

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **015706-2021**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
29 August 2024	[REDACTED]
DATE	SIGNATURE

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

In the matter between:

TJALE: HOSIA KGADOMONYANE

Applicant

and

ROAD ACCIDENT FUND

First Respondent

Summary: **Motor Vehicle Accident** – Compensation – Claim against Road Accident Fund – Liability of Fund

Evidence - Single witness – court under no obligation to accept such evidence – whether or not to accept evidence depend upon court's own assessment of the quality of the evidence

JUDGMENT

- [1] The plaintiff, Hosia Kgadomonyane Tjale was involved in a hit-and-run motor vehicle accident with an unidentified motor vehicle and has instituted a claim for damages against the Road Accident Fund ("*the Fund*") pursuant to and in terms of the Road Accident Fund Act, Act 56 of 1996 ("*the Act*").
- [2] The plaintiff claims the following heads of damages:
- a. future medical expenses;
 - b. future loss of income;
 - c. future loss of earning capacity; and
 - d. general damages.
- [3] The plaintiff at the hearing of this matter abandoned the claim in respect of past medical expenses by virtue of the fact that he was treated at a State Medical Facility at no material cost to him. Furthermore, the future medical expenses, by agreement between the parties are to be dealt with in terms of Section 17(4)(a) of the Act. Finally, and in relation to the issue of general damages, the parties have agreed that the Fund is to issue the plaintiff with a formal rejection letter and that this issue be referred to the Health Profession Council of South Africa for final determination by its Appeal Tribunal.
- [4] Consequently, the only remaining issues for consideration by this court are the issue of liability including a possible apportionment and future loss of earning capacity. That being said and as far as the issue of future loss of earning capacity is concerned, the defendant failed to deliver any expert reports and it does not seem that the defendant is seriously opposing this issue.

LIABILITY

- [5] On 16 December 2019 and at the intersection at Roosevelt and 20th Avenue, Alexandra, the plaintiff, a pedestrian at the time, was involved in a collision with a blue Toyota Corolla motor vehicle. As the Toyota Corolla did not stop after the

collision, the plaintiff was unable to establish the identity of its owner or driver. The plaintiff was injured in the collision.

- [6] After the collision the plaintiff was assisted by unknown bystanders who eventually transported him to a nearby clinic. At the clinic he stood in a que with other patrons and was only attended to some time after 21:00.
- [7] Initially, a plaster of *paris* was applied to the plaintiff's leg and he was instructed to return the following day, being 17 December 2019 for purposes of x-rays to be taken to establish the extent of the plaintiff's injuries. Having been x-rayed, the plaintiff was advised that the injuries were serious and that the plaintiff had to be admitted to hospital. Consequently, the plaintiff was transported to the to the Edenvale Hospital via ambulance. Upon arrival at the Edenvale Hospital, the plaintiff was advised that there were no beds available and that he had to return on 5 January 2020 for further treatment. As a consequence, the plaintiff was discharged from hospital.
- [8] The plaintiff eventually, on 5 January 2020, underwent surgery on his right ankle in terms of which 6 plate screws were inserted on a lateral aspect and 1 screw on a medial aspect of the right ankle. The plaintiff thereafter was discharged from hospital and was subsequently treated as an out-patient in terms of which he attended various physiotherapy sessions.
- [9] Section 17(1)(b) of the Act provides that:
- “The Fund ... shall... subject to any regulation made under s 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself ... caused by or arising from the driving of a motor vehicle by any person ..., if the injury ... is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle...”
- [10] The version of events is placed before court by means of the plaintiff's written statement made to the Alexandra South African Police Service, the written statement made by him pursuant to and in terms of Section 19(f) of the Act and finally by him having testified in open court. No other factual witnesses testified at the hearing. This is relevant to the credibility of the version presented as the

various versions contain a number of discrepancies. The question however is whether the discrepancies are of such nature that the court ought to reject it.

- [11] Ordinarily, the party who bears the *onus* can discharge it only if that party has adduced credible evidence, particularly where there are mutually destructive versions. Very often the assessment of the witness and the general probabilities will be decisive. In **National Employer's Generals Insurance v Jagers**¹ it was held that:

"It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutual destructive stories, it can succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and forced to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendants, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false."

- [12] Furthermore, when dealing with the evidence of a single witness, the trial judge will weigh his evidence, consider his merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are certain shortcomings or defects or contradictions in his evidence, and decide whether the version of events presented by the plaintiff are probable to be true.²

- [13] The written statement made in terms of section 19(f) of the Act contains a very short description of the relevant events. It is contained in a typed document with the plaintiff having appended his signature thereto and in paragraph 3 of the said document the following is recorded:

"On the 16th day of December 2019 and at (sic) or near 20th Avenue and Roosevelt Street, Alexandra, I was walking on the pavement when a blue Toyota Corolla with an unknown registration number travelling at excessively high speed bumped and knocked me down and I was waiting for the vehicle to pass. The unknown vehicle and/or driver did not stop at the scene of the accident."

¹ [1984] 4 All SA 622 (E) 624 – 625; 1984 (4) SA 437 (E) 440D - G.

² S v Sauls and Others 1981 (3) SA 172 (A) at 180F

[14] The written statement made to the South African police Services contains the following description:

"On Monday 16-12-2019 at about 15:30 I was walking on the pavement corner 20th Avenue and Roosevelt, Alexandra, 2090. Whilst I was about to cross the street, I saw a blue Toyota Corolla coming towards me and I waited for the vehicle to pass and while I was still waiting for the vehicle to pass the same vehicle hit me and it never stopped. The driver drove off and left me lying on the ground."

[15] The plaintiff's *viva voce* evidence, in chief and after having undergone cross-examination revealed that the collision occurred on the pavement and that the driver of the blue Toyota Corolla drove off immediately after the collision occurred.

[16] It is not clear whether the plaintiff stopped and observed prior to having crossed the street, whether he noticed the Toyota Corolla prior to having crossed the street; whether he noticed the Toyota Corolla prior to the collision; whether the vehicle collided with the plaintiff from the rear or the front. All of these issues are relevant to the issue of contributory negligence.

[17] I am not prepared to dismiss the plaintiff's evidence as not being credible this notwithstanding the clear and obvious contradictions. This is so in view of the fact that the important and relevant features of his evidence consistent in his various testimonies and unchallenged in cross-examination is the fact that the collision took place on the pavement and the driver of the Toyota Corolla drove off immediately after the collision.

[18] There are no contradictory versions presented to this court in that, as previously stated, the plaintiff was the only witness. Whether or not the plaintiff's evidence is to be accepted will depend upon the quality of the evidence. Evidence which is vague, contradictory, highly improbable or just plain irrational will not pass master. In **Siffman v Kriel**³ the court said:

"It does not follow, because evidence is not contradicted, that therefore it is true. Otherwise, the court, in cases where the defendant is in default, would be bound to accept any evidence the plaintiff might tender. A story told by the person whom the *onus* rest may be so improbable as not to discharge it."

³ 1909 TS 538

[19] This approach has been followed without exception in various subsequent judgements.⁴ As previously stated, it does not seem to be improbable and specifically in view of the fact that there is nothing to suggest that the collision took place at a location other than the referred to pavement. Equally it is not challenged or placed in dispute that the driver of the blue Toyota Corolla drove off immediately the collision. This is indicative to me as a person having realised that he was at least to some degree liable for the occurrence of the events that occurred. I am satisfied that, on a balance of probabilities that the driver of the Toyota Corolla was the cause of the collision.

[20] However, and as a direct consequence of the referred to discrepancies I am of the view that a 10% contributory negligence should be placed with the plaintiff.

FUTURE LOSS OF EARNING CAPACITY

[21] Over and above the fact that the Fund did not file any expert reports, it was agreed between the parties that there was no need for the plaintiff to call any of his expert witnesses to provide viva voce evidence. These experts include – Dr P T Kumbirai, Orthopaedic Surgeon, Katlego Mabye, Occupational Therapist, Clement Bell, Industrial Psychologist, and DT Mureriwa and ATT Ticharwa, Actuaries.

[22] The plaintiff is a 44-year-old, self-employed male. He is married with three children. He is a painter by trade which requires him to stand for prolonged periods of time including the climbing of ladders. His highest level of formal education is grade 7.

[23] The plaintiff's treatment included a clinical and radiological examination, an open reduction and internal fixation of the right ankle with plate and screws, analgesia, anti-sepsis management, physiotherapy rehabilitation and crutches. The plaintiff spend a total period of 9 days on hospital.

⁴ Katz v Bloomfield and Keith 1914 TPD 379 381; Shenker Bros b Bester [1952] 4 All SA 64 (A); 1952 (3) SA 664 (A) 670F – G; Nelson v Marich [1952] 3 All SA 161 (A); 1952 (3) SA 140 (A) 149A- D; Kentz (Pty) Ltd v Power [2002] 1 All SA 605 (W) para [15] – [20]

[24] After his recovery the plaintiff went back to his self-employment as a painter, however, he experienced the prolonged standing, walking and lifting of heavy weights exacerbating the pain experienced in his ankle. The pain, decreased his productivity.

[25] It was further concluded by the relevant experts that the pain experienced in his right ankle will limit the plaintiff's choice of occupation as occupations which require prolonged standing, walking and lifting of heavy weights will aggravate his symptoms. He will not be able to compete fairly for a position in the open labour market.

[26] The Occupational Therapist reported that the plaintiff was able to meet the physical requirements for work that requires sedentary, light to low medium types of work. Although he was able to carry loads of a light nature, it must be considered that he was in significant pain and therefore it is recommended that he only carries negligible loads to avoid causing strain on his right ankle. The plaintiff, during the Matheson Bench Test was not able to meet the physical requirements for work that requires sustained standing tolerance.

[27] The Industrial Phycologist reported that the plaintiff's work capacity has been negatively affected by the accident. The plaintiff, as self-employed painter was able to generate an income in some months in the amount of R27,000.00 prior to the accident. However, subsequent to the collision, the plaintiff has managed to secure opportunities entailing cleaning, lifting and carrying twenty litres of paints, moving furniture to clear a work space, covering the furniture and the floor and painting the walls.

[28] The actuaries reported as follows:

Loss of Earnings

Pre-Accident	Post- Accident	Loss
Past Income	505,962	359,286
Past Contingencies	(25,298)	(17,964)

Net Past Income	480,664	341,322	139,342
Future Income	4,751,949	4,337,497	
Future Contingencies (712,792)		(1,084,374)	
Net Future Income	4,039,157	3,253,123	786,034
Total Loss			925,376

[29] Applying a 15% contingency on the plaintiff's pre-accident earnings and a 25% contingency on his post-accident earnings, the plaintiff is entitled to an amount of R475,549.90 as far as and in relation to his future loss of earnings is concerned.

THE ORDER

[30] Consequently, I make the following order:

- a. The defendant is ordered to pay an amount of R475,594.90 to the plaintiff in respect of the plaintiff's past and future loss of earnings and earning capacity.
- b. The defendant is ordered to issue the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996.
- c. The defendant is ordered to issue the plaintiff with a rejection letter within a period of 10 (ten) days from date of handing down of this judgement and order and to refer the determination of the plaintiff's general damages to the Health Profession Council of South Africa.
- d. The defendant is ordered to pay the plaintiff's costs of the action, such costs to be taxed on the party and party scale.



AUCAMP S
JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on **29 August 2024***

HEARD ON:
DATE OF JUDGEMENT:

16 April 2024
29 August 2024

For the Plaintiff:

Adv T N Dzivhani
Instructed by R Malise Attorneys

For the Defendant:

Mr E M Mdlovu
Instructed by The State Attorney