REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH A

LIMPOPO DIVISION, POLOKWANE

CASE NO:4314/2022

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

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

(3) REVISED

DATE: 5-09-2024

SIGNATURE:

In the matter between:

PHUMLANI XUMA	**PLAINTIFF**
And	
ROAD ACCIDENT FUND	**DEFENDANT**

JUDGEMENT

MASHAMBA AJ:

INTRODUCTION

[1] The plaintiff, Phumlani Xuba, a male person, born on the 19th April 1992, has instituted an action against the Road Accident Fund ("the defendant") for damages

resulting from personal injuries sustained on the 03rd September 2020, at Klasserie public road, Limpopo Province. The plaintiff was a driver of a motor vehicle accident with registration numbers and letters, F[...] which vehicle lost control after being disturbed and caused to overturned by another motor vehicle with registration number and letters which are unknown to the plaintiff.

[2] The plaintiff was 28 years old when the accident occurred and currently he is 32 years old, employed as a teacher.

[3] On the 07th September 2023, the parties reached a settlement agreement of 60/40 in favour of the plaintiff. On the 09th May 2024, the defendant formally through a correspondence letter accepted the claim for general damages under 5.1 as the plaintiff sustained severe injuries. The court will entertain the issues of general damages in this matter.

ISSUE BEFORE THIS COURT

[4] The court is called to determine the plaintiff's claim for general damages, future medical expenses and past, future loss of earnings. The plaintiff claimed an estimated amount of **R 14 000 000.00** calculated as follows;

5.1 Future Medical Expenses	section 17 undertaking
4.2 Past and future Loss of Income	R 12 000 000.00
4.3 General Damages	R 2 000 000.00

[5] The Future Medical Expenses claim will be substituted with an undertaking certificate in terms of section 17 (4) (a)-(b) of the Road Accident Fund Act 56 of 1996, as amended. The summons against the defendant was issued on the 09th May 2022, and served by the sheriff on the 15th June 2022, at the defendant principal place of business. The defendant did not enter his appearance to defend.

[6] The plaintiff proceeded with this matter on the absence of the defendant, the plaintiff used the experts' medical reports to substantiate his claim. The plaintiff relied on the following expert reports;

8.1 Dr SM Khanyile (Orthopaedic Surgeon)

8.2 Dr Mkhonza (Neurosurgeon)

8.3 Dr Divaris (Radiologist report)

8.4 Thembelani Lephoto (Clinical Psychologist)

8.5 Masana Tshitamba (Occupational Therapist)

8.6 NJ Mabote (Occupational Therapist)

8.7 Oscar Sechudi (Industrial Psychologist)

8.8 One Pangaea (Actuaries)

[7] The plaintiff made his submissions based on the conclusions of the medical experts' reports duly filed before this court. The court evaluated the probabilities of all experts' opinion as per their respective reports. The court considered the case of *Prince v Road Accident Fund*[1], where the court held at paragraphs 55, 56 and 59 in the evaluation of the probabilities in respect of expert evidence.

> *"Sufficient proof is established when an inference can be drawn about the fact in issue, providing that the inference is consistent with all the proven facts. In civil matters, it suffices if the inference is the most probable inference. Further, once prima facie proof or evidence has been provided, that is proof calling for an*

[1] (CA 143/2017) [2018] ZAECGHC 20 (20 March 2018). Par 55, 56 & 59

answer. This becomes conclusive proof on the point in issue usually if no evidence is produced to rebut it. The fact of the matter is, however, that the Court must at the end of the case reviews all the evidence and evaluate this according to the applicable primary criterion. It must be accepted, of course, that where, for example, a Defendant fails to produce evidence, this does not mean necessarily that the opponent's version in the case, falls to be accepted. The acceptance of Plaintiff's case depends on the probative strength of Plaintiff's case, being whether it is sufficient to cast, an evidential burden on the Defendant to present evidence."

PLAINTIFF'S INJURIES AND EVIDENCE

[8] The medical records from Tintswalo Hospital show that the plaintiff had the following injuries; cervical spine injury, Skull Injury and mandibular bilateral fracture. The plaintiff was transported to Tintswalo Hospital by an ambulance and was then transferred to Rob Ferreira Hospital. The plaintiff was admitted on the 03 September 2020 and discharged on the 08 October 2020. The medical records indicate that the GCS was 3/15 on admission and it was noted that the plaintiff was intoxicated. The medical records are not complete, the plaintiff filled few medical records from Titswalo Hospital and a discharge form from Rob Ferreira Hospital.

[9] Dr S.M KHANYILE (Orthpaedic surgeon), examined the plaintiff on the 24th February 2022, and recorded injuries sustained; as cervical spine injury, neck injury, and skull injury. The plaintiff reported that he loses focus and persistent neck pain. The plaintiff received the following treatment; emergency treatment, clinical and radiological examination and analgesia. The plaintiff further attended rehabilitation as an outpatient at Rob Ferreira Hospital. The plaintiff was referred to Dr S Divaris Radiologist on the 25th February 2022. The X-ray show the old healed fractures involving the symphysis mentis and the left aspect of the mandible. The levoscoliosis is present. No orthopaedic surgery is expected. The WPI was calculated at 8 %. Dr Khanyile qualifies the plaintiff with narrative test RAF 4. *5.1 serious long-term impairment or loss of a body function.*

[10] Dr M.F Mkhonza, (Neurologist) examined the plaintiff on the 11th November 2022. Dr Mkhonza, reported that the plaintiff lost consciousness during the accident, woke up at Rob Ferreira Hospital after 7 days. The Plaintiff sustained head injury and mandibular fracture. The plaintiff was clinically examined, intubated and ventilated, open reduction and internal fixation of the mandible, physical rehabilitation and analgesia. The plaintiff reported that he has a weak left side of his body, lack of concentration and forgetful, personality changes and decrease hearing with the left ear. Dr Mkhonza concluded that the plaintiff sustained a severe traumatic brain injury (initial Glasgow coma scale of 3/15; improved 6/15; intubated, he also had left hemiplegia). The plaintiff has 17.2 % chances of epilepsy. The calculated WPI is 35%.

[11] T. F Lephoto, the clinical psychologist (hereinafter referred as "the clinical'') examined the plaintiff on the 24th February 2022, who concluded that the plaintiff's current neuro-cognitive test results revealed the following;

1. Attention and concertation: according to his performance, the results suggested that his attention and concentration to be inadequate, within the low average and below average range.

2. Memory: The results were suggestive of inadequate visual memory, and inadequate auditory and working memory within the low average and below average range.

3. Processing speed: the plaintiff processing speed was found to be inadequate.

4. Visio-spatial and constructional abilities: the plaintiff performance ranked between the average and low average range.

5. Verbal and abstract reasoning: the plaintiff performance ranked in the

average and low average range.

6. Executive functioning: the plaintiff performance suggests mildly impaired executive planning abilities and fell within the low average range.

[12] The clinical opined that based on the plaintiff overall test profile, the results suggest average to moderately impaired neurocognitive abilities. The clinical opined that the plaintiff may have suffered a severe head injury which resulted in significant neurocognitive deficits. The plaintiff presents with symptoms of a mood disorder which is classified as Mild Depression Disorder. The plaintiff would benefit significantly from psychotherapeutic intervention to deal with his current presentation of depressive symptomatology. With the aid of a clinical psychologist, the plaintiff may be able to find a meaning to life and not dwell on the negative.

[13] M Tshitamba, (occupational therapist) examined the plaintiff on the 24th February 2022. The occupational therapist indicated that the plaintiff occupation as an educator requires occasional walking, elevated work, lifting and carrying and that the plaintiff is presenting with left side hemiparesis (weakness) and decreased endurance as noted during the assessment. The occupational therapist opines that the plaintiff limitation and pain has compromised his ability to function at the same level as his uninjured co-workers, even in a situation with the physical demand category matching his physical abilities. The plaintiff is thus considered a vulnerable competitor in the open labour market compared to his non-injured counterparts.

THE PLAINTIFF LOSS OF EARNINGS

[14] O. O, Sechudi, the Industrial Psychologist (hereinafter referred as the IP), examined the plaintiff on the 22nd August 2023, noted that the plaintiff matriculated in 2011, thereafter, obtained tertiary level qualifications. The plaintiff obtained Bachelors in Education in 2015. and further obtained Honours in Bachelors of education in 2016. The plaintiff registered for 2 (two) year Masters in Public Management in 2019 and

discontinued with his studies as a result of the injuries sustained in the accident. The plaintiff is employed as a teacher at Sekhukhune Secondary School.

[15] The IP noted the paysheets which has indicated that the plaintiff's gross monthly salary is R 26 893.82. The salary scales for government employees. Therefore, the industrial psychologist opined that the plaintiff 's earnings are in line with those of a teacher (grade 12 plus 4 years tertiary) with the earnings ranging between the R 280 038 to 621 906 per year.

[16] **Pre-accident Potential;** The IP, opined that the plaintiff would have likely continued working within the same line of work while pursuing opportunity for career advancement. The plaintiff would have eventually secured a job as a school principal and his income would have increased in a straight-line with his earnings likely reaching those of a school principal ranging from 348 747 to R 1 050 657 per year (Koch 2020). The plaintiff would have reached career ceiling by the age of 45 years. From the age of 46 years, the plaintiff career activities would have stabilised as he focused on maintaining his source of income. Therefore, the plaintiff would have earned additional inflationary increases until retirement age. Therefore, the plaintiff would have possibly retired at the age of 65 as per employer's policy and with health permitting.

[17] **Post-accident Potential;** The IP noted that the plaintiff was on incapacity leave from the date of accident until the present date. The IP further called the plaintiff on the 02nd August 2023, the plaintiff indicated that he has yet resumed his duties. The IP indicated that the plaintiff post-accident potential has likely been adversely affected. The plaintiff may suffer job loss due to his inability to report for duty while experiencing multiple challenges. In the event he suffers job loss, he would likely be medically boarded which would possibly preclude him from participating in the labour market in future. In the event the plaintiff may find himself unemployed, he would possibly remain unemployed for the rest of his life.

PLAINTIFF'S SUBMISSIONS

[18] The plaintiff submitted that as a result of the accident he discontinued with his Masters degree. The plaintiff's counsel further argued that the plaintiff is unfit to do the current job as a teacher because since the plaintiff resumed his duties, he received two verbal warning as a result of failure to accomplish his duties. The Counsel submitted that the plaintiff returned to work to avoid being declared medical boarded in terms of the employer's policy. The Counsel further submitted that although the plaintiff resumed his duties as a teacher, he has done so at the mercy of the employer.

[19] The Counsel further submitted that the plaintiff is remunerated for the work he is not doing and in accordance with the principles established in *Fulton v Road Accident Fund*,[2] the remuneration is being granted ex gratia and it is not to be taken into consideration for purposes of the plaintiff's loss of earnings. The counsel submitted that the same principles of *Fulton* case should be followed in this case.

[20] The plaintiff submitted that a contingency of 5 % on past loss of income and contingencies of 15% on pre-morbid and 25 % on post-morbid would be fair and reasonable given his age and the fact that he is more than likely to remain unemployed if medically boarded. The plaintiff further submitted that the calculation by the Actuary represent a fair and reasonable amount of compensation. The plaintiff referred the court to the Koch, in Quantum Year Book 2020, where the following guideline regarding contingencies has been indicated; Normal contingencies: as deductions of 5% for past loss and 15% for future loss; Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on *Goodall v President Insurance*[3].

[21] The plaintiff appointed One **Pangaea Actuaries** to calculate the plaintiff's past and future loss of income based on the postulations made by the Industrial Psychologist. The contingencies of 5 % past loss, 15 % pre-morbid and 25 % post

[2] 2007/31280 (2012) ZAGPJHC 3; 2012 (3) SA 255 (GSJ)
[3] 1978 (1) SA 389

morbid was applied.

	Pre-accident (R)	**post -accident (R)**	**Loss (R)**
Past income	1 373 750	1 193 979	
Past contingencies 5%	(68,688)	(59 699)	**R 170 782**
Net past income	**1 305,062**	**1 134 280**	
Future income	15 448 181	721 351	
Future Contingencies 15% premorbid & 25% postmorbid	(2 317 227)	(180 338)	
Net future Income	13 130 954	541 013	12 589 941
Total Loss			**12 760 723**
Impact of cap			**(2 061 454)**
Net Loss			**10 699 269**

COURT'S FINDINGS ON ISSUES OF THE PLAINTIFF'S LOSS OF EARNINGS

[22] This leads me to the issues of the order for the future loss of earning capacity and contingencies to be applied. In this regard I am also guided by *Mngomezulu v RAF*[4], Kgomo J argued that:

[4] (Case No. 04643/2010) [2011] ZAGPJHC 107 (8 September2011)

"[84] For the Plaintiff to *succeed in* a *claim* for loss of *earnings, he* is *required* to *provide* a *factual basis for an actuarial calculation. This* is a *process designed* to assess *actuarial / mathematical calculations* on *the basis of the evidence as well* as *over-all assumptions vesting or depending* on *such evidence. This approach is known as the actuarial approach.*

[85] The actuarial approach seeks to *determine the loss of earnings* as *realistically* as *possible* to *what may be the Plaintiff's actual* losses. *The approach comprises* of *(a) providing a factual* basis *upon which the* loss *of earning* is *to be calculated and only then (b) by applying appropriate contingency deductions."*

[23] When deciding issues of past and future loss of earnings, this court has considered a decision in *Southern Insurance Association Ltd v Bailey NO*[5] Nicholas JA stated as follows:

"*Where the method of actuarial computation is adopted, 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 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."*

[24] The plaintiff informed medical experts that he discontinued with his Masters degree as a result of the accident and the court requested the proof of Master's degree registration. The plaintiff provided a letter and academic record which indicated that the plaintiff did not discontinue with his Master's degree after accident, instead, he

[5] 1984 (1) SA 98, par 116-117

completed on the 04th October 2023 and graduated on the 06th December 2023. The court requested the plaintiff to do Addendum report of the Industrial Psychologist in consideration of the completed Masters degree and that the plaintiff has resumed with his employment as a teacher. The court further requested that the actuaries must recalculate the plaintiff loss of earnings in consideration of the new information.

The plaintiff was requested to furnish the addendum reports on or before the 30th August 2024.

[25] The industrial psychologist prepared an addendum report, which has considered that the plaintiff has completed his Master's degree in Business Management. The Industrial Psychologist reported that the plaintiff was contacted on the 21 August 2024, the plaintiff mentioned that he was assigned to lighter duties as an administrative assistant as a result of the injuries. The Industrial Psychologist did not confirm the plaintiff's current challenges with the employer but only relied from the plaintiff's reported information. The opinion made from the Industrial Psychologist first report did not change as a result of the new information. No collateral information was provided to prove that the plaintiff is unable to do his current duties as a teacher and that he was put in lighter duties.

[26] The court noted that the plaintiff reduction of his capacity but still employed by the same employer. This court has highlighted the above as will change the method used by the actuaries to calculate the plaintiff's loss of past and future earnings. The court noted that there is no past loss of earnings since the plaintiff has received his income during recuperation period.

[27] The plaintiff had an opportunity to supplement his evidence through addendum report but such opportunity has not been entirely utilised because the Industrial Psychologist failed to confirm the plaintiff's current occupational challenges with the School Principal since the plaintiff has returned to work since January 2024. The Industrial Psychologist report did not confirm the submissions made by the plaintiff's

counsel when he indicated that the plaintiff received verbal warning from the principal as a result of his misconduct. No evidence was put before this court to prove that the plaintiff is not coping with the current duties as a teacher since his return in January 2024. No evidence from the employer to confirm that the plaintiff is working on his sympathy.

[28] The court has considered that the plaintiff is a government employee and the risk of dismissal is not equal as in private sector and that even if the plaintiff may be dismissed as a result of the injuries, he will be compensated in terms of the government employment policy. The plaintiff is not going to have a total loss of his future earnings. The method used in the above actuarial calculation did not consider the government policies in a situation where the employee may lose employment as a result of medical incapacity.

[29] The court finds that the plaintiff should be compensated by an application of spread of 35% as a future loss of his earning, calculated as follows;

	PRE-ACCIDENT	**POST-ACCIDENT**	**LOSS**
FUTURE INCOME	R 15 448 181	R 15 448 181	
SPREAD OF 35%	15%	50%	
	R 2 317 227	R 7 724 090	
	R 13 130 954	R 7 724 090	R 5 406 863

[30] In the circumstances, I find that the appropriate amount to be awarded to the plaintiff in respect of the future loss of earnings capacity is in the sum of **R 5 406 863**, minus **40 % apportionment** to be applied. The amount of **R 3 244 118** to be awarded to the plaintiff for his future loss of earnings.

GENERAL DAMAGES:

[31] The defendant has sent a correspondence letter on the 09th May 2024, they acknowledged that the plaintiff sustained serious injuries and accepted that the plaintiff qualifies for the compensation for general damages. This court should proceed to deal with the issues of general damages

[32] Moseneke DCJ in *Van der Merwe v Road Accident Fund and Another*[6] stated that,

> "*non-patrimonial damages, which also bear the name of general damages, are utilized to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include "pain and suffering", "disfigurement", and "loss of amenities of life."*"

[33] *Sandler v Wholesale Coal Supplies* Ltd[7] where the court held that;

> "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case".

[34] The plaintiff referred the court in the unreported case of *Kruger v Road Accident Fund*[8]**,** the plaintiff suffered a skull fracture which resulted in a moderate to severe traumatic brain injury resulting in deficits in his neuropsychiatric, neuro-

[6] (CCT48/05) [2006] ZACC 4
[7] 1941 AD 194 at 199
[8] (27383/2009) [2022] ZAGPPHC 73 (14 February 2022)

behavioral and neuro-psychological functions. He also suffered injuries to his cervical and lumber spine. Kruger experienced drastic personality changes as he was aggressive and anti-social. The court awarded R 1 400 000.00 for general damages, which is equivalent to R 1 474 000.00.

[35] The plaintiff further referred to the case of Nsele v Road Accident Fund[9] a thirty-four (34) years old male was involved, as a pedestrian, in a motor vehicle accident. Nsele suffered a moderate to severe traumatic brain injury that diffuse in nature. Nsele also suffered a femur fracture and several lacerations on his legs and facial area and he was awarded an amount of R 1 100 000.00 for general damages which translates to R 1 143 000.00 in 2024.

[36] The plaintiff further referred the Court to the matter of *Torres v Road Accident Fund*[10] the plaintiff was awarded an amount of R 600 000 in general damages in circumstances where the plaintiff sustained a head injury with sequelae of post-traumatic stress disorder and headaches. The amount translates to a figure of R 1 538 000.00 in 2023 as per Koch.

[37] The Plaintiff submitted that the amount of **R 1 400 000.00** is fair and reasonable to compensate the Plaintiff.

[38] The Court in deciding a fair compensation for general damages, has considered the plaintiff's injuries as discussed in the above respective experts' medical reports and guided by the case laws referred above by the plaintiff. The court finds that the amount of **R 1 300 000.00** is reasonable to compensate the plaintiff. After consideration of 40 % apportionment the plaintiff is awarded the amount of **R 780 000.00** for general damages.

[39] The Court shall not deviate from the general rule that the cost shall follow the

[9] (70447/2019) [2021] ZAGPPHC 455 (13 July 2021)
[10] 2007 (6) QOD A4-1 (GCS)

successful party.

ORDER

[40] In the circumstances, the following is the Order of this Court:

1. The defendant is held liable to compensate the plaintiff 60% for his proven damages arising out of a motor vehicle collision that occurred on the 03 September 2020.

2. The defendant shall pay the plaintiff the sum of **R 3 244 118** (Three Million, Two Hundred and Forty-Four Thousand, One Hundred and Eighteen Rands) in respect of the future loss of earnings.

3. The defendant shall pay the amount of **R 780 000,00** (Seven hundred and Eighty Thousand Rands) in respect of the general damages.

4. The defendant shall furnish the plaintiff with an undertaking in terms of section 17 (4) (a) of Act 56 of 1996, wherein the defendant undertakes to pay 60% of the costs resulting from the motor vehicle accident which occurred on the 03 September 2020. The defendant shall furnish the abovementioned undertaking within 30 days from the date of receipt of this court order.

5. The Amount in paragraph 2 and 3 above shall be paid into following Bank Accounts;

NAME OF BANK: STANDARD BANK
ACCOUNT HOLDER: TK MACHITELE ATTORNEYS
TYPE OF ACCOUNT: TRUST CHEQUE ACCOUNT
ACCOUNT NO: 0[…]
BRANCH CODE: 051001

6. The defendant shall be liable to pay interest on the aforesaid amount's *tempore morae* at the rate of 7% per annum from 180 days after the date of this order to date of the payment.

7. The defendant shall pay the plaintiff 's taxed or agreed party and party costs until the date of this order including costs of a counsel scale B.

8. The costs consequently in the preparation of and obtaining the medico legal and actuary reports that were served on or provided to the defendant.

9. The reasonable taxable preparation, qualifying and reservation fees, if any of the plaintiff's experts for trial of whom notice was given to the defendant.

10. The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the plaintiff for attending the medico legal examination, subject to the discretion of the taxing master.

11. The reasonable taxable costs of traveling, subsistence, accommodation costs of the plaintiff for attending court.

12. The defendant shall be liable to pay interest on the amount of the Plaintiff's costs of suit, as taxed or agreed, at 7 % per annum from 14 (fourteen days) of the allocatur of the taxing master or the date of the agreement, whichever applies, to date of payment.

E MASHAMBA

ACTING JUDGE OF THE HIGH COURT,

POLOKWANE; LIMPOPO DIVISION

APPEARANCES

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FOR THE DEFENDANT	**: NO APPEARANCE**
INSTRUCTED BY:	
DATE OF HEARING	**: 24th June 2024**
DATE OF JUDGEMENT	**: 05 September 2024**