REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:2301/2021

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

Signature …………………….

Date…………………….

In the matter between:

EMMANUEL KIRI KGATLE **PLAINTIFF**

And

ROAD ACCIDENT FUND. **DEFENDANT**

JUDGMENT

MONENE AJ

INTRODUCTION

[1] The plaintiff, 51-year-old legal practitioner instituted action proceedings against the defendant for damages arising from a motor vehicle accident which occurred on 8 December 2019. The plaintiff was a driver of a motor vehicle at the time of the accident and according to his ultimately uncontested version he sustained injuries as he collided with another motor vehicle driven by the insured driver on the R101 road between Polokwane and Mokopane.

[2] The defendant which initially defended the matter up to the point of filing a plea, folded on 29 May 2023 when before Kganyago J it conceded 100 percent liability in favour of the plaintiff and accepted to pay an interim payment of R650 000.00 to the plaintiff.

[3] As regards quantum the defendant did not really defend this action at all leading to the plaintiff approaching this court on default and seeking to be heard per cover of affidavit in terms of uniform rule 38(2).

[4] It being now trite that the jurisdiction of this court is unfortunately as per precedence hampered by the defendant's failure to make an election on the seriousness of the injuries in casu, what stands to be determined before this court the is plaintiff's loss of earnings with general damages having to be postponed sine die. A further determination to be made is whether the defendant should be ordered to, if it can be done in law, make an undertaking for future medical care in terms of section 17(4)(a) of Act 56 of 1996.

LOSS OF EARNINGS

[5] Under cover of affidavit the plaintiff adduced in sum the following uncontested evidence:

> [5.1] The orthopedic surgeon, Dr TT Rachoene recorded the key injuries suffered by the plaintiff in the accident as a right femur fracture and a Montagia fracture which was explained as a right proximal ulna fracture with radial head dislocation. This witness testified further that the plaintiff has a whole-body impairment of 16 percent and that he had reached the ceiling of his healing or possible medical improvement, meaning that whatever sequelae of the injuries the plaintiff has can only be managed and not cured.

[5.2] Dr Akhona Mazwi the neurosurgeon's evidence was to the effect that the plaintiff had, in the accident, picked up a mild head injury which resulted in difficulty with concentration, recurrent headaches, significant long term mental disturbances and poor memory. This expert opined further that arising from the accident the plaintiff significant long term mental disturbances and permanent serious disfigurement. Dr Mazwi emphasized his findings as follows:

> "*The head injury is a direct result of the accident. The memory disturbance and poor concentration are due to the head injury…The claimant has significant mental disturbance, and it is fair to compensate the claimant. In conclusion, the claimant should be compensated for general damages, future treatment and loss of earning capacity."*

[5.3] Ms Lebogang Phildah Selahle, a clinical psychologist, opined that the plaintiff falls within moderate traumatic brain injury qualifying him to be moderately disabled and telling are her following words which are taken verbatim from her report:

> "…*Emmanuel met criteria for significant long term mental and significant long term disturbance as per RAF 4…"*

[5.4] The occupational therapist, Ms Phinecia Pale an occupational therapist, observed that not only is the plaintiff heavily reliant on pain medication to relieve recurrent headaches and lower back pain but he had stayed away from work for eight months post the accident because of the injuries sustained in the accident and their sequelae. Classifying the plaintiff as a skilled worker in the category of medium physical demands, this witness opined that the job analysis according to Ergo science evaluation table indicated that the plaintiff is unable to cope with some of the performance tasks for a legal practitioner in the open labour market and mainstream skilled employment. Ms. Pale put her key expert determinations, inter alia, in the following words:

"*Should he lose the current job he will struggle to cope with employment that demands constant standing. His job is physically and cognitively demanding, therefore injuries sustained put him at risk of being unable to perform a job that he has qualifications for…He will also struggle with concentration, problem solving and attention due to constant headache. His constant headache will also affect him negatively when he has to study client files when preparing for court… In this regard, Mr Kgatle presents with memory impairments. The writer further notes in this regard, that his ability to manage his business has in all likelihood been compromised as a result of his outlined deficits, he will in all likelihood remain a vulnerable individual in the open labour market.*"

[5.6] The industrial psychologist, Zaheer Fakir, who observed that the plaintiff, a legal practitioner who at the time of the accident was employed on a short-term contract as an Acting Magistrate went on to give the following opinions:

5.6.1 Although the plaintiff continues to work as an attorney after his Acting Magistrate contract expired, he struggles at the job owing to deficits already alluded to above and would struggle to secure employment should his practice fold owing to his incapacities.

5.6.2 The accident has left him as a vulnerable worker in the open labour market.

5.6.3 But for the accident the plaintiff would have continued in his capacity as a magistrate or attorney making a progressively increasing income as dictated by inflationary increases until he reached retirement age at 65.

5.6.4 A higher than normal contingency had to be applied to address the plaintiff's increased vulnerability.

5.6.5 At the time of the accident in 2019 he was earning a monthly Acting Magistrate salary of R56 679.52 which translated to R680 154 .00 per annum and was in 2023 earning R15 000.00 per month or R180 000.00 per annum as an attorney.

[5.7] Informed in the main by the industrial psychologist's report, Tsebo Actuaries, postulated a total future loss of earnings at R4 685 446.00 having factored contingencies at pre- and post-morbid past loss at 5 percent and 15 percent overall for future loss of earnings.

[6] Although I was referred to several authority by counsel for the plaintiff on preferability of computation being better informed by science based actuarial calculations as opposed to judicial guesswork, which authority I acknowledge and agree with, the go to approach in loss of earnings computation, forever preferred by this court, was long ago outlined in ***Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F|("Bailie")*** in the following words:

> "*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 y way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.*"

[7] In ***Prince v Road Accident Fund(ca143/2017) [2018] ZAECGHC 20(20 March 2018)*** the full court cautioned courts never to ignore loss of earnings computations so long as those computations are having an evidential basis.

[8] This court has as a point of departure, no appetite to deviate from actuarial computations in this matter seeing that they are premised on the uncontroverted evidence of preceding experts such as the Orthopaedic surgeon, the neurosurgeon, the occupational therapist and the industrial psychologist whose evidence was reflected on in sum supra. I am, in my disinclination to plunge into the unknown world of speculation, indeed counseled as called on to by the plaintiff in his written submissions by ***Mashaba v RAF 4 All SA 384(T)(2 March 2006) at paras 49 to 56*** where in general actuarially computed amounts were encouraged over lump sum determination with lump sum judicially determined amounts being the odd exception

[9] Furthermore, having regard to the facts and expert opinions already referred to above, particularly the plaintiff's relatively young age of 51 years now in the light of the longer than normal working life of legal practitioners and the probably more true than not true reality that the plaintiff will not survive as a legal practitioner for long regard being had to the cognitive sequelae of the injuries such as poor memory, poor concentration and recurring headaches all against the backdrop of a very high unemployment rate in this country more likely to be faced by a plaintiff lacking in alternatives to what he studied for, I am persuaded that the contingency percentages for past and future loss of earnings factored in by the actuaries as already alluded to above are fair and reasonable. Indeed, I find those contingencies to accord with ***Van der Plaats v Southern African Mutual Fire and General Insurance Co 1980(3) SA 105(A) 114-115*** which a long time ago spelt out that contingency deductions must allow for the possibility that the plaintiff may have less than normal expectations of life and may experience periods of unemployment flowing from accident sequelae and must be seen within the prism of prevailing economic conditions.

[10] I am persuaded by the well-reasoned uncontroverted expert evidence led under cover of affidavit in terms of uniform rule 38(2) and see no reason to deviate an inch therefrom. That takes me to the actuarial scientists computed total loss of earnings of R4 685 446.00 from which I must subtract the interim payment of R650 000.00 ordered in favour of the plaintiff on 29 May 2023.

FUTURE MEDICAL EXPENSES

[11] According to the Orthopaedic surgeon the plaintiff will going forward need physiotherapy treatment and pain medication in addition to possible surgical treatment.

[12] The clinical psychologist, Mrs. Ace Dede Selahle stated as follows, about the plaintiff, in her report:

> "*Unique rehabilitation needs of a person with moderate traumatic brain injury may not be fully met in acute care, it is important that treatment continues for the rest of his life.*"

[13] The neurosurgeon recommended, in addition to compensation, that the plaintiff must be afforded future treatment.

[14] In the premises I find that a case for future medical care undertaking has been made and will, reservations this court on its availability and efficacy notwithstanding, because of precedence, be ordered.

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

[15.1] The defendant shall pay an amount R 4 035 446.00(**FOUR MILLION THIRTY-FIVE THOUSAND FOUR HUNDRED AND FOURTY SIX RANDS ONLY**) in respect of loss of earnings.

[15.2] The said amount shall, within 180 days of this court order being granted, be paid by direct transfer into an attorneys' trust account nominated by the plaintiff's attorneys within 14 days of this court order being granted.

[15.3] The defendant shall pay the plaintiff's taxed or agreed to party and party costs on a high court scale which costs shall include the costs attendant to obtaining expert reports and the costs of counsel on scale B

[15.4] Should the defendant fail to pay the amount in 15.1 above within the 180 days and/or the agreed to or taxed costs within 30 days of such agreement or taxation, the plaintiff shall be entitled to recover interest thereon at the prescribed rate of interest from the date of mora to date of final payment.

[15.5] The defendant shall furnish the plaintiff with an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 within 60 days of this order being granted.

[15.6] The issue of general damages is postponed *sine die*.

MALOSE S MONENE

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on *: 24 June 2024*

Judgment delivered on	*: 24 October 2024*
For the Plaintiff	*: Adv. M D Matshethe*
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For the Defendant	*: No appearance*