REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:3098/2022

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

Signature ....[redacted]....

Date: 08 November 2024

In the matter between:

MASENYA WILLIAM ATTI **PLAINTIFF**

And

ROAD ACCIDENT FUND. **DEFENDANT**

JUDGMENT

MONENE AJ

[1] The plaintiff, a 29-year-old unemployed man, instituted action proceedings against the defendant for damages arising from a motor vehicle accident which occurred on 11 March 2021. The plaintiff was a passenger in a motor vehicle at the time of the accident.

[2] The defendant who, as is now custom, failed to defend the action, formally conceded merits on 10 October 2023 where it admitted 100 percent liability for the plaintiff's proven damages. The seriousness of the plaintiff's injuries having not been conceded by the defendant and thus ousting this court's jurisdiction on general damages, what remains to be determined is the plaintiff's loss of earnings.

[3] To prosecute his undefended claim for loss of earnings the plaintiff sought this court's leave to invoke uniform rule 38(2) and thus proceed to lead evidence under cover of affidavit. Leave was granted as sought by this court.

[4] The plaintiff then adduced the following uncontested evidence in brief:

[4.1] Regarding the injuries suffered by the plaintiff, Dr Thabo Sefatsa, an Orthopaedic surgeon, gave evidence had a left upper limb laceration. The sequelae thereof were a painful left elbow and a deformed left hand.

[4.2] Pale Setobane, an occupational therapist, testified that she observed the plaintiff to have a 23-centimeter scar on the elbow joint and restricted left arm function. This witness noted further that the plaintiff had a grade 9 level of education and was at the time of the accident unemployed. Noting that the plaintiff had earlier done some work as a general worker on a part time basis, it was this expert's testimony that the plaintiff is now unable to cope with tasks required off a general worker, tasks such as prolonged carrying of objects. It was further opined by this expert that owing to the physical deficiencies flowing from the accident the plaintiff will until retirement find it very difficult to get employment in the open labour market.

[4.3] The industrial psychologist, Dr Zaheerah Fakir's evidence elicited the following:

4.3.1 The plaintiff would have reached a career ceiling at 45 years of age.

4.3.2 But for the accident the plaintiff would have been able to secure employment.

4.3.3 Had the accident not occurred the plaintiff would have earned up to the upper quartile of unskilled labourers.

4.3.4 The plaintiff would, but for the accident, have been employed until normal retirement age.

4.3.5 The plaintiff is post-morbid most unlikely to reach the upper quartile of unskilled labourers that he was destined for prior the accident.

4.3.6 Because the plaintiff was unemployed at the time of the accident he had suffered no past loss of earnings. However, the diminution in his earning capacity and employment prospects qualify him, even if he was unemployed at the time of the accident, to be compensated for future loss of income.

[4.4] Informed by the reports of the three experts whose evidence was reflected upon above, Itai Karidza, an actuarial scientist, postulated a net future loss of earnings at R1 209 6278.75 having factored contingencies at 15 percent for uninjured income and 35 percent for injured income.

[5] It is trite that the principle underlying our law on compensation in Road Accident Fund matters is that the plaintiff who has been harmed by the negligence of an insured driver must, as far possible, be placed by a compensation award given, in the position such a plaintiff would have, but for the injuries suffered, been. Trite as that principle is, I cannot resist the temptation to, in that regard, defer to the time-tested counsel of Rumpff J in ***Dippenaar v Shiel Insurance Co Ltd 1979(2) 904(A),*** to which I was referred by counsel for the plaintiff, which went this way:

"*In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.*"

[6] In so far as this court is concerned, the approach in assessing loss of earnings can be put no better than it was stated in **Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F** where the following was stated:

"*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] This court is not inclined to deviate from the uncontested expert evidence tendered before it, more so the actuarial computations. To so deviate I would need something better or a counterview or at least a reasoned view that the expert evidence led is irrational or otherwise not to believed for another reason. All that is lacking in casu. I thus cannot fault any of the experts in casu in any manner. In fact, I find the actuary's computations and contingency deductions of 15% and 35% to be fair and reasonable. More compelling to this court is the following paragraph from the industrial psychologist's report, on which the actuarial scientist expressly relied in his computations:

"*The writer considers that as Mr Masenya is still young and would in all likelihood attempt to secure work, most likely in the informal capacity. It is however noted that he would not cope with fulltime position and would most likely take an intermittent work that allows his rest in between. He is also highly likely to experience extended periods of unemployment. In this capacity he is unlikely to earn beyond the lower quartile of the unskilled informal category by the time he reaches age 45 years. Current scales for unskilled employees in the non-corporate sector are: R26 000-R47 000-R104 000 per annum (Quantum Yearbook,2023). He will thus suffer a loss of earnings comparable to his pre-accident earning potential* for which he should be compensated."

[8] In his heads of argument counsel for the plaintiff rather generously proposed a change of contingencies to 20 percent premorbid future loss and 35 percent post morbid future loss resulting in his submission of an amount slightly lesser than the one computed by the actuary at R1 115 998.30.

[9] On the other hand, the plaintiff's particulars of claim put a million rands as the amount claimed for loss of earnings. Them having not been amended, I am constrained by the principle that parties are bound by their pleadings to the amount in the particulars of claim, that is, my view that the higher amount postulated by the actuary is well reasoned and fair notwithstanding.

[10] According to the orthopedic surgeon's expert evidence the plaintiff will going forward need pain relief, rehabilitative treatment on his left arm and physiotherapy. That alone, in my view, militates for an order relating to an undertaking for future medical care if only to ensure that going forward the plaintiff's medical needs, as they flow from the injuries he suffered in the road accident in casu, are insured.

[11] Premised on all the above, I make the following order:

[11.1] The defendant shall be liable 100 percent for damages suffered by the plaintiff arising from the motor vehicle accident of 11 March 2021

[11.2] The defendant shall pay an amount R 1 000 000.00(**ONE MILLION RANDS ONLY**) to the plaintiff in respect of loss of earnings.

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

[11.4] 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

[11.5] Should the defendant fail to pay the amount in 11.2 above within the 180 days and/or the agreed to or taxed costs within 30 days; the plaintiff shall be entitled to recover interest thereon on the prescribed rate of interest from the date of mora to date of final payment.

[11.6] The defendant is ordered to, within 14 days of this order, furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of which all future medical expenses of the plaintiff arising from the injuries and sequalae of the accident of 11 March 2021 shall upon proof be paid by the defendant.

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

[redacted]

MALOSE S MONENE

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	*: 01 July 2024*
Judgment delivered on	*: 08 November 2024*
For the Plaintiff	*: Adv. M C Netshiendeulu*
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For the Defendant	*: No appearance*