REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:1893/2023

(1) **REPORTABLE: ~~YES~~ / NO**
(2) **OF INTEREST TO THE JUDGES: ~~YES~~ / NO**
(3) **REVISED.**

Signature ……[redacted]

Date: **22 OCTOBER 2022**

In the matter between:

MARIPA MALOSE PHILLIMON **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MONENE AJ

[1] On 16 October 2021 the plaintiff, then a 41-year-old man, was a passenger in a motor vehicle it was involved in a motor vehicle accident arising from which he, in the main sustained a left *scapula* fracture, an injury accounted for in the uncontested evidence of Dr M N Kgoedi, the Orthopaedic surgeon.

[2] Consequent upon the plaintiff instituting action proceedings against the defendant the defendant filed a plea which was prefixed by a special plea of premature issuance of summons and unenforceability.

[3] Earlier, that is, prior the matter was set down the plaintiff had per consequential effects of an order of Kganyago J dated 20 March 2024 been deemed to qualify for general damages, it being so that the defendant had, despite that court order calling on it to make a determination on the seriousness of the plaintiff's injuries laid possum, thus effectuating the deeming parts of the order. Hence this matter proceeded before me on merits, general damages and loss of earnings with the defendant having, save for the special plea, offered absolutely no defense to the plaintiff's claim characteristically filling no expert reports and leading no evidence to assist with the determinations to be made in this matter.

[4] Unlike in many other matters where the defendant consistently does not show up for trial, in this matter Mr Mafiri came on record to argue the point *in limine* as well as

to challenge, without counter evidence, the foundations of the expert evidence of the plaintiff's industrial psychologist. I shall shortly return to these two issues which were eloquently argued by Mr Mafiri, counsel for the defendant.

[5] Save for the two issues raised by Mr Mafiri the matter served before this court in default with the plaintiff praying that I determine liability, general damages and loss of earnings as they arise from the injuries sustained in the said motor vehicle collision and their sequelae.

[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). This meant that all evidence, save for that of the plaintiff's industrial psychologist as disputed by the defendant, was presented under cover of affidavit.

THE POINT IN *LIMINE*

[7] The technical point taken by the defendant as per its plea was that the plaintiff's summons was unenforceable owing to them having been issued "prematurely". The said prematurity as per the plea and address by counsel before me was that the defendant had in terms of section 24(5) of the Road Accident Fund objected to plaintiff's claim for compensation and to date that objection had not been cured.

[8] The factual foundations of the objection were that the cause of action having arisen on 16 October 2021, the plaintiff had lodged his claim on 18 August 2023 which was objected to by the defendant on 13 September 2023.

[9] I dismissed this point *in limine* and proceeded to hear the matter on the merits on account of the following considerations:

9.1 It is factually incorrect to state that the plaintiff's claim was lodged on 13 August 2023. Emblazoned on the plaintiff's lodgment notice dated 19 July 2022 is the date stamp of the defendant's lodgment letter with a clear date of lodgment being 26 July 2022.

9.2 In terms of section 24(5) of the Road Accident Fund Act 56 of 1996 as amended the defendant had 60 days from date of lodgment to register an objection. The objection date of 13 September 2023 was made more than a year after the claim was lodged making the objection by the defendant itself an unenforceable legal curiosity.

9.3 Furthermore, at rule 37 conference at least as evidenced by the pre-trial minute which *ex facie* was attended by Mr Mafiri himself; the issue of the special plea was not reflected upon with the defendant recording itself to have suffered no prejudice. I would have expected the defendant to, at the pre-trial conference, magnify the alleged pre-maturity of the summons as highly prejudicial and deserving of being noted. This was not done and this, to me, suggests an abandonment of the special plea. However, even if I be wrong in inferring abandonment of the special plea, it is clear that simply on the factual basis of when lodgment was done as against the objection notice, the point *in limine*, is a none-starter.

9.4 Additional to all the above on this special plea is this court's general lack of appetite to uphold overly technical points which tend to be merely dilatory and circuitous stratagems in the extreme. Clearly, the intention of the defendant in arguing that there is technically no summons before me is to push towards the plaintiff having to issue new summons to which it will then most probably plead most prescription. This will then see the matter recycled with technicalities around whether the first summons interrupted prescription or not. In the meantime, the merits are ignored and put on the backburner as a usually recalcitrant litigant not itself known for strict compliance with prescripts like the defendant in casu calls out a plaintiff for non-compliance. Such legal gymnastics and ringside sideshow litigation sparring are, despite often being preferred by legal practitioners as some form of masterful erudite display, in my view, generally not in the interests of justice and should generally be discouraged. Where disputes are placed before a court of law it is the determination of the core of those disputes which must, where humanly possible, be prioritized and focused on and not the unhelpful escapist kicking of the can down the road. At any rate I do not understand the legislature in providing for an objection route in section 24 of the Act to have intended to put the Fund in the driving seat of the determination of when lodgment and summons are deemed acceptable or not. The Fund holds no special position than any other litigant before court.

LIABILITY

[10] To prove liability the plaintiff relied on his 19(f)-affidavit incorporating the police accident report both of which prove conclusively that he was a passenger in one of the motor vehicles which collied on 16 October 2021.

[11] The defendant did not lead any evidence to counter the plaintiff's version. I have no reason to doubt the uncontested evidence of the plaintiff as to liability and accordingly accept it.

[12] The proverbial one percent negligence needing to be proven by a passenger plaintiff has been proven and there being no shred of evidence to gainsay the plaintiff's version that he did nothing to contribute to the causation of the accident, I am unhesitant in finding the defendant liable for 100 percent of the plaintiff's proven damages in casu.

QUANTUM (LOSS OF EARNINGS]

[13] According to the evidence of NM Ramuhulu, the occupational therapist, the plaintiff who has only a grade 11 level of education and was builder cum carpenter

cum hair dresser at the time of the accident the sequelae of the injuries suffered by the plaintiff render him a struggler in regard to performing erstwhile non-problematic motor skills such as lifting, carrying, pushing, squatting, walking and standing for long periods. These rendered him unfit to do the carpentry and building jobs and to have difficulties with the rigors of the hair dressing or barber job given the deficiencies he suffers post-morbid. And whereas he used to be capable of doing medium to very heavy jobs prior the accident, opined this expert, he can now only do, albeit with difficulty still, sedentary to light jobs.

[14] Orapeleng Oscar Sechudi, the industrial psychologist, testified *viva voce* before this court and spoke to his report in sum as follows:

14.1 The plaintiff's efficacy to perform pre-morbid jobs was negatively affected by injuries sustained in the accident and the sequelae thereof.

14.2 But for the accident the plaintiff would have continued to generate income of about R11 000.00 per month and stood a good chance of improving his income up to the upper quartile of semi-skilled workers projected at R178 000.00 per year by Robert Koch in 2021.

14.3 The plaintiff's continued generation of income post-morbid was on a very limited scale as he can only work, at a limited level still, as a barber/hairdresser given the lightness of that work as opposed to the full spectrum of his pre-morbid capacities which allowed him to be a builder and carpenter.

14.4 The plaintiff is, because his pre-morbid work capacity has been diminished, no longer a fair competitor in the open labour market.

14.5 Given the hostile economic environment of this country and given his limited educational background it is unrealistic to expect the plaintiff to get sympathetic employment anywhere.

14.6 It is more likely than not that the plaintiff may lose his tenuous current source of income as a disabled barber and become fully unemployed and unemployable.

14.7 The plaintiff's income generation capacity gloom may persist until he reaches a retirement age at 70 years.

14.8 Owing to the injuries and their sequelae the plaintiff incurred past loss of earnings deserving of compensation and will also suffer future loss of income.

[15] As I understood the cross-examination of this witness by Mr Mafiri on behalf of the defendant, the high watermark of contesting his version was that there having been no collateral information to support the plaintiff's contention that he, pre-morbid

earned R11 000.00 a month from his barber-carpenter-builder jobs, the industrial psychologist should not have relied simply on the plaintiff's say so because such information from the plaintiff was unreliable. To this the industrial psychologist replied that while he could have found good use for collateral information regarding the plaintiff's pre-accident earnings, there was nothing wrong in relying only on the plaintiff's report about how much he made per month as the plaintiff remains the primary source of information.

[16] When counsel for the defendant queried the industrial psychologist on how the plaintiff's reported earnings compared to recognized scales used to determine general income levels, the clearly competent, well-read, assured and persuasive Mr Orapeleng Oscar Sechudi replied that he had used the 2021 scale and had found the plaintiff's stated monthly income to, according to that scale, be comparable to those of semi-skilled labourers of the plaintiff's ilk, remarking further that; "You may be unskilled but earn like a semi-skilled or even a skilled worker." All this rang true in this court's ear as it resonates with its knowledge about many a semi-skilled childhood and school friends of this court who smile wider than this court on pay day.

[17] On being challenged by counsel for the defendant that the retirement age in *casu* ought to have been postulated at 65 years of age, the irrepressible Sechudi countered that it is standard to postulate the retirement age of self-employed people at 70 years as opposed to the 65 years of employed people. Asked whether at the time of the

accident the plaintiff had reached his career ceiling or not this expert witness replied that career ceilings are for employed people only and that in the context of the self-employed like the plaintiff there is no career ceiling.

[18] This court was most impressed by the industrial psychologist's clear and educative evidence and even post cross-examination found his postulations and reasoning behind them unassailable.

[19] Armed with the industrial psychologist' report Koch Consulting Actuaries computed a total loss of earnings at R1 716 061.00 comprised of past loss of earnings at R213 651.00 and R1 502 410.00 as future loss of earnings. This was arrived at having factored in 5 percent pre-morbid and 5 percent post morbid contingencies on past loss and 20 percent pre-morbid and 15 percent post-morbid contingencies on future loss of earnings.

[20] 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, **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."

[21] This court has previously, in the unreported matter of **Makgoba Malesela Freddy and Road Accident Fund (2121/2023) out of this division and heard on 22 May 2024 and delivered on 28 August 2024,** made the following remarks by which it still stands:

"*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 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."*

[22] I see no reason not to accept the evidence of the industrial psychologist which having been informed by the reports of the Orthopaedic surgeon and the occupational therapist formed the basis of the actuarial calculations. Equally I must accept the actuarial computations arrived at by the experts.

[23] It being trite that there are no fixed rules regarding the determination of general contingencies and there being, in my view, no illogical basis nor manifestly out of syn with established practice on contingency computation in the actuaries' report and further regard being had to the current uncertain situation regarding the plaintiff's employment fortunes against the unknown variables such as life expectancy and national economic fortunes, I find no fault with the contingencies applied by the actuary.

[24] Accordingly, I am inclined to award the plaintiff total loss of earnings at R1 716 061.00.

QUANTUM (GENERAL DAMAGES)

[25] As already alluded to *supra* this court is clothed with jurisdiction to determine general damages, that is absent a determination on the seriousness of the offence by the defendant, because the plaintiff previously obtained an order dated 20 March 2024 per Kganyago J of this division which order read inter alia that, ”The respondent is ordered to make a decision on whether the Plaintiff's injuries are serious in light of the RAF4 form reports by Dr MN Kgoedi, failing which the Applicant's injuries are deemed to be serious and the Applicant is deemed to qualify for general damages”. The deeming provision of this order kicks in because the defendant has not made the decision on the seriousness of the injuries as ordered.

[26] I am alive to Mr Mafiri's submissions to the effect that the defendant intends to appeal that order previously made by Kganyago J but without any process served towards or pursuant to an appeal, the defendant's “intentions to appeal” are of no moment to me as they carry no force of law compared to a court order which must be complied with until lawfully set aside.

[27] The Supreme Court of Appeal in De Jongh v Du Pisane [2004] 2 All SA 565(SCA) at 682I stated that fairness is achieved if an award is made consistent with previous awards in matters of a similar nature. The same court in Road Accident Fund v Marunga 2003(5) SA 164 SCA at 169 E-F stated this principle further when it

remarked that previous comparable awards adjusted to reflect current values are a key consideration in ensuring reasonability and fairness of general damages awards. Carrying through this principle, I was ably referred to the following guiding decisions by the plaintiff's counsel:

27.1 ***Silombo v Road Accident Fund (3062/2019) [2022] ZAMPMBHC 81(24 October 2022)*** where a plaintiff who had suffered a right clavicle fracture was awarded general damages of R 425 000.00 in 2022 which when given a 2024 value is about R473 000.00.

27.2 ***Mlalandle v Road Accident Fund (1496/2007) [2010] ZAECGHC 124(17 December 2010)*** where fracture of the right scapula blade plus three-ribs fracture and partial paralysis of an arm attracted a general damages award of R325 000.00 in 2010 amounts in current value to R669 000.00 according to the 2024 Quantum Yearbook.

[28] On the strength of the above, Mr Magagane counsel for the plaintiff submitted that a fair and reasonable general damages award in *casu* would be R450 000.00.

[29] Given the fact of the fracture of the scapula as testified to the orthopaedic surgeon and already alluded to *supra* and the debilitating sequalae of continuous shoulder pain and inadequate endurance and further regard being had to the fact that, in my view, both matters referred to as comparators the injuries and sequelae were more

pronounced than in casu, I find that a proper general damages award would be R400 000.00.

[30] In all the afore going premises, I make the following order:

30.1 The defendant is liable for 100 percent of the plaintiff's damages arising from injuries and sequelae of the accident on 16 October 2021.

30.2 The defendant shall pay the plaintiff a total sum of R2 116 061.00 (**TWO MILLION ONE HUNDRED AND SIXTEEN THOUSAND FOUR HUNDRED AND SIXTY-ONE RANDS ONLY**) in respect of general damages and total loss of earnings being damages suffered by the plaintiff in relation to the motor vehicle accident in *casu* which occurred 16 October 2021.

30.3 The amount in order number 30.2 above shall, within 180 days from date of this order, be paid by direct transfer into the trust account the details of which shall be nominated by the Plaintiff's attorneys of record within 14 days of this court order.

30.4 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.

30.5 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.

30.6 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.

[redacted]

MALOSE.S. MONENE

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	*:12 July 2024*
Judgement delivered on	*: 22 October 2024*
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