

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case Number: 3944/2022

In the matter between:

TSHEDISO JOSEPH SHUPING

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

HEARD ON: 28, 29 November 2023

CORAM: JORDAAN,AJ

DELIVERED ON: 04 June 2024

- [1] On the 13th of January 2019 the plaintiff- then a 49year old taxi-driver- was a passenger in vehicle with registration numbers and letters [...] (the insured vehicle) driven by Mr. Rantiti Ramokone (the insured driver), when at or near 34571, Chris Hani, Bloemfontein, the insured vehicle collided with motor vehicle with registration number and letters [...], driven by Mr. Matshediso Mokoua.

[2] The Plaintiff consequently instituted action in terms of the provisions of the Road Accident Fund Act 56 of 1996 (RAF Act) as amended to recover damages computed at R2 700 368,00 comprising of:

2.1 Estimated Past Hospital Medical Expenses	R84 419,00
2.2 Estimated Future Medical and Related Expenses.	R661 000,00
2.3 Estimated Past Loss of Earnings	R306 936,00
2.4 Estimated Future Loss of Earnings	R848 013,00
2.5 General Damages	R800 000,00

[3] At commencement of the trial the Plaintiff submitted that the Defendant settled the merits 100% in favour of the Plaintiff, further that the General Damages were settled in the amount of R600 00,00 and that the Defendant undertook in terms of s17(4)(a) of the RAF Act to provide for the Plaintiff's future medical and related expenses. These submissions were confirmed by the Defendant. The Plaintiff submitted that the claim for past hospital and medical expenses is abandoned.

[4] The Plaintiff applied that the evidence of the experts who prepared the medico- legal reports of the Plaintiff, be adduced on affidavit in the interest of *inter alia* saving costs, which application was not opposed by the Defendant, the court upheld the application to receive the evidence of Dr Oelofse (Orthopaedic Surgeon), A Jansen (Occupational Therapist), A van der Bijl (Earnings Expert) and W Loots (Actuary) on affidavit.

[5] Dr Oelofse, the orthopaedic surgeon, noted that according to the Plaintiff, he suffered a fracture in 1999 for which an open reduction and internal fixation was done, the instrumentation remained *in situ* and the Plaintiff suffered no pain until the accident. Dr Oelofse reports that the Plaintiff suffered small lacerations on his face and swelling of the right knee with restricted range of movement of the knee. The X-rays revealed a right distal femur fracture. In theater an open reduction and internal fixation of the right femur was done. The Plaintiff was discharged on the 11th of February 2019 and had a follow up appointment on the 25th of February 2019 when the clips were removed and physiotherapy was done.

- [6] Dr Oelofse diagnosed the Plaintiff with malunited distal femur fracture resulting in:
- 3.1 open reduction and internal fixation of the femur (on top of previous fracture and instrumentation)
 - 3.2 leg length discrepancy of 3cm
 - 3.3 painful instrumentation
 - 3.4 painful and swollen knee
 - 3.5 post-traumatic osteoarthritis of the knee joint
 - 3.6 scarring deferred to opinion of a plastic surgeon
- [7] Dr Oelofse opines that the Plaintiff sustained a right upper leg and knee injury from which he continues to suffer the sequelae. He considered that the injuries had a profound effect on the Plaintiff's amenities of life, productivity and working ability and will continue to do so in the future. Dr Oelofse opined that with successful treatment the Plaintiff's productivity will improve, however, as the degeneration in his right knee progresses the Plaintiff's productivity will decrease again.
- [8] It was the opinion of Dr Oelofse that regardless of successful treatment, the Plaintiff will always have a permanent deficit. Dr Oelofse qualified the injury as serious on the narrative test as the injury resulted in serious long-term impairment or loss of body function and permanent serious disfigurement.
- [9] Anthea Jansen, occupational therapist, observed that the Plaintiff had difficulty sitting for a prolonged time and walked with a limping gait and reported pain at his left hip and right knee. He was unable to crouch due to his right knee and was unable to flex the right knee. Ms Jansen opined that the Plaintiff's physical capacity falls within the sedentary range.
- [10] The occupational therapist, reports that the Plaintiff left school in Grade 7, was a taxi-driver prior to the accident, but unemployed since the accident. The Plaintiff has no other qualification. Ms Jansen opines that the Plaintiff would be an unfair competitor in the open labour market compared to his uninjured peers.

- [11] Ms Arabella van der Bijl, earnings expert, reports that the Plaintiff completed Grade 5, was employed as a taxi driver at the time of the accident, receiving a salary- according to his income certificate- of R900,00 per week in 2011 plus benefits of R1 400,00. He did not return to work after the accident. She opined that it was reasonable to assume that he would have continued as a taxi driver for the foreseeable future.
- [12] Ms van der Bijl, reports that according to the medical experts the claimant does not meet the physical demands of his work as a taxi driver, but a light/sedentary type of work for which he has no experience. The Plaintiff was reliant on his physical abilities to secure and maintain employment and will find it difficult due to his physical limitations, low level education and limited experience to compete with other healthy individuals. She therefore opined that the Plaintiff will remain unemployed for the remainder of his working career.
- [13] Mr Wim Loots, the actuary, calculated the estimated past and future loss of earnings based on the expert reports of Dr Oelofse, Ms Jansen and Ms van der Bijl as well as the income affidavits filed in computing his calculations. The court directed that the past loss of income, based on the income affidavits, be recalculated as the basis did not mathematically accord with the income reflected in the affidavit, a corrected Past Loss of income was then supplied by Counsel for the Plaintiff at R240 492,99. The actuary calculated the post-morbid loss of income was at R848 013,00, while the contingency was left for the court to determine.
- [14] Counsel for the Plaintiff submitted that the expert reports indicate that the injury that led to the unemployability of the Plaintiff was the second collision in 2019 and accordingly, a higher contingency deduction would not find rational basis. The Defence submitted that the Plaintiff decided not to continue working, he was not dismissed and requested a higher post-morbid contingency deduction.
- [15] The Defence submitted that the Plaintiff's work is classified as light work

according to his own expert and thus equate to sedentary work, The Plaintiff decided to not return to work, he was not dismissed, therefore higher contingency should be applied.

[16] There was no evidence led or expert reports in opposition submitted. The court accept the opinion of Dr Oelofse, which is uncontested and supported by collateral information, that the second accident in 2019 caused the injury and the sequelae that caused the Plaintiff's current condition. It is the opinion of the Plaintiff's experts that the Plaintiff has a permanent deficit, regardless of successful treatment and will remain unemployed for the remainder of his working career.

[17] I considered that the Plaintiff was 49 years at the time of the collision and 53years old at the time of the calculation; that he is no longer fit for employment in the open labour market due to the sequelae of the injuries. The actuarial calculations are based on the expert reports, which this court had accepted. It is trite that the court has the discretion to determine the contingency deduction. In *Road Accident Fund v Guedes*¹ the court stated: *"Assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court ... There are no fixed rules as regards to contingencies"*

[18] Having regard to the circumstances of this case as enumerated herein, I hold the view that the Past Loss of Earnings of R240 492,99 submitted, is the actual loss of earnings that the Plaintiff suffered due to the injuries sustained in the 2019 collision and its sequelae. The Plaintiff is entitled to compensation of the R240 492,99 loss suffered.

[19] In respect to the Plaintiff's Future Loss of Earnings calculated at R848 013,00 the Plaintiff suggested a contingency of 15% should court find the 1999 accident injuries played a roll. This Court found that the sequelae suffered by the Plaintiff was caused by the injuries sustained in the 2019 collision. The Plaintiff *in casu* has no post-morbid scenario as he is completely

¹ 2006 (5) SA 583 (SCA)

unemployable. Bearing in mind his age, that he has no qualification or experience of any form of sedentary work, I therefore decided to exercise my prerogative to apply a fair, reasonable and just contingency of 0% on the Future Loss of Earnings.

[20] I accordingly make the following order:

ORDER

1. The merits are settled on the basis that the Defendant accepted liability for payment of **ONE HUNDRED PERCENT (100%)** of the Plaintiff's proven or agreed damages.
2. The Defendant shall, within **FOURTEEN (14)** days of this Order, furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, for payment of **100%** of the costs of the future accommodation of the Plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to the Plaintiff arising out of the injuries that the Plaintiff sustained in the motor vehicle collision which occurred on the 13th of January 2019 and the sequelae thereof, after such costs have been incurred and upon proof thereof.
3. The Plaintiff's claim in respect of past hospital and medical expenses is abandoned.
4. The Plaintiff's claim for general damages is settled on the basis that the Defendant pays to the Plaintiff the amount of **Six Hundred Thousand Rand (R600 000,00)** in full and final settlement in respect of general damages.
5. The Defendant is ordered to pay to the Plaintiff the amount of **One Million and Eighty-Eight Thousand Five Hundred and Five Rand and Ninety-Nine Cents (R1 088 505,99)** in respect of the Plaintiff's claim for past and future loss of earnings.
6. The Defendant shall pay to the Plaintiff the **Capital Amount of One Million**

and Eighty-Eight Thousand Five Hundred and Five Rand and Ninety-Nine Cents (R1 088 505,99) in respect of proven and/ or agreed made up as follows:

Loss of Earnings (Past and Future)	R 1 088 505,99
General Damages	R 600 000,00

7. The aforesaid payment of the **Capital Amount** will be made directly into the Trust Account of the Plaintiff's Attorneys, **VENTERS INC**, the particulars of the account which are as follows:

Name of account holder: [...]
Name of bank: [...]
Account Number: [...]
Branch code: [...]
Reference number: [...]

8. Should payment in terms of the amount reflecting in this Order not be made within One Hundred and Eighty (180) days from the date hereof, the Defendant shall be liable for payment of interest on the said amount calculated at the prescribed interest rate applicable at the time, from Fourteen (14) days after date of this Order, to date of payment.
9. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on a High Court scale to date of this order, such costs which shall include the cost of counsel for Two (2) days and the reasonable qualifying and preparation fees (where applicable) of the following experts:

- 9.1 Dr L F Oelofse (Orthopeadic Surgeon)
- 9.2 A. Jansen Digby (Occupational Therapist)
- 9.3 A. van der Bijl (Industrial Psychologist/ Earnings Expert)
- 9.4 W. Loots (Actuary)

10. The plaintiff shall allow the defendant One Hundred and Eighty (180) calendar days to make payment of the taxed or agreed costs

11. No writ for costs or capital will be issued by the Plaintiff prior to the expiry of One Hundred and Eighty (180) days

M.T. JORDAAN
ACTING JUDGE.OF THE HIGH COURT,
BLOEMFONTEIN

APPEARANCES:

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