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

CASE NO:235/2017

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

Signature ……………………

Date:

In the matter between:

BOSHOMANE MACHUENE KENETH **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MONENE AJ

INTRODUCTION

[1] On 22 August 2008 the plaintiff, a major male former school principal, was a passenger in a motor vehicle when the motor vehicle driven along the N1 road ploughed into two cows and overturned.

[2] Upon receipt of medical attention the plaintiff was determined to have suffered a blunt chest injury, knee injury, and head injury.

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

[4] The defendant who had initially raised a special plea of prescription as part of a bare denial plea and later withdrew that special plea per court before Muller J dated 7 September 2017 offered absolutely no defense to the plaintiff's claim having failed to file any expert reports and failing to show up for trial despite being properly served with a set down.

[5] The matter served before this court in default with the plaintiff praying that I determine the question of liability, the loss of earnings and the need for the defendant to be ordered regarding 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 accident. General damages fell to be postponed sine die it being so that this court's jurisdiction thereon was ousted by the precedence-imposed question of the seriousness of the injuries having neither been conceded by the defendant nor ordered by the court in terms of regulation 3 of the regulations of 2008 promulgated in terms of the Act.

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

<u>MERITS</u>

[7] In ***Groenewald v Road Accident Fund (74920/2014)[2017] ZAGPPHC 879(5 October 2017)*** at para 3, Mavundla J stated the following:

> "It *is trite that the plaintiff, as a passenger claimant, need to prove only 1% negligence on the part of the driver in order to succeed with her claim against the defendant…"*

[8] In the unreported judgement of ***Mukansi v Road Accident Fund (22/2013) [2024] ZALMPPHC 101(3 September 2024)*** at paragraph 8 this court made the following remarks which I find apt in casu as well:

> *"I struggle to fathom why negligence on the part of an insured driver is, in passenger claims, sometimes treated as some brainteaser because, save for where the passenger somehow took over or hijacked or interfered with the act of a driver by perhaps contesting over control of the steering wheel of a motor vehicle or the acceleration, clutching or braking system or perhaps frustrating the driving function in any manner, there is simply no way a passenger can be liable for a motor vehicle accident."*

[9] *In casu* there is nothing to gainsay the following:

9.1 That the plaintiff was a mere passenger in the motor vehicle which overturned upon hitting two cows on the road, overturned and fatally wounded the driver.

9.1 That if the driver had kept a proper lookout and/or driven slowly he would have avoided driving into the cows.

9.3 That the plaintiff did not and could not have contributed in any manner in the causation of the accident.

9.4 That according to the pre-trial minute between the parties the defendant the defendant, apparently unaware of a court order wherein it had withdrawn its special plea of prescription, had undertaken to tender a liability concession in favour of the plaintiff the existence of the withdrawal order was brought to the defendant's legal representatives.

[10] The plaintiff's version on liability is unassailable more so because it was not opposed by any evidence by the defendant who was virtually a no-show. The proverbial one percent negligence on the part of the insured driver is, in my view, sufficiently proven.

[11] In the premises, I find that the defendant is hundred percent liable for the plaintiff's proven damages.

LOSS OF EARNINGS

[12] As already alluded to supra the main take homes as to the injuries suffered by the plaintiff in the accident were blunt chest, knee and head injuries as testified to under cover of affidavit by Dr L D Ramushu, an orthopedic surgeon who was testifying for the plaintiff. The sequelae of those injuries were recorded as left knee pains, an inability to stand and walk for long as well as an inability to carry heavy stuff. The orthopedic surgeon further opined that the plaintiff had suffered serious long-term impairment or loss of body function, had reached maximum medical improvement and had a Whole Person Impairment of 14 percent.

[13] The neurosurgeon, Dr A Mazwi opined that the plaintiff had a mild head injury, brief loss of consciousness, amnesia and severe long-term behavioral disturbance and disorder.

[14] Mr Stephen Molepo the clinical psychologist testified that while the plaintiff presented with intact auditory memory, he was symptomatic of emotional adjustment disorders opining in that regard as follows:

> "*The clinical picture emerging from the results of his clinical and neuropsychological assessment is consistent with that of depressive disorder, somatic symptoms disorders, as well as adjustment disorders. There were indications of mild neuropsychological difficulties…"*

[15] The occupational therapist, Ms. Sarah Marule, observed that the plaintiff could post-morbid no longer be able to perform his pre-morbid duties as a school principal owing to pain and inability to walk and stand for long. He had, it was observed, been forced into early retirement by the sequelae of the injuries he sustained in the motor vehicle accident. It was stated further by this witness that but for the accident the plaintiff would not have stopped working.

[16] T Maitin, the industrial psychologist's expert contribution to the evidence was that with the help of collateral information from the plaintiff's immediate supervisor, the circuit manager of the Capricorn North District, it was determined that after the accident the limping and forever sickly plaintiff was incapable of coping with the demands of his job as a school principal. This expert observed that at the time of the accident the plaintiff was 45 years of age earning an annual salary of R214 578.00 which would in the expert witness' opinion have to R476 011.25 by December 2013 and to R521 241.00 in December 2022 which would have been his retirement age at age 60 years. This witness determined that owing to having been forced into early retirement by the sequelae of the injuries sustained in the motor vehicle accident the plaintiff loss of earnings both in the past and in the future.

[17] Relying heavily on the industrial psychologist's report Tsebo Actuaries postulated a net past loss at R1 429 388.00 and a future loss at R1 612 047.00 having factored contingencies at 5 percent uninjured and 2 percent uninjured for past loss and 15 to 35 percent for future loss. This resulted in a possible award of R3 041 435.00.

[18] 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 very from the strongly probable to the speculative.*"

[19] Layman as I am to actuarial computations, I have no intention of blindly plunging into the dark unknown world of speculation when at my disposal I have what I consider to be competently reasoned expert reports, particularly by the neurosurgeon, industrial psychologist and actuarial scientists.

[20] I cannot fault the expert evidence led before me in any manner and readily accept that evidence without any reservations.

[21] What remains for me is to determine whether in my discretion, contingencies as applied by the actuarial scientists are, in the circumstances of the case, fair, it being trite that the factoring in of a contingency percentage is purely a discretion of the court.

[22] Given the fact that post the accident the plaintiff was unable to work as a principal or to work at all and was forced to dig into his pensions earlier than expected and further that at age 45 when the accident occurred he was not really a youngster, as well as the life expectancy rate which is not necessarily at post-retirement even for those who do not get involved in any accidents and therefrom become incapacitated, and the

fact that post the accident in 2018 the plaintiff did continue working with a normal salary up to 2013,I find that the contingencies already applied are fair and just.

[23] However, I cannot order the amount computed by the actuarial scientists as is even though I was per evidence persuaded to order it. My hands are tied. The pleaded amount in the plaintiff's particulars of claim regarding loss of earnings is R 2000 000.00 and it falls short of the amount led into evidence. There has been no amendment of the particulars of claim, either through the formal rule 28 route or informally from the bar. Parties are, as far as I know, bound to their pleadings. They cannot plead a case at a particular amount and nonchalantly prove another amount, particularly a higher one at trial. With hands firmly handcuffed behind my back by the plaintiff I can, in the circumstances, order only up to what was pleaded. To this amount or to whatever loss of earnings award I make, counsel for the defendant argued that I should deduct an amount of R300 000.00 allegedly received by the plaintiff ostensibly as a lump sum pension payout upon his early retirement. He was making this argument as he put it, on the plaintiff's own papers and reports and arguing that the industrial psychologist and the actuary ought to have factored that amount into deductibles from the loss of earnings. I was not persuaded by this submission at all not only because the argument was some incongruent attempt at arguing the collateral source rule but because that amount was not proven by the defendant and could not because the defendant did not lead any evidence before me.

FUTURE MEDICAL TREATMENT

[24] While it is true that given the injuries suffered by the plaintiff he may in future need medical care, I consider the arguably liberal compensation award for a pensioner granted for loss of earnings and the fact that the plaintiff is already receiving pension to be sufficient for him attend to his medical needs in a manner he would have been probably medically insured during his employment as a senior educator.

[25] Accordingly I deem it not necessary for me to order anything towards an undertaking, an order which, although I have seen courts, including this one order routinely, is, in my view, a curiosity given the applicable legal instruments in these RAF matters.

[26] In those premises I am disinclined to order an undertaking for future medical care.

ORDER

[27] Resultantly, I make the following order:

> [27.1] The defendant is liable for 100% of the plaintiff's proven damages arising from the injuries and sequelae flowing from the motor vehicle accident of 22 August 2008.
>
> [27.2] The defendant shall pay the plaintiff a total sum of R2 000 000 .00 (**TWO MILLION RANDS ONLY**) in respect of the total loss of earnings suffered by the plaintiff in relation to the motor vehicle accident in *casu.*
>
> [27.3] The amount in order number 26.2 above shall, within 180 days from date of this order, be paid by direct transfer into the trust account of the plaintiff's attorneys of record the details of which must be provided to the Defendant within 14 days of this order being granted.
>
> [27.4] 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.
>
> [27.5] 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.

[27.6] 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 failing which interest at the prescribed rate shall commence to run until date of payment.

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

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

APPEARANCES

Heard on	*: 21 June 2024*
Judgement delivered on	*: 24 October 2024*
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