

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 3982/2021

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED

DATE: 4/10/2024

SIGNATURE

In the matter between

PLP THIRRY

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

[1] The plaintiff claims damages from the defendant arising from bodily injuries sustained in a road accident which occurred on 15th January 2020 at or near Murchison between the insured motor vehicle driven by an unknown driver and the vehicle driven by the plaintiff.

[2] This court is called upon to determine the issue of merits and loss of earnings payable. By agreement between the parties, the determination of General Damages is postponed *sine die*.

[3] Further, by agreement between the parties, the Defendant has agreed to furnish the Plaintiff with an unlimited undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996,

[4] The court granted the application that was made by the Plaintiff at the commencement of this hearing:

4.1 that the Plaintiff's affidavit (in terms of section 19(f) of the Road Accident Fund Act, 56 of 1996), and the confirmatory affidavits of the experts obtained and filed on behalf of the Plaintiff, be accepted as evidence in terms of Rule 38(2) of the Uniform Rules of Court; and

4.2 that the expert reports and collateral information contained therein be allowed as constituting admissible hearsay both in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 and in terms of Part IV of the Civil Proceedings Evidence Act, 25 of 1965.

[5] The affidavit¹ of the Plaintiff, dated 10 June 2024 that detailed how the accident occurred was tendered as evidence. For the determination of past loss of earnings, the Plaintiff relied on the Expert Reports.² Neither the Plaintiff nor the Defendant called any witnesses to testify.

DETERMINATION ON THE MERITS

[6] The Plaintiff was involved in the accident on 15 January 2020, at or near Murchison. He was driving a Ford-Ranger motor vehicle, at a robot-controlled intersection. He had right of way as the light was green, when, an unknown driver in a Toyota Tazz motor vehicle collided with the vehicle in which the Plaintiff was travelling. As a result of this motor vehicle accident, the plaintiff suffered bodily injuries.

¹ Merits Bundle 002B28-002B29

² Expert Notices 007-1 to 007-90

[7] The Plaintiff's version remains uncontested, although it was argued on behalf of the Defendant that the court should apportion thirty percent of the liability to the Plaintiff.

[8] In *MM Dlamini v Road Accident Fund*³ at paragraph 15, it is said:

“Once a prima facie case has been made, it is for the other side to respond. Thus in *R v Jacobson & Levy*, Stratford JA stated that:

‘Prima facie evidence in its more usual sense means a prima facie proof of an issue, the burden of proving which is upon the party giving that evidence, In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges the onus,

16. The plaintiff in this case had the onus of proving negligence on the part of the insured driver on a balance of probabilities. The defendant could then refute the evidence by placing a different version, even one that is mutually destructive to the version of the plaintiff, before the court. It would then be up to the court, based on the evidence presented, to decide on a balance of probabilities which version it will accept.”

[9] In *Moloi v RAF*⁴ the court held:

“The Defendant called no witnesses to prove such contributory negligence. It follows therefore that the Plaintiff's version on the cause of the accident remained unchallenged and therefore no contributory negligence could be established by the Defendant.”

³ Unreported decision of Du Plessis AJ dated 13 March 2023 (Pretoria Gauteng Division)

⁴ (804024/2016)[2020]ZAGPPHC 87(26 March 2020) at para 8

- [10] In *hoc casu* the Defendant has not presented any evidence to the court to substantiate its submission for an award of contributory negligence. The Plaintiff needs to prove 1% negligence on the part of the insured driver, to succeed in an award of 100% liability being made against the insured driver.
- [11] The evidence in respect of how the collision occurred is uncontroverted. The Plaintiff approached the intersection to turn to the right whilst the traffic light was green in his favour. The insured driver entered the intersection and collided with his vehicle. There was nothing that he could have done to avoid such collision, In the absence of evidence to gainsay the evidence of the Plaintiff, the claim made by the Plaintiff must succeed.
- [12] Having considered the evidence before the court, in respect of the determination of the merits, it must be concluded that the accident was caused solely by the negligent driving of the insured driver. Defendant is liable to pay 100% of the proven or agreed damages incurred by the Plaintiff in the above collision.

CLAIM FOR LOSS OF EARNINGS

- [13] This court is called upon to determine the loss of earnings that the Plaintiff has incurred and will incur as a direct consequence of the injuries sustained in the accident.
- [14] The Plaintiff is 64 years old. He completed a national trade certificate (NTC3). He did a trade test in Tool and Die making. At the time of the accident the Plaintiff operated a business situated in Port Shepstone. The business manufactures various farming equipment, timber industry machines trailers for the farming and forestry industry and it does repairs of tools and machinery. The Plaintiff's son and two other people worked at the business. The Plaintiff's son attended to breakdowns and off-site work while the Plaintiff remained at the workshop where he liaised with clients, attended to quotations and administration. In addition, the Plaintiff's son did design and fabrication. The Plaintiff performed some physical work in the form of machining. The Plaintiff

did not draw a fixed salary but all his expenses were paid from the business account.

- [15] It has always been the intention of the Plaintiff to register his son as a co-owner of the business. He would have done so upon his retirement around 2023/2024. The Plaintiff continues to work at the business but his son does some of the duties that he used to do. The Plaintiff has also employed an additional person to assist with heavy duty work that he cannot do on his own. His daughter and daughter-in-law work at the business but they do not draw salaries from the business. His expenses are still paid by the business.
- [16] The nature of the injuries that the Plaintiff has suffered have been detailed in the report of Dr LF Oelofse, an Orthopaedic surgeon as an injury to the neck, injury of the lumbar spine and injury to the right hip. Dr Oelofse opines that the Plaintiff should be placed in a permanent light duty and spine-friendly working environment.
- [17] The physiotherapist, Mr C Botes, in his report states that the Plaintiff continues to work in the same capacity as before, with physical pain and limitations related to the accident. He further mentions that he is unable to carry loads while walking and that he had to employ someone to assist with heavy tasks. He is unable to climb ladders and has decreased balance and weakness caused by the right hip pain. He concludes by saying that he will need ongoing help from an employee for high intensity physical activities.
- [18] The Occupational Therapist, Ms K Nieuwoudt reports that the Plaintiff presents with the capacity to perform work of light physical demand and that he does not meet the medium physical strength demands of a tool and die maker.
- [19] In her report, Ms N Kotze, the Industrial psychologist, states that the Plaintiff did not draw a salary from the business. All his personal expenses were paid from the business account. She goes on to explain that the Plaintiff, regardless of the accident, would have made his son a partner in the business in 2023/2024. The Plaintiff's son would then have become a co-owner of the

business with whom he would have had to share the profit 50/50. Her opinion is that the Plaintiff's own net income/profit sharing derived from the business would have been reduced accordingly as all the net income would then have been divided equally between the two of them. The name of the business has been changed and the Plaintiff and his son are 50/50 shareholders/owners of the business. According to the Plaintiff, this decision was brought on earlier due to the accident. She also records that the Plaintiff was absent from work for a period of one day after the accident. He continues with his work, albeit with significant difficulty. She also confirms that he had to employ an extra employee to assist with heavier duties and that the salary paid to that employee is R4000 per month.

[20] Ms Nieuwoudt's assessment of the impact that the accident had on the Plaintiff in the carrying out of his duties and earning capacity, in summary is, that the appointment of an assistant and making his son a co-owner of the business, earlier than anticipated, affect the net income of the Plaintiff.

[21] The Plaintiff relies on an actuarial calculation contained in the report of Johan Sauer Actuaries⁵ to demonstrate his past and future loss of earnings. The report reflects the total loss of earnings to amount to R1 127 643-00.

[22] To claim loss of earnings or earning capacity, a patient must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss⁶.

[23] In the case of Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at paragraph [9] the court referred with approval to The Quantum Yearbook, by R Koch under the heading 'General contingencies', where it states that when:

“[in] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit

⁵ CaseLines 008-212 to 008-216

⁶ Rudman v Road Accident Fund 2003(SA 234) (SCA).

allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court. . . .”

- [24] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (*AA Mutual Association Ltd v Maqula* 1978(1) SA 805 (A) 812; *De Jongh v Gunther* 1975(4) SA 78 (W) 81, 83, 84D; *Goodall v President* 1978(1) SA 389 (W) 393; *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980(3) SA 105(A) 114-115A-D).
- [25] The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of *Southern Insurance Association Ltd v Bailey* **1984 1 SA 98** (A) 113H-114E , where the Court stated :

“Any enquiry into damages for loss of earning capacity is of its nature speculative... 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 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. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.”

- [26] The Defendant has not furnished any conflicting reports or calculations, to assist the court in making a determination that the Defendant considers just in the circumstances.

[27] On a conspectus of the evidence presented and upon a consideration of the actuarial calculation in respect of the loss of earnings I find that a higher contingency for future loss of earnings is justified. I have accordingly adjusted the amount to be awarded.

The award as adjusted is as follows:

Past Loss of earnings: R274 381-00

Future Loss of Earnings R663648-00 (R948069 minus 30% contingency deduction)

Total Loss of Earnings: **R938 029-00**

[28] For present purposes, and for all the foregoing reasons, the following order is made:

1. The application to tender evidence in terms of Rule 38(2) of the Uniform Rules of Court is granted.
2. The Defendant is ordered to pay 100% of the Plaintiff's proven or agreed damages.
3. The Defendant is ordered to pay the Plaintiff the sum of **R938 029-00 (NINE HUNDRED AND THIRTY-EIGHT THOUSAND AND TWENTY-NINE RAND)** in respect of loss of earnings and earning capacity.
4. The Defendant is ordered to furnish the Plaintiff with an unlimited undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996.
5. In the event of the aforesaid amounts not being paid within 180 days, the Defendant shall be liable for interest on the amount at the statutory rate, compounded.

6. The Defendant is to pay the Plaintiff's taxed or agreed costs on the scale as between party and party on the High Court scale until date of this order, including but not limited to:

i. The costs attendant upon obtaining payment of the amounts referred to in this order;

ii. The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the experts, and the costs relating to the plaintiff attending their medico legal examinations

iii. Counsels' fees

7. Payment of the capital amount shall be made without set-off or deduction directly into the trust account of the Plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Van Niekerk Attorneys	Trust Account
Bank	FIRST NATIONAL BANK
Branch Code	- 25-37-42
Account No.	- 6[...]
Reference	- F[...]

8. It is recorded that there is NO contingency fee agreement applicable herein.

9. The Defendant rejects the Plaintiff's claim for general damages and same is to be referred to The Health Professions Council of South Africa (HPCSA).

10. The remainder of the quantum is postponed sine die.

A.K. RAMLAL AJ

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 15h00 on 4 October 2024

Matter heard on: 11 July 2024

Judgment granted on: 04 October 2024

Appearances:

On behalf of the Applicant Adv. A Jansen

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On behalf of the Respondent Mr T Shivambo

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