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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 2465/2019

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE: 11/04/2024

SIGNATURE

In the matter between:

MFANUYASHA ACKEN GWEBU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 11 April 2024 at 10:00.

J U D G M E N T

MASHILE J:

[1] The Plaintiff, a mine machine operator, instituted this delictual damages action against the Defendant for personal injuries that he sustained during a motor vehicle accident on 3 August 2017 at about 13:30 on the road between Hendrina and Carolina, Mpumalanga Province. The Plaintiff was the driver of motor vehicle with registration letters and number H[...] 2[...] F[...], which was forced to swerve off the road to avoid a collision with an unknown motor vehicle that had entered its path of travel. The Plaintiff believes that the manner in which the accident occurred renders the Defendant vulnerable to liability for the damages claimed by him.

[2] The matter served before this Court on 13 March 2023 with liability having been resolved on the understanding that the Defendant would compensate the Plaintiff for all damages that he may in the future prove against it. Additionally, and in line with that agreement, the parties resolved that the Plaintiff would:

2.1 Pay to the Plaintiff an amount of **R1 120 000.00**, which amount represented **80%** of the total under general damages;

2.2 Furnish the Plaintiff with a Certificate in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, as amended for future medical treatment.

[3] Notwithstanding that the Defendant was represented by the State Attorney during the hearing, the matter was effectively not defended. There were no opposing papers, the reports of the Plaintiff's experts were admitted into evidence without any contestation from the Defendant and there was no meaningful cross-examination of the Plaintiff's witnesses. Moreover, the Defendant did not lead any witnesses in opposition. That said and with regard to past medical expenses, the Defendant pleaded with the Court to hold back on its decision until the Supreme Court of Appeal pronounces on the issue whether the Defendant is under any obligation to compensate Plaintiffs for such damages in circumstances where medical aid has settled them.

[4] Merits, general damages and future medical treatment having been settled by agreement, this matter now concerns the determination of future loss of earnings only. In his endeavour to prove his case, the Plaintiff called four expert witnesses before he could take the stand himself. These expert witnesses were:

4.1 Dr AJ Troskie, an Orthopaedic Surgeon;

4.2 Tryhou, an occupational therapist;

4.3 Ms HT Kraehmer, an Industrial Psychologist; and

4.4 Mr J Potgieter, an actuary of GRS Actuarial Consulting.

[5] The summary of the evidence of Dr Troskie is that:

5.1 the Plaintiff sustained severe injuries in the accident, which radically changed his ability to enjoy life and pursue his previous occupation. He suffered a traumatic amputation of his right dominant arm and has consequently lost the ability to do any bimanual activities. He also sustained a spinal dislocation at the level of L2 and L3, which was stabilised with a L1 to L4 fusion which, he said, basically renders his lumbar spine immobile (section 6);

5.2 Regarding pain and suffering Dr Troskie's evidence is that the Plaintiff experienced severe acute pain after the accident. He had numerous surgical procedures which would also have caused additional acute pain episodes. Amputations are prone to cause phantom limb pain in the post-operative period which is frequently difficult to control. He testified that it is fair to say that he probably experienced significant acute pain after the accident for a period of about 2 months. Regarding chronic pain, Dr. Troskie stated that the Plaintiff experiences pain in his spine in cold and wet weather as well as when he is

sitting for long periods. He experiences pain in the amputation stump (phantom pains);

5.3 On prognosis, Dr Troskie said that no short-term changes are expected. In the long-term, he has permanent functional impairment of his right dominant arm, which gives him **100%** Upper Extremity Impairment and **60%** Whole Person Impairment (WPI) for this injury alone. He has a L1-L4 fusion which will put increased strain on the T12 - L1 high mobility segment as well as L4 - LS joint, which can lead to degenerative changes at these levels and might ultimately require further surgical intervention/fusion in future. This will add another **7%** WPI for a Total Whole Person Impairment of **67%** (section 7 – a);

5.4 Insofar as future conservative treatment is concerned, Dr Troskie indicated that the Plaintiff can use analgesics for pain as needed. He might require the use of Lyrica for the neurogenic pain that he experiences in the amputation stump. He may benefit from physiotherapy and exercises to strengthen the muscles of his right shoulder girdle for him to qualify for a myoelectric prosthesis. Regarding future surgery Dr Troskie indicates that there is a **5%** chance that he will develop spondylosis of the spinal levels adjacent to the fusion and might therefore require future spinal surgery of these levels;

5.5 Concerning incapacity, Dr Troskie indicates that the Plaintiff has lost the use of his right dominant arm and can therefore not do any bimanual activities leading to major functional impairment. He cannot sit for long periods due to the spinal fusion and he cannot bend over to pick things up. He is only able to do light administrative tasks.

[6] The summary of the findings of Ms Tryhou, the Occupational Therapist is that:

6.1 The Plaintiff's role as an Operator at Sasol Mine at the time of the accident falls in the light to medium category of work. Assessment results indicate that the

Plaintiff will meet the physical requirements of a sedentary occupation at present. He will never be able to perform any light, medium or heavy duty work in the future. His current position as a Clerk falls in the sedentary category of work. He should be able to continue working in a sedentary position until normal retirement age;

6.2 The accident most definitely affected the Plaintiff's options of work in the open labour market. If the Plaintiff loses his current position he might struggle to perform any tasks that require bilateral lifting or carrying of objects. He will most probably need a sympathetic employer who will be willing to accommodate him (section 8.4, page 26);

6.3 On future treatment, Ms Tryhou emphasised the need for occupational therapy, which she thought 17 hours should suffice. The Plaintiff should consult with an orthotist to assess for a myoelectric prosthesis. She also indicated the need for certain special and adapted equipment.

[7] The evidence of Mr Kraehmer in relevant part is that:

7.1 Insofar as cognitive functioning, the Plaintiff reported that he never failed any years in school. The Plaintiff told her that he passed Standard 9 in 1997. He subsequently left school due to financial reasons. He claimed to have completed training as Security Officer albeit that the Plaintiff did not furnish her with proof of his qualifications. Ms Kraehmer said that based on this, as well as his career history, it would seem that his cognitive ability was in all probability average. No further formal education was envisaged, but in-house / on-the-job training relevant to his role and potential promotion remained likely;

7.2 On personality and behavioural functioning, she testified that there were no reported difficulties. Based on the very positive collateral feedback from his three direct supervisors, Messrs Mathebula, Namo and Khambule, she said, he

was capable of building and maintaining effective relationships with other people in a work situation. His drive and motivation to work was clearly also in place;

7.3 Mr Namo who is the Miner / Team Leader to whom the Plaintiff reported directly, described the Plaintiff as a “nice person”, who “was never fighting with anybody”. He was considered as a hard worker. The Plaintiff was always willing to work overtime and he had a very good attendance record (“he was always there”);

7.4 Physically, the Plaintiff informed her that he did not suffer from any serious illness or any impairment and was in good general health at the time of the accident. He was capable of doing his normal work as a Machine Operator, roof bolt machine, or whatever work that his education and experience would have allowed for. She said that she noted that in this regard, Ms. Tryhou, the occupational therapist, indicated that the Plaintiff’s role as an Operator at Sasol Mine falls in the light to medium category of work;

7.5 Ms Kraehmer’s evidence on the Plaintiff’s career and earnings was that there was nothing that would have prevented or restricted his ability to earn an income within the scope of his education and experience and the type of work for which this made him suitable. She said that the Plaintiff’s career history, as reported to this writer indicates that between 1998 and 2011 (period of 13 years) Mr. Gwebu worked for five different security companies (Tornado Security, Capricorn Security, Die Hard Security, Funulnwazi Security, as well as Phoenix Security) in / around Nelspruit as a Security Officer. He informed her that in each case he resigned to pursue a better opportunity;

7.6 In 2012, he was employed by a sub-contractor to Sasol Mine Limited as a General Worker and placed at Sasol Mine. In this regard, Ms Kraehmer noted that according to Mr. Namo, the Plaintiff was initially employed by a sub-contractor to the mine. When the mine realised that he was extremely good, a

decision to absorb him into the mine was taken. Sasol Mine Limited appointed and placed him as a roof bolt machine operator. The Plaintiff worked in this capacity for about one year before he was appointed permanently by Sasol Mine Limited on 1 March 2013. She said that the Plaintiff was still working in this capacity when the accident occurred on 3 August 2017;

7.7 The Plaintiff's available salary advices for the period August 2016 to July 2017 (12 months prior to the accident on 3 August 2017) indicate that the guaranteed portion of his income (control amount / basic salary, housing allowance, living out allowance, fixed bonus and fringe benefits, as well as a rotating shift allowance – **10%** of his basic salary, as per Mr Khambule) amounted to **R 15 544.80** per month (**R 186 537.60** per annum). She testified that this amount would have been equivalent to a level between the lower quartile and median on Paterson B2 (annual guaranteed package), as per the General Staff Remuneration Survey (April 2017), conducted by P-E Corporate Services (now Willis Tower Watson);

7.8 Additionally, she said, the fluctuating portion of his income (overtime, travel to work, travel time, work on a public holiday and miscellaneous allowances, but excluding leave encashment and *Illima* bonus) amounted to an average of **R 5 972.02** per month (**38.42%** of his guaranteed income). She said that in addition, he also received an average of **R 1 262.01** per month from *Illima* Bonus, which, in her experience refers to a general mine / production bonus, usually not related to individual performance;

7.9 The General Staff Remuneration Survey (April 2017) indicates the following remuneration on Paterson B2 (all areas, rounded off):

	Lower quartile	Median	Upper quartile
Annual Basic Salary	R134 230	R154 530	R175 750

Annual Package	Guaranteed	R173 560	R198 730	R230 360
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7.10 The Plaintiff was 42 years old when the accident occurred on 3 August 2017. His experience was restricted to the role of Security Officer (13 years), General Worker (± 1 year) and Machine Operator (4 years and 4 months). She testified that if it is accepted that he would, based on his age alone, have remained a Machine Operator (working underground) for the rest of his career, his income would probably have increased based on annual increases as negotiated with organised labour (considering that his salary increased at an average of **6%** per annum between December 2016 and December 2020);

7.11 It is noted that according to Messrs Mathebula and Khambula, all underground workers continued to work despite COVID-19 restrictions. They even worked overtime. Thus, in an uninjured state, Mr. Gwebu would also have continued working despite COVID-19 restrictions and he would have continued to earn an income from overtime and work on public holidays (average of **R 614.27** per month prior to the accident, which would probably have increased based on inflation from 2016/2017). Ms Kraehmer obtained collateral feedback from three separate sources, higher than the Plaintiff in the hierarchy. These were Messrs Mathebula, Namo and Khambule who indicated that he had the potential of advancing to the position of Miner / Team Leader responsible for other Machine Operators;

7.12 When asked regarding the quality of the Plaintiff's performance and potential, Mr Mathebula indicated that his performance was "**100%**". He said that the Plaintiff could easily have progressed to the position of Miner. In addition, Mr Khambule indicated that he could have progressed to the position of Miner, or even to Shift Supervisor. He then concluded by stating that: "he was so good – a high performing individual". It is noted that (according to Mr. Mathebula and Mr.

Khambule) he would have had to complete a period of on-the-job training (“learnership”) of about 18 to 24 months prior to promotion;

7.13 Thus, given the available collateral feedback, Ms Kraehmer was of the opinion that it would be equitable to postulate that the Plaintiff would, but for the accident, have been in a favourable position to advance to the position of Miner / Team Leader (Paterson B4) as his hierarchical career ceiling, at approximately age 48 – 50. She said that at that point the guaranteed portion of his income would probably have increased to ± **R 34 158.67** per month (**R 409 904.04** per annum in current value), which would be equivalent to a level above the upper quartile of Paterson B4 (annual guaranteed package), as per the General Staff Remuneration Survey (April 2020), conducted by Willis Tower Watson. In addition, the fluctuating portion of his income would probably have amounted to ± **R 7 123.29** per month (**R 85 479.48** per annum);

7.14 She testified further that from this point forwards the guaranteed portion of his income would probably have increased based on annual increases as negotiated with organised labour, considering that his salary increased at an average of **6%** per annum between December 2016 and December 2020. The fluctuating portion of his income would probably also have increased based on inflationary pressure only.

[8] The next witness to take the stand was Mr J Potgieter, an actuary. He compiled a report with information largely obtained from the opinion of the Industrial Psychologist, Ms Krahmer, whose report I have discussed in the preceding paragraph. Mr Potgieter applied a **5%** contingency deduction in respect of past income and a **15%** in respect of future income. This brought him to a past loss of **R109 865.00** and a future loss of **R3 960 532.00** with a total loss of **R4 070 397.00**. The figures in respect of both past and future loss of income represent outcome following the application of the cap. A deduction of **20%** pertaining to the merits apportionment leaves a final total loss of **R3 256 317.60**.

[9] The issue for this Court to adjudicate is whether the Plaintiff's injuries, which have rendered him **67%** disabled has diminished his patrimony or estate. If not, no future loss of earnings can be anticipated. Another ancillary matter for consideration is whether his current position has been specifically created to accommodate him and that fundamentally, it exists solely because the employer is sympathetic to his situation.

[10] Prior to delving into the issues raised by this matter, it will be prudent to first set out the legal principles that govern this area of the law. I have already stated that all the other heads of damages but loss of earnings have been settled. Insofar as loss of earning capacity is concerned it should be common cause that the Court can adopt one of two approaches. Whether the Court adopt the one or the other will depend on what information is placed before it. These two ways are firstly, that the Court may ascertain a practical and realistic amount of loss based on the verified facts and the existing circumstances of the case; or secondly, the court may, with reference to mathematical computation, determine an amount made on the demonstrated facts of the case using such calculation as a foundation for its award. See in this regard the case of *Southern Insurance Association v Bailey N.O.*¹.

[11] In those instances where there is dearth of information, the Court may find the "gut feel" approach normally ideal. In that case, however, the Plaintiff must put at the court's disposal adequate evidence to enable it to assess such financial loss. The basis upon which Mr Potgieter founded his calculation of the Plaintiff's loss of earning capacity is not firm. He relied, as he was expected to do though, exclusively on the assumptions made by Ms Kreamer. Such reliance where there is no tangible reason to persuade the Court to believe that the Plaintiff would have summited around ages 48 to 50 instead of the normal 45 must be rejected. Against that background the calculations by Mr Potgieter stand to be approached with greater caution.

¹ 1984 (1) SA 98 (A)

[12] The information supplied to this Court is ideal for the adoption of the actuarial calculations made by Mr Potgieter. To the contingencies applied by Mr Potgieter, the Court will, with the figures suggested by him on past and future income in mind, apply the usual contingencies such as:

12.1 the possibility of mistakes having been made in the determination of the life expectancy of the Plaintiff;

12.2 Accidents which may affect his earning capacity and life expectancy;

12.3 Circumstances which would increase or decrease his cost of living;

12.4 the likelihood of illness, inflation and adjustment for costs of living allowance;

12.5 the fact that the Plaintiff lives in a violent and lawless neighborhood which increases the risk of him being killed or assaulted; and

12.6 the likelihood of the Plaintiff being fired or retrenched.

[13] The list above of possible contingencies is not exhaustive but it is merely intended to serve as guidance. However, it is also true that one cannot always assume that the worst will happen to a Plaintiff. In this regard see *Southern Insurance Association Ltd v Bailey*² where Nicholas JA expressed it in the following terms:

“Where the method of actuarial computation 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 the “vicissitudes of life”. These include such

² 1984 (1) SA 98 (A)

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. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case. In making such a discount for "contingencies" or the "vicissitudes of life", it is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable."

[14] Turning to the award that this Court will regard as appropriate in the circumstances of this case. I agree that the Plaintiff is not in any position to earn an income if he is **67%** disabled, which has been brought about as a result of his amputated right dominant arm. He has now lost the ability to do any manual activities. He also sustained a spinal dislocation at the level of L2 and L3, which was stabilised with a L1 to L4 fusion. According to Dr Troskie, this essentially renders his lumbar spine immobile.

[15] Although the Plaintiff remains in employment, it can hardly be contended that the employer is obtaining as much financial gain from an employee who is **67%** physically challenged as it would had he been fit. Even with sedentary work, which is the area in which he is currently involved, he remains ineffective because of the lumbar spine pain and the fact that he utilises one arm to pick up paper for filing purposes. The evidence of Ms Kreahtmer that the employer has indicated that the plan is to discontinue the position of the Plaintiff stands uncontested.

[16] This means that as soon as the Plaintiff has a meaningful financial security such as the award that this case will make, there will be no need to keep him as he will have financial security for the rest of his life. For all practical purposes, the Plaintiff is

unemployable. In the matter of *Santam v Beyleveldt*³, it was held that when an employee was employed purely on compassionate grounds, his salary should not be considered when dealing with the claim for loss of earnings.

[17] Having considered all the above I have concluded that the contingency deductions on the value of income but for the accident should remain at **5%**. However, the value of income having regard to the accident is raised from **15%** to **25%**. Additionally, this Court was not furnished with reasons why his salary is expected to only stabilize at age 48 to 50 instead of 45. For that reason, the increase in the contingency will take care of any inflation of the loss that could be brought about as a result of the **6%** extending up to age 50 instead of age 45.

[18] In the result, I make the following order:

1. The Defendant is liable for payment of the sum of **R4 096 366.00** to the Plaintiff being **R2 976 366.00** for loss of earnings and **R1 120 000.00** for general damages;
2. Interest at the aforesaid sum at the legal prescribed rate of interest a *tempora morae* calculated, if the amount is not settled within 14 days, from date of judgment;
3. The Defendant is liable for payment of the costs of the Plaintiff to date.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

³ 1973 (2) SA 146 (A)

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Date of Judgment:

2024

11 April