>be obliged to compensate any person</u> (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, <u>caused by or arising from the driving of a motor vehicle</u> by any person at any place within the Republic, <u>if</u> the injury or death is <u>due to the negligence or other wrongful act of the</u> driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for <u>non-pecuniary loss shall be limited to compensation for a serious injury</u> as contemplated in subsection (1A) and shall be paid by way of a lump sum.

(1A)(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (<u>Act 56 of 1974</u>).

(2) ......" (own underlining)

[19] The underlying basis of the RAF Act is the common law principles of the law of delict. A claimant must therefore prove all the elements of a delict before it can succeed with its claim in terms of the Act.[3] All five elements of a delict must generally be present,[4] namely; (a) conduct; (b) wrongfulness; (c) fault; (d) causation; and (e) harm or loss.[5]

[20] Considering the above elements through the prism of the RAF Act and its liability to compensate a claimant, it equates to (a) the loss resulting from bodily injury; (b) arising from the driving of a motor vehicle; (c) caused by the negligence or other wrongful conduct (d) of the insured driver.[6]

Trial by default

[21] When a party to litigation (like the Respondent in this instance) is in default of entering appearance to defend, and a matter is adjudicated upon by the Court on a default basis, Rule 31(2) and Rule 39 of the Uniform Rules of Court find application.

[22] Rule 31(2) provides:

''(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment

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[3] *Septoo obo Septoo and Another v Road Accident Fund* (058/2017) [2017] ZASCA 164 (29 November 2017)

[4] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) par [25]

[5] Neethling and Potgieter *Law of Delict* 4, See also *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) at par [12]

[6] *Mnisi v Road Collision Fund and Seven Similar Matters* (1823/19; 2538/18; 315/20; 208/20;4082/19;4423/19;2382/19;4067/19) [2022] ZAMPMBHC 23 (1 April 2022), par [17]

against the defendant or *<u>make such order as it deems fit.'</u>*[7] (own underlining)

[23] Rule 39 provides:

"(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may <u>prove his claim so far as the burden of proof lies upon him</u> and judgment shall be given accordingly, <u>in so far as he has discharged such burden</u>. Provided that where the claim is for a debt or liquidated demand, no evidence shall be necessary unless the court otherwise orders.

…

(5) Where the burden of proof is on the plaintiff, he or one advocate for the plaintiff may briefly outline the facts intended to be proved and the plaintiff <u>may then proceed to the proof</u> thereof." (own underlining)

[24] Procuring of evidence by affidavit on trial is also dealt with in the Practice Directives and the relevant paragraphs read:

"Procuring evidence for trial through affidavits

5.4 As contemplated in rule 38 (2), evidence during trial in unliquidated or damages claim cases shall be procured through witnesses ***who shall be examined viva voce.***

[7] See Practice Directives for this Division where Paragraph 5.3 ~~it~~ provides, "[a}s *contemplated in rule 31 (2) (a,) there <u>shall be no default judgment</u> in any claim which is not for a debt or liquidated demand like damages claim matters <u>without hearing evidence</u> and only after the court shall have heard evidence, will the court consider whether to grant default judgment or not.*
5.3.1 <u>Hearing of evidence shall mean tendering of evidence viva voce on all relevant and unresolved factual basis of the case</u>.
5.3.2 Failure to adduce evidence as provided in the rules may lead to dismissal of the action or to absolution from the instance"

5.5 *Evidence procured by way of affidavits in the unliquidated claims or damages claims may only be so procured* ***with the leave of the court*** *and on such terms and conditions as the trial court may seem meet.*

5.6 *As contemplated in rule 39 (1), if the defendant does not appear when a trial is called, the plaintiff may prove his or her unliquidated claim or debt or may discharge the burden resting on him or her by way of viva voce evidence."*

[25] The term "trial" in the context of Rules 38 and 39 includes applications for default judgment where evidence is led in support of the pleaded claim.[8]

[26] Rule 38(2) provides:

"(2) The witnesses at the trial of any action <u>shall be orally examined</u>, but a court <u>may</u> at any time<u>, for sufficient reason</u>, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit." (own underlining)

[27] A plaintiff is still required, even in the absence of a defendant on trial, to adduce admissible evidence in support of his or her pleaded case. Although the Court in a default trials will only have one version before it, it will not always follow that the pleaded case would be proven. A plaintiff seeking damages in delict, is still required to prove the elements of a delict on a balance of probabilities.[9] In its determination as to whether the evidence supports a finding in the plaintiff's

8 *Saunders v Butt* 1906 EDC 17

9 *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548 A

favor, the Court is still required to apply the applicable rules and principles, as it would have done in a defended matter.[10]

[28] In *Mnisi v Road Accident Fund and Seven Similar Matters*[11] the Court in respect of Rule 38(2) held as follow:

'The subrule provides a mechanism whereby the court may on application and if sufficient reason is shown, allow that evidence be given on affidavit. Firstly, there must be an application to adduce evidence by affidavit. Secondly, there must be sufficient reason for doing so and thirdly, the court may lay down the terms and conditions for the evidence to be adduced. In Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) at 25, the Supreme Court of Appeal expressed itself over subrule 38(2):

'The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.'"

[29] The Court *a quo* was therefore entitled to prompt the Appellant's legal representative to seek admission of the affidavits in terms of Rule 38(2). Equally the Court *a quo* was not obliged to accept the evidence presented on the affidavits absent an application thereto in terms of Rule 38(2).

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10 *Siffman v Kriel* 1909 TS 538

11 *Mnisi v Road Accident Fund and Seven Similar Matters* (1823/19; 2538/18; 315/20;208/20; 4082/19; 4423/19; 2382/19; 4067/19) [2022] ZAMPMBHC 23 (1 April 2022) at par 52

[30] However, pursuant to the affidavits being read onto the record, the Court *a quo* was requested, to admit the affidavit as evidence in terms of Rule 38(2). The Court *a quo* acceded, received the affidavits as evidence and marked them as exhibits. We are of the view that for the court *a quo* to later hold that the affidavits it had earlier allowed to be read into the record, were inadmissible was a misdirection. Having received them as exhibits, it was not open to it to hold otherwise in its judgment. What remained was for it to assess the probity of the evidence and the weight to be attributed thereto. This misdirection entitles us to interfere with its finding and proceed to consider the Respondent's liability for the claim.

<u>LIABILITY OF THE RESPONDENT</u>

[31] The Appellant's pleaded case was that:

> *"On or about the 08th of February 2020 at or near Tintswalo, Acornhoek, Plaintiff was a pedestrian while trying to cross the road when a White Opel Corsa motor vehicle bearing registration numbers and letter **D[...]** (herein referred to as (sic) insured motor vehicle) driven by one **Mr. Billy Mokgotho** (herein referred to as (sic) insured driver) came at a high speed in (sic) a gravel road without observing pedestrians crossing on the road and knocked down the plaintiff.*
>
> *…*
>
> *The aforesaid collision was caused by the sole and exclusive negligence of the driver of the insured motor vehicles (sic), who was negligent in one or more or all of the following respects:*
>
> *5.1 He failed to keep any proper look-out (sic) pedestrian more specifically (sic) Plaintiff;*

5.2 He executed an inherently dangerous maneuver without exercising the degree of a skilled reasonable person required under the circumstances;

5.3 He failed to avoid the accident by the exercising of the skill of a reasonable person (sic) skill he could and should have done so; and

5.4 He failed to apply the brakes of the motor vehicle either timeously or at all, alternatively he drove the said motor vehicles (sic) with defective brakes.

…

As a result of the aforesaid collision and negligent driving…."

[32] While the Appellant's *viva voce* evidence before the Court *a quo* may not have been aligned with the pleaded case and grounds of-negligence he relied on, this cannot be said to be in contrast to warrant its rejection. The case seems to shift from the negligence, which was pleaded, to intentional knocking down with a motor vehicle after hearing the Appellant's evidence. Whether negligent or intentional, it is beyond any doubt that such conduct was wrongful and covered by the RAF Act for which the Respondent is liable.

[33] Ms Ngobeni's affidavit on the other hand confirms that the Appellant was involved in a motor vehicle accident in that he was knocked down by a motor vehicle driven by her husband. Her affidavit does not support the Appellant's version, as pleaded. One remains unsure of whether she was in the company of her husband (the insured driver) or her lover (the Appellant) at the time of the accident. The variance is unsurprising given the nature of relationship she had with both men, which puts her in an awkward position. After all, the Appellant's undisputed evidence is that he lost consciousness at that stage.

[34] We are mindful that a party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a Plaintiff to plead a particular

case and seek to establish a different case at trial. It is equally not permissible for a trial Court to have recourse to issues falling outside of the pleadings when deciding a case.[12] The whole purpose of pleadings is to bring, clearly to the notice of the Court and the parties to an action, the issues upon which reliance is to be placed.[13]

[35] It is generally accepted that a party will and should be kept strictly to his or her pleaded case. This is however not inflexible, provided the circumstances justify a departure from the pleadings. This is so as pleadings are made for the Court, not the Court for the pleadings. A departure from the aforesaid general position is justified provided that the departure would not cause prejudice or would prevent a full enquiry. Within those limits, the Court has a wide discretion.[14]

[36] *In Du Toit obo Dikeni v Road Accident Fund*[15] at paragraph [43] the court quoted with approval the following extract from *Erasmus Superior Court Practice*:

"*The object of pleading is to define the issues so as to enable the other party to know what case he has to meet. The parties are, therefore, limited to their pleadings: a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvas another. However, since pleadings are made for the court . . . it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues. . . .The general principle is that the parties will be held to the issues pleaded unless there has been a full investigation of the matter falling outside the pleadings. . . ." (own underline)*

[37] In the present matter there can be no prejudice to the Respondent who elected not to be part of the proceedings before the Court *a quo*, and never defended the Appellant's claim. Given that the Appellant was at liberty to seek an

12 *Minister of Safety and Security v Slabbert 2*010 (2) ALL SA 474 (SCA) par [11]
13 *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) 107C-H
14 *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198
15 2016 (1) SA 367 (FB)

amendment to his particulars of claim after evidence was led and once it has become clear that the evidence was not in line with the pleaded case, the failure to do so cannot be placed before the door of the Appellant himself. That insight should have befallen the Appellant's legal representative, who failed to appreciate same.

[38] Absent any prejudice to the defaulting Respondent and in the circumstances of this specific case, it is justified to allow a departure from the pleaded case. The Appellant notwithstanding a foregoing, proved on a balance of probabilities that he sustained injury as a result of a wrongful act of the insured driver. The Appellant should thus be compensated.

EVALUATION OF EVIDENCE

[39] In Principles of Evidence, Schwikkard PJ *et al*, observed:[16]

"'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. In Miller v Minister of Pensions, Lord Denning expressed the civil standard of proof as follows: "It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not." Miller v Minister of Pensions was adopted by the Appellate Division in Ocean Accident and Guarantee Corporation Ltd v Koch." (footnotes omitted)

[40] The dictum in *National Employers' General Insurance Co Ltd v Jagers*,[17] although held in the context of a defended case, finds equal application in default of the defendant. Eksteen AJP, held the following, at 624-5:

[16] paragraph 32 7 Civil Standard of Proof, page 628

‘…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 accept his version as being probably true. ..”

[41] It was held in *S v Sauls and Others*[18] that there is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merits and demerits and having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.

[42] The Appellant’s *viva voce* evidence and the expert evidence of Drs. Mkhonza and Molomo proves that the Appellant could have sustained injuries, resultant from a motor vehicle collision.

QUANTUM

[43] Considering the finding above, the quantum stands to be dealt with next. The *viva voce* evidence of the Appellant was summarised in paragraph 6 above.

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17 *National Employers’ General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E)
18 1981 (3) SA 172 (A) at 180 E-F

The expert evidence before the Court *a quo* was summarized under paragraphs 14 and 15 above.

[44] An MRI was done and confirms previous bruises and small bleeding on the right temporal region of the brain. This side of the brain is responsible for memory. The Appellant’s Glascow coma scale (GCS) was 8/15 on being admitted, and later improved to 14/15. The neurosurgeon diagnosed a moderate to severe traumatic brain injury with the Appellant. He testified that that post-concussion symptoms can include headaches, amnesia and personality changes and that most patients recover within a year of a traumatic head injury. 15% of patients may take 3 to 4 years to recover. He made provision for headache medication for a period of two years post-accident. He concluded that opposed to the normal 5% chance of developing epilepsy, the Appellant has a 17% chance of developing epilepsy. If developed it would probably be treated with medication. It was opined that no future neurosurgical intervention was anticipated.

[45] The maxillofacial and oral surgeon, Dr Molomo testified that he examined the Appellant on 17 March 2021. Function has to a great extent been restored. He confirms scars on the right lower eyelid and the brow. He testifies that the injuries are consistent with blunt trauma. There might be a future risk of infection although the risk of same developing is not high. The plates and screws might lead to pain in extreme weather conditions and might have to be removed in case of infection. He testified that the Appellant’s possibility for future surgical removal of the implants or prosthetic devices cannot be completely eliminated.

[46] Dr Modiba is a Clinical Psychologist. She opined that the Appellant tested within the mild intellectual disability range. She concluded that it seemed that this was a decline from his pre-morbid functioning. The Appellant seems to present with moderate non-verbal short term memory deficit, moderate planning and organizational deficit, mild verbal short term and working memory deficit, mild attention deficit, mild learning ability deficit, mild anxiety and mild trauma.

[47] Ms Sebaku, an Occupational therapist, concluded that the Appellant's residual physical aptitude within the mid-range of medium work demands. She reports that his cognitive and emotional fallouts are sufficient to impose on his scholastic aptitude and his productivity in an open labour market. It translates into a reduction of his competitiveness in the open labour market .

[48] Ms Baloyi, an industrial psychologist opined that the Appellant's occupational functioning had been compromised. His post morbid employment prospects are precarious as his career choices had been truncated and he may suffer productivity and efficiency challenges in the workplace. She concluded that the Appellant is a poor match for his desired employment. She opined that the Appellant, pre-accident, had the ability to progress to the status of a colonel in the police force at the age of 45 as she assumed he would be promoted every five years. To a question by the Court, Ms. Baloyi replied that the intervals for promotion are the general guideline and were not verified with the police service.[19]

[49] An actuarial report compiled by Mr Choi was relied on by the Appellant. Mr Choi testified that in compiling the report he relied on the information per the Industrial Psychologist's report dated 30 November 2020. More specifically, his report was based on the Appellant being unable to secure employment and that the Appellant would remain unemployed in the future. Mr Choi opined that various assumptions had to be made as the available information left room for interpretation. The report reflects that the Capital Value of the Loss of earnings, before contingencies amounted to Past: R 278,200.00 and Future: R 9,229,900.00. Totaling R 9,508,100.00.

<u>Damages</u>

[50] The object of the allotment of damages is to place the Appellant in the same position (or as close thereto as possible) as he would have been, but for the

19 Pages 347 to 349 of the Record

accident.[20] The award of damages falls squarely within the Court's discretion,[21] Court hears the relevant evidence and considers the object and effectiveness of the compensation, the principles of fairness and conservatism and previous awards as set out in the precedents.

[51] Damages are generally dealt with under various heads. So too, a distinction is made between pecuniary and non-pecuniary losses in the RAF Act.

Non-pecuniary damages : General damages

[52] Section 17(1)(b) thereof reads: *'…… Provided that the obligation of the Fund to compensate third parties for non-pecuniary loss shall be limited to compensation for a serious injury…'* In terms of section 17(1A) of the Act, seriousness shall be assessed by a registered medical practitioner.

[53] Regulation 3(1)(b)(ii) and (iii) states what shall be considered as a serious injury for the purposes of compensation. Where the WPI (Whole Person Impairment) is less than 30%, a serious injury will also include (i) a serious long-term loss of a bodily function, (ii) permanent serious disfigurement; (iii) severe long-term mental or severe long-term behavioral disturbances and (iv) the loss of a fetus, may also be qualified by using the AMA guides.

[54] There was no indication as to whether the Respondent considered the Appellant's RAF4 and found the sustained injuries to be serious enough to warrant the payment of general damages22. Once the Respondent RAF 4 Form was submitted, the Respondent should have reacted thereto within a reasonable time. Regulation 3(3)(d), 3(3)(e), 3(4), 3(5) and 3(8) to 3(8) to 3(13) set out the procedure to be followed should the Respondent reject a claimant's injuries as serious. In terms of the Regulation, the claimant would be referred to further medical investigations on the Respondent's expense. On the Respondent again rejecting the injuries as serious, the appropriate

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20 *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917

21 *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA)

22 Regulation 3(3)(c) and 3(3)(d) to the Act

mechanism would be to engage the appeal tribunal at the Health Professionals Council of South Africa ("the HPCSA"). Should the Respondent fail to make a decision the Appellant stands to compel same.[23]

[55] Without a finding to the effect that the Appellant's injuries are considered to be serious by the Respondent, this Court has no jurisdiction to make an assessment of the Appellant's injuries or an allocation in general damages. As was held by the Supreme Court of Appeal in Road Accident Fund v *Duma and three related cases*[24]

'[18] … the High Court's judgments … seem to set out from the premise that it is ultimately for the Court to decide whether the plaintiff's injury was 'serious' so as to satisfy the threshold requirement for an award in general damages. Proceeding from that premise, these decisions assume that if the Fund should fail to properly and timeously reject an assertion to that effect by a third party, the rejection can be ignored. If the medical evidence before the Court then shows, on balance, the plaintiff was indeed seriously injured, the Court can proceed to decide the issue of general damages.

[19] That approach, I believe, is fundamentally flawed. In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the Court…."

[56] In the result this court does not have the jurisdiction to award any general damages to the Appellant until the legislature prerequisite as dealt with above has been complied with.

Loss of Earnings

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23 *Makuapane v Road Accident Fund* (9077/2022) [2023] ZAGPPHC 15 (19 January 2023)
24 2013 (6) SA 9 (SCA)

[57] Future loss of earnings is the difference between what the Appellant could potentially have earned before the damaging causing event, and what he will earn now that the damage causing event has taken place. Past loss of earnings on the other hand, represents the income the Appellant lost from date of accident to date of judgment. The difference between the two represents the Appellant's actual loss of income. The Court is assisted by the actuarial calculations to determine the monetary value to be awarded in respect of the loss of earnings or earning capacity. As the whole exercise of determining same is in essence speculative in nature and devoid of any certainty, contingencies are applied by the Court to align the actuarial calculation with the circumstances of the case and life as it happens in general.

[58] The application of contingencies falls within the Court's discretion. It was held in *Southern Insurance Association Ltd v Bailey NO:*[25]

'Where the method of actuarial compensation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial judge is 'tied down by inexorable actuarial calculations.' He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or differently put the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case.'

[59] Expert reports and expert evidence are mechanisms utilised to come to the assistance of the Court in making its determination. The expert reports and evidence presented to the Court a *quo* were not as clear and without error as one would have hoped. Brief examples include the report by the Maxillofacial

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[25] *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A) at 116G to117A

and Oral Surgeon, recorded the Appellant's age and date of accident wrong, held under the heading summary and recommendations that the claimant alleged he was involved in a pedestrian vehicle accident, reported loss of consciousness, was transferred from one hospital to another and sustained orbital rim fracture which were operated on. The former is plainly non-sensical. The report by the Occupational Therapist hold that the Appellant will require a smart phone, smoke detectors, large print calendar and self-lock with no indication why these are to be regarded as required. The report by the Industrial Psychologist fails to deal with the age at which the Appellant started his formal schooling, the fact that he was progresses year after year and the impact this has on the pre-morbid capacity of the Appellant. The Industrial Psychologist deferred the Appellants residual intellectual capacity to an Educational Psychologist, yet no evidence of an Educational Psychologist was placed before the Court a quo. Be that as it may, same does not make the expert reports valueless, but does diminish their reliability. All the expert reports are older than 2 years, which is normally the period for which they are regarded to be current or accurate. Their diminished value can adequately be addresses by this Court through application of contingencies.

[60] Holistically considered, the following appears relevant for the purpose of the just contingency deduction. The Appellant commenced with grade 1 in 2003 at age 9 years. There is no indication that he passed each grade since then. The report of the Industrial Phycologist records he 'progressed' each year and failed grade 10,11 and 12. He was again progressed to grade 10 and 11 and only passed grade 12 the second time around. The reason for his progressing might be due to his age, but there is no clarity in this respect. He obtained his matric qualification during 2015 with a "D" symbol at the age of 21 years. He completed a two-day practical training course in management and handling of crime scenes and defensive restraining techniques in 2016. In 2017, he obtained a National Certificate: Resolving Crime being a NQF 5. In 2018, he obtained a National Diploma: Policing being a NQF 6.

[61] At the time of the accident in 2020 the Appellant was unemployed. He had thus not secured employment at the age of 26. He had limited career

experience other than contract work as a waiter. Six months after the accident, in his injured state, he started volunteering, for the South African Police Services, doing admin work and he remained so volunteering at the time of the various expert assessments.

[62] The Industrial Phycologist projected that the Appellant would, in his uninjured state, have secured employment as a Constable during 2020/2021. He would have progresses at a 5-year interval from Constable to, Sergeant, to Warrant Officer, to Captain, to Lieutenant Colonel and finally to Colonel. The Industrial Psychologist did not consider the requirement that the Appellant had to successfully complete a training course with the South African Police Force. The Industrial Phycologist suggests that he will be a mismatch to his desired career path and testified that he will be a "undesirable" employee in the open labour market. No conclusion was reached that he was unemployable. He was found by the Occupational Therapist to be able to attend to a mid-range to medium range of work demand. This was however not postulated on by the Industrial Phycologist. The result was that no provision was included for any future earnings post-morbid.

[63] The calculation of future loss of earnings will generally bear a larger contingency deduction where the facts the actuary depended on at the time were farfetched or simply incorrect. The role of the industrial psychologist in providing accurate information to the actuary cannot be emphasised enough. It was held in *MT v Road Accident Fund; HM v Road Accident Fund:*[26]

'[50] The report of the industrial psychologist is pivotal to the actuarial calculations. This is because the actuarial calculation must be performed on an accepted scenario as to income, employment, employment prospects, education, training, experience and other factors which allow for an assessment of the likely career path pre- and post-the injuries.

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26 *MT v Road Accident Fund; HM v Road Accident Fund* (37986/2018)[2020] ZAGPJHC 286; [2021] 1 All SA 285 (GJ); 2021 (2) SA 618 (GJ) (16 November 2020)

[51] It thus stands to reason that, if the base scenarios adopted by the actuary are fallacious, the actuarial calculation is of no value to a court or to the RAF officials engaged in negotiating a settlement.'

[64] A contingency of 40% was applied where it was found in *Schmidt v Road Accident Fund*[27] that the Plaintiff still had the ability to work, rather than being completely unemployable as suggested. In *Gwiba v Road Accident Fund*[28] a contingency of 50% was applied where the Plaintiff had an inconsistent employment record and the company where she worked at the time of the accident, closed a few months thereafter.

[65] Considering the above factors in combination, the diminished value of the expert reports relied on, the Appellants age, assumptions relied on by the Actuary and unemployment rate generally, a contingency deduction of 60 % is fair and reasonable in respect of both past and future loss of earnings.

[66] The Appellant's loss of earnings were calculated on the following basis:

Total Loss of earnings as calculated by Actuary	R9 508 100
Less 60% Contingency deduction	R5 704 860
Actual Future Loss of Earnings	R3 803 240

Future Medical Expenses

[67] All the experts confirm that provision be made for analgesics to treat the Appellant's headaches. An Order should be made to compel the Respondent to bear the costs of the Appellant's future medical expenses.

CONCLUSION

[27] *Schmidt v Road Accident Fund* (4835/05) [2006] ZAGPHC 64; [2007] 2 All SA 338 (W) (23 June 2006)

[28] *Gwiba v Road Accident Fund* (6468/2017) [2023] ZAFSHC 58 (3 March 2023)

[68] For the reasons set out above, the appeal has to succeed. That said the appeal could potentially been avoided had more care and attention been given to drafting of the pleadings, the approach adopted by the Appellant's legal representative in presenting the evidence and focused instruction to the experts in preparing their reports.

ORDER

The following order is proposed:

1. The Appeal is upheld and the Appellant is entitled to 100% of his proven damages.

2. The determination of general damages is postponed pending compliance with 2.1 below:

2.1 The Appellant is ordered to serve the RAF 4 on the Respondent and re-enroll the matter of general damages once the seriousness of the injuries has been determined either by the respondent or the Health Professions Council of South Africa.

3. The Respondent is ordered to compensate the Appellant's in respect of loss of earnings in an amount of R3,803,240.00

4. The Respondent is to provide the Appellant with a Section 17(4)(a) undertaking;

5. The Respondent is ordered to pay the Appellant's legal costs on a party and party scale, as agreed or taxed, limited to the discretion of the taxing master. Such costs shall include the costs associated with the transport of the Appellant, consultations, reports, reservation and fees associated with the testimonies in the Court *a quo* of Dr Mkhonza, The Neurosurgeon; Dr Molomo, the Maxillofacial and Oral Surgeon; Dr Modiba, the Clinical Psychologist; Ms.

Sebapu, the Occupational Therapist; Ms. Baloyi, the Industrial Psychologist, and Mr. Choi, the Actuary.

6. All amounts payable in terms hereof shall bear interest at 11, 75%, should payments not be made within 120 days from date of Order.

7. The Appellant is ordered to serve a copy of this judgment upon the Respondent at its head office as well as provincial office within 7 days from date of judgment.

TV RATSHIBVUMO
Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

D GREYLING-COETZER
Acting Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

D PICK
Acting Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

Date of hearing: 24 November 2023
Date of Judgment: 28 March 2024

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