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

**CASE NO:2121/2023**

**(1) REPORTABLE: YES/NO**

**(2) OF INTEREST TO THE JUDGES: YES/NO**

**(3) REVISED.**

Signature:

Date: 2024/08/29

In the matter between:

**MAKGOBA MALESELA FREDDY**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**MONENE AJ**

[1] On 23 November 2021 the plaintiff, a major male person then 31 years of age, was a driver of a motor vehicle which collided with another on the Mandela Drive public road in the Lephalale area within the geographical area of this court.

[2] Consequent upon that motor vehicle collision the plaintiff suffered an injury explained by medicos as right distal radio ulnar fracture.

[3] In the aftermath of all that the plaintiff instituted proceedings against the defendant under cover of section 17 of the Road Accident Fund Act 56 of 1996.

[4] As is now standard reaction to these kinds of actions the defendant offered absolutely no defense to the plaintiff's claim having neither entered an appearance to defend nor a plea.

[5] The matter served before this court in default with the plaintiff praying that I determine the questions of liability, loss of earnings and the need for the defendant to make an undertaking in respect of the future medical needs of the plaintiff to the extent that those medical needs would be arising from the injuries sustained in the said motor vehicle collision. A further prayer was that I postpone the issue of general damages sine die.

[6] To attend to the issues which lay before me for determination the plaintiff sought and was granted leave to prosecute his case on paper in terms of Uniform rules 38(2) and 39(1).

## **LIABILITY**

[7] According to the only evidence tendered before me under cover of rule 38(2) the motor vehicle collision was caused by the sole negligence of the insured driver, being the driver, whose motor vehicle rammed into that driven by the plaintiff, the negligence manifesting, in the main, through failure to keep a proper lookout.

[8] There being nothing placed before me to gainsay the evidence of the plaintiff as carried through by both the accident report and the section 19(f) affidavit, I find no reason not to accept that evidence and find on the merits, in favour of the plaintiff.

[9] Accordingly the defendant who never put up any opposition to this matter from the beginning, must be held 100 percent liable for all proven damages suffered by the plaintiff arising from the motor vehicle collision.

## **LOSS OF EARNINGS**

[7] As already alluded to supra the main take homes as to the injuries suffered by the plaintiff in this matter was a right distal radio ulnar fracture. From the evidence tendered under cover of affidavit I understand that to, in English, mean a fracture of the hand wrist area. In this case it was the right-hand wrist. This was testified to by Dr T A Mudau, the orthopedic surgeon who went on to calculate the plaintiff's whole-body impairment to be 4 percent. The sequelae of the injuries suffered manifested, according to this expert, in the form of the plaintiff being unable to lift heavy objects and experiencing right wrist and right shoulder pains.

[8] The occupational therapist, Rabelani Makuya's evidence was first to the effect of confirming the sequelae identified by the Orthopaedic surgeon. This expert further found that, *"Mr Makgoba has adequate hand function with presence of all functional grasps"* although experiencing deviations which denote *"inadequate grip strength on his right hand"*. It was further opined by this witness that the plaintiff is, post the accident, left in a position where he can be classified as being able to perform sedentary to low range medium manual work as he has no capacity to undertake full medium to very heavy occupations.

[9] Ruwa Ntuli, an industrial psychologist, observed and noted that the plaintiff, who had been a taxi driver prior the accident was post the accident unemployed as he "did not return to work". It remained unclear whether not returning to work was caused by the accident although reference was made by this witness to the occupational therapist's conclusion that given the physical demands of the work of a taxi driver the plaintiff's ability to do his erstwhile work was "compromised". It was however this witness' conclusion that the plaintiff can still work as a taxi driver. Factoring the plaintiff's uncorroborated but plausible version that he earned R 4000.00 per month from his job as a taxi driver, this witness found that this located him above the lower quartile of semi-skilled workers according to Robert Koch's Quantum Yearbook of 2021. The expert thus further opined that it being so that at

31 years when the accident occurred, he was in the establishment stage of his career he would have reached his career ceiling earning of between median and upper quartile of semi-skilled workers by age 45. The expert then concluded without postulating any different scenarios to work on that the plaintiff has suffered past loss of earnings as well as being likely to experience a future loss of income.

[10] The last witness whose evidence I considered regarding loss of earnings is Ndumiso Mavimbela of Manala Actuaries. He based his report solely on the Industrial psychologist report which must be understood, as it is, to have been premised on both the Orthopaedic and Occupational therapist reports. Calculating the loss from 1 June 2023 this expert expressly stated, unlike many in his field, that the past loss was computed from the date of the accident up to the calculation date and further that the future loss was computed for the period after the calculation date up to an unknown date in the future. Finding the RAF cap to be having no bearing on the results of his computations and applying no contingencies this expert summarized his computations pegging past loss at R83 837.00 and the net future loss at R2 374 738.00 which when added resulted in a net loss of R2 458 575.00.

[11] In the backdrop of the above uncontested expert evidence, I must determine loss of earnings suffered by the plaintiff in respect of which the lodestar to a proper approach remains, in my view, and which I venture to repeat *ad nauseum* **Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F** where the following was said:

*“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, augururs 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. 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 evidence.*

*The validity of this approach depends upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.”*

[12] I am a layman to all the disciplines of the experts who testified. While I may not and should not merely rubberstamp their recommendations and must subject them to a test of looking into the reasoning which went into their opinions, I should not and will not allow myself to be swayed by maudlin alarmist sensitivities in the public domain emanating from either the defendant in casu which has literally abandoned and absconded from defending these actions which flood our court rolls daily or that of the defendant's apologists whose common mantra is to see any amount having six figures as undeserved or as an attempt by plaintiffs to deceptively and greedily milk the “cash-cow” that is the Road Accident Fund.

[13] An amount of two million rands, for example, spaced out over a period of an expected life period of 44 years for example equates to R45 000.00 a year which in turn amounts to about R3 700.00 a month, hardly a largesse nor a fortune from a horn of plenty presumed by the chattering voices comprised in the main by those amongst us who at times spent that monthly amount per night at dinners or drinks outings.

[14] Regard being had to how the experts in casu reasoned their opinions as alluded to supra and reflected upon in argument before me, I cannot in anyway bring myself to fault the expert evidence led before me and readily accept that evidence without any reservations. What then remains for me is to determine whether in my discretion, contingencies must be applied to the past and/or future loss of earnings arrived at in casu. That is the case it being trite that the factoring in of a contingency percentage is a purely discretionary matter.

[15] Without resorting to the traditional approach in judgement writing of providing truncated citations and quotations of previous decisions on what contingencies are and what purpose they serve, I understand the need for contingencies to be informed by the speculative nature of the work done by the learned experts employed in the determination of quantum which involve, in general, looking into uncertainties such as life expectancy, future

employment or unemployment prospects, future improvements or diminutions in working conditions prospects and a host of other unknown and uncertain variables such as the economic viability of a country. Those are factored in to either temper with amounts postulated by actuaries downwards or upwards, although practice has, perhaps actuated by persuasions I lamented supra, sadly developed to factor contingencies only to what, at first blush, appear to be possibly too high amount postulations.

[16] Given the age of the plaintiff at the time of the accident which was a fairly youthful 31 years, the expected longer life span expected still more so in the light of the evidence of the avoidance of vices such as alcohol and smoking by the plaintiff, the fast depreciating value of money in our current downward economic slide and the projections of a further bleak economic future which is more likely to see the plaintiff unemployed for life than not and my supra indicated view of how little an amount of two million plus amounts to when spaced out over a life-time, I am disinclined to factor any contingencies to the amounts postulated by the actuary in casu.

[17] That said, I however note that the amount pleaded as future loss of earnings is at R2 200 000.00, less than the net future loss postulated by the actuary. There is on record no amendment of the particulars of claim which sought to reconcile the pleaded amount with the amount tendered into evidence. Parties being bound by their pleadings I cannot and will not order an award above what was pleaded which then means I will put a ceiling on the net future loss of earnings at the amount pleaded.

#### **FUTURE MEDICAL TREATMENT AND UNDERTAKING**

[18] According to the orthopedic surgeon's evidence the plaintiff will continue to suffer the inconvenience and discomfort on his right shoulder and wrist and will thus need pain management, reconstructive surgery for scars and physiotherapist intervention for rehabilitation.

[19] The Occupational Therapist recommends 25 hours of occupational therapy intervention in pain alleviation strategies, joint protection principles, work hardening and the need for a variety of assistive devices from wheeled laundry bucket to reusable heat pads.

[20] It certainly cannot thus be gainsaid that the plaintiff will in future need medical attention.

[21] In the above premises a case for an order compelling an undertaking for medical expenses in the future has, in my view been made.

[22] In the result I make the following order:

22.1 The defendant is liable for 100% of the proven damages for the plaintiff.

22.2 The defendant shall pay the plaintiff a total sum of R2 283 837.0 (**TWO MILLION TWO HUNDRED AND EIGHTY-THREE THOUSAND EIGHT HUNDRED AND THIRTY SEVEN RANDS ONLY**) computed from R83 837.00 in net pass loss of earnings and R2 200 000.00 in respect of the loss of earnings being damages suffered by the plaintiff in relation to the motor vehicle accident in *casu* which occurred 23 November 2021.

22.3 The amount in order number 22.2 above shall, within 180 days from date of this order, be paid by direct transfer into the **Trust Account** of **B H Lebesse Attorneys** the details of which are as follows:

**BANK: FNB**

**Account Number: 6[...]**

**Branch Code: 2600148**

**Ref: LEB/RAF/056/2022**

22.4 In the event of the above capital amount not being paid timeously, the defendant shall be liable for interest at the prescribed rate of interest per annum, calculated from the date of mora to date of payment.

22.5 The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) (a) of Act 56 of 1996 in respect of all medical treatment, medical costs and the supply of any medicine and goods and services arising out of the injuries sustained by the plaintiff in the motor vehicle accident implicated in this matter.

22.6 General damages are postponed sine die.

22.7 The defendant is ordered to pay the cost of this suit on a High Court scale inclusive of the costs attendant to obtaining the expert reports relied upon in evidence and the costs of counsel on scale B.

22.8 The plaintiff shall, if the parties disagree as to the costs referred to supra, serve a notice of taxation on the defendant and shall allow the defendant 14 court days post taxation to make payment of the taxed costs.

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**MALOSE.S. MONENE**  
**ACTING JUDGE OF THE HIGH COURT,**  
**LIMPOPO DIVISION, POLOKWANE**

**APPEARANCES**

*Heard on* : 22 May 2024

*Judgement delivered on* : 29 August 2024

*For the Plaintiff* : Adv. T Maluleke  
: Instructed by B H Lebesse Attorneys



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*For the Defendant*

: No appearance

POLOKWANE HIGH COURT