

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/21839

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

4 September 2024



In the matter between:

WILSON DALISO CHAPOTELA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Mdalana-Mayisela J

[1] This is an action in terms of section 17(1) of the Road Accident Fund Act, 56 of 1996, as amended ("the Act"), brought by the plaintiff against the defendant for damages amounting to R1,085,869.00 for bodily injuries

sustained in a collision with the motor vehicle, with registration numbers HKM 138 FS on 24 December 2017 at approximately 18H05 and along Minnaar street, near Abrahamsrust, Vaalpark, Gauteng Province, at which time the plaintiff was a pedestrian.

[2] The plaintiff is suing the defendant for past and future medical and hospital expenses, general damages and future loss of earning capacity. The defendant is opposing the action and has filed two special pleas: lack of jurisdiction and non-compliance with section 17(1A) read with regulation 3 of the Act, and a plea. At the commencement of the proceedings, I was advised that the parties have agreed to separate the issues. The issues for determination are liability, future loss of earnings or earning capacity, and future medical and hospital expenses. The issue of general damages is to be postponed *sine die*.

[3] The plaintiff testified in his case and called no witnesses. He has filed the reports of orthopaedic surgeon, occupational therapist, industrial psychologist, and actuary. He has also filed the affidavits of all these experts confirming their reports. The defendant led no evidence on both the issues of liability and quantum. It admitted the plaintiff's expert reports and stated that it would argue the issue of contingencies only on quantum.

[4] It is common cause between the parties that the plaintiff was involved in a motor vehicle collision on 24 December 2017 as a result of which he sustained contusion of the right hip and open fracture- dislocation of the right talus. It is also common cause that he received medical treatment at Metsimaholo and Pelonomi hospitals. His right ankle injury was treated surgically by way of open reduction and internal fixation, and a Plaster of Paris back slab was applied. He also received conservative treatment for both injuries. In November 2018, his ankle injury became septic while in Malawi. He received a medical treatment in a hospital in Malawi. Due to sepsis and avascular necrosis of the talus, the talus was removed.

[5] The sequelae of the injuries are also common cause. He experiences pain in the right ankle and big toe daily. He is only able to walk on the forefoot. He

walks with a limp. He struggles to walk far, stand long and to climb stairs. He cannot wear formal shoes or sneakers but can only use flip-flops. The right ankle is always swollen. There are fixed 60 degrees equines of the right ankle. He walks on the metatarsal heads due to the equines. He has severe atrophy of the right calf in all muscles. The right heel is in varus. The talo-navicular joint is destroyed as well as, there is a non-existing subtalar joint. There is arthritis between the talus and cuboid.

[6] According to the parties the issues in dispute are as follows:

[6.1] Whether the insured driver was causally negligent, and if so, whether he was solely responsible for the collision or whether the collision was caused by the joint and contributory negligence of the insured driver and plaintiff;

[6.2] Whether the court should apply the contingencies of 20% or 15% to the loss of earning capacity; and

[6.3] Whether the contingencies of 7% or 7,5% should be applied to the past loss of income.

[7] I first deal with the issues of negligence and causation. It is trite that the onus rests on the plaintiff to prove the insured driver's negligence which caused the damages suffered on balance of probabilities. The plaintiff testified that on 24 December 2017 around 17h00 he was accompanying his friend to the taxi rank to take a taxi to Van der Bijl Park. They were walking in the emergency lane in Minnaar street. They were walking along the converging traffic. He was pushing his bicycle at that time. He collided with the insured motor vehicle which was approaching from behind. He sustained injuries on his right hip and right ankle as the result of the negligence of the insured driver. He did not see the insured motor vehicle before the collision, and therefore no steps were taken by him to avoid the collision. He could not recall the make of the insured motor vehicle but stated that it was green. After the collision, his bicycle landed underneath the insured motor vehicle. He heard from his friend that he also collided with the mirror of the insured motor vehicle. His friend did not testify.

[8] The defendant did not lead the evidence of the insured driver on negligence and causation, although he made an affidavit. It submitted that the court should

apply the 70/30% apportionment on liability in favour of the plaintiff in terms of the Apportionment of Damages Act, Act 34 of 1956, as amended, because the plaintiff was walking in the emergency lane and along the converging traffic. In support of this submission it relied on the case of *Gaba v Minister of Police*¹ where the court applied the apportionment of 70/30% in favour of the plaintiff because the plaintiff walked on the road with his back to the traffic, without observing vehicles from the rear and had failed to walk closer to a fence when circumstances permitted him to do so, resulting in some negligence on his part.

[9] The plaintiff submitted that the insured driver was 100% causally negligent. That the defendant has failed to plead and lead evidence showing that the state of emergency had occurred which caused the insured motor vehicle to move from its correct lane to emergency lane, resulting in the collision. In support of this submission, I was referred to the case of *Fox v Road Accident Fund*² where the court stated that '*where the defendant had in the alternative pleaded contributory negligence and an apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities*'

[10] I have considered the testimony of the plaintiff, and the submissions made by the parties on the issues of liability and causation. I agree with the view of the Court of Appeal in *Fox* case supra. However, I wish to add that, where contributory negligence is pleaded, in the absence of the evidence by the defendant establishing negligence on the part of the plaintiff, the court must exercise its discretion and apportion the damages if the plaintiff's evidence proves that he was also negligent.

[11] It is trite that no one has an absolute right of way on the public road. The plaintiff also had a duty to avoid the collision. He failed to give evidence showing that he took steps to avoid the collision. He testified that he did not see the insured motor vehicle before the collision. This version implied that he failed to

¹ 1975 (2) SA 220 (EDC).

² (A548/16) [2018] ZAGPPHC 285 (26 April 2018).

keep a proper lookout and observe the motor vehicles approaching from behind. He was walking in the emergency lane along the converging traffic. The emergency lane is not reserved for the exclusive use by the pedestrians.

[12] On the evidence presented by the plaintiff, I find that the insured driver was causally negligent, but he was not solely responsible for the collision. I also find that the collision was caused by the joint and contributory negligence of the insured driver and plaintiff. In the premises, in exercising my discretion I apportion the damages suffered by the plaintiff hereunder.

[13] I turn to deal with the issue of future loss of earnings. To succeed on a claim for future loss of earnings the plaintiff must prove on a balance of probabilities that he suffered a significant impairment giving rise to a reduction in earning capacity. There must be proof that the reduction in earning capacity gives rise to pecuniary loss.³

[14] I have referred to the undisputed injuries sustained by the plaintiff and the sequelae thereof above. For future treatment of the injuries, the orthopaedic surgeon, Dr JJ Theron suggested surgery in the form of Elongation with Achillies tendon capsulotomy and Fusion with bone graft and conservative treatment. He opined that the plaintiff has severe impairment and disability. Currently it is difficult to get a plantigrade in the plaintiff's foot, it is difficult to get fusion and he will have shortened leg, in comparison with the other leg. He may even require a permanent build-up shoe. According to Dr Theron, the plaintiff has serious long-term impairment and serious permanent disfigurement, with 43% whole person impairment due to right ankle injury.

[15] The plaintiff is 43 years old. He holds a Form 2 Malawian education equivalent to grade 9 in South Africa. He is married and has 4 children. He is a Malawian citizen and came to South Africa for work. His family lives in Malawi.

³ Rudman v Road Accident Fund 2003 (2) SA 234 SCA; Masiza v Road Accident Fund (A163/16) [2021] ZAGPJHC 94 (7 January 2021).

He lives at Vaal Park Sasolburg, Free State Province. According to his employer Anton du Plessis, he was working as gardener as well as doing maintenance and domestic work. He commenced working for his employer in January 2005 and is still employed. At the time of the accident, he was earning R3000.00 per month and a basic bonus of R600.00. His age of retirement is 65 years.

[16] The occupational therapist, Clara Sivhabu stated that the plaintiff's physical demand of his duties falls under medium to heavy physical demand. Collectively, his residual physical ability falls in the light physical demand. He does not meet the physical demands of his duties. Therefore, his injuries have reduced his work ability and rendered him incompetent to perform his job. He suffered a loss of earnings for 3 years when he could not work while recuperating and when he returned to work, his salary was reduced as he could no longer perform assistant mechanic duties. Furthermore, he is enduring pain daily at work which may cause him to retire from his work prematurely, considering his orthopaedic prognosis.

[17] The Industrial Psychologist, Dr A C Strydom is of the opinion that but for the accident the plaintiff most probably would have continued working in his pre-morbid position as a gardener at the same or other employer or had capacity to work in any other unskilled position until the retirement age of 65 years. It is assumed that his salary would have increased, and it is likely that the normal inflation rate would have been one of the determinants of the increases.

[18] According to collateral information obtained, post-morbid the plaintiff was off work recuperating from home, and only returned to work in January 2021. He was not paid whilst being off work, therefore he suffered a past loss of earnings. His current salary is R3,700.00 per month. His current earnings manually calculate to R44,400.00 per annum, excluding a bonus from time to time. He received a bonus of R2 000.00 in 2021. The earnings fall somewhere between the medium and upper quartile of an unskilled worker's earnings noted by Koch 2022.

[19] Dr Strydom opined that the plaintiff will be suffering a loss of employability, work and subsequent earnings capacity, should he lose his current position, for which he is found unsuitable. Given his skill set and work experience, the chances of him securing a sedentary to low-light type of position are regarded as highly unlikely.

[20] Dr Strydom suggested that the plaintiff be compensated for being regarded as a less competitive and vulnerable employee in the open labour market. A substantially higher post-morbid contingency deduction is suggested to accommodate fluctuations in earnings, performing his current unsuitable work with pain and discomfort, long periods of unemployment between jobs (should he lose his current position), being at risk of not taking full advantage of his remaining employment years and risk of remaining unemployed should he lose his current position.

[21] In that regard the plaintiff has submitted that a contingency deduction of 12% be applied for future loss on the uninjured income and 32% on the injured income. The Actuary has applied the contingency deductions suggested by the plaintiff. The defendant has submitted that allowance for future loss can be made by applying higher than normal contingency deduction to the value of the injured earnings but lower than the percentage applied by the actuary because there is no objective proof of earnings. It is not correct to say that there is no objective proof of earnings. There is a certificate by the employer confirming employment, salary and bonus. Dr Strydom also received collateral information from the employer about the current salary and the bonus received in 2021.

[22] Considering the risk factors mentioned above, I am of the view that the contingency deductions applied by the Actuary on pre-morbid and post-morbid earnings result in a fair and just compensation for the plaintiff's future loss of earnings.

[21] With regard to past loss of earnings, it is common cause that the plaintiff was off work from 24 December 2017 until January 2021 due to the injuries he sustained in the collision. It is also common cause that he received no salary

from his employer during that period. The Actuary has made provision for past loss of income in his report. However, the plaintiff has not claimed for past loss of income in his original or amended particulars of claim. It is trite that parties are bound by their pleadings. In the premises, I am not awarding damages for past loss of income.

[22] The parties have agreed that if the plaintiff is successful on the issue of liability, the defendant will furnish the plaintiff with an undertaking in terms of section 4(1)(a) of the Act for future medical and hospital expenses. The plaintiff has claimed R1 000.00 for past medical and hospital expenses. However, he has not led evidence on these expenses and has not provided supporting documentation. This claim fails.

[23] I now turn to deal with the issue of costs. The plaintiff is substantially successful in this litigation and therefore, he is entitled to costs of the action on a party and party scale.

ORDER

[24] The following order is made:

1. The defendant is liable to pay 80% of the plaintiff's proven damages for bodily injuries sustained from the motor vehicle collision that occurred on 24 December 2017.
2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 for future medical and hospital expenses incurred because of the abovementioned motor vehicle collision.
3. The defendant shall pay to the plaintiff an amount of R131,100.00 for future loss of earnings.
4. The defendant shall pay the plaintiff's taxed or agreed party and party costs which costs shall include counsel's fees on the applicable High Court Scale.

5. The determination of the issue of general damages is postponed *sine die*.


MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division,
Johannesburg

(Digitally submitted by uploading on CaseLines and emailing to the parties)

Date of delivery: 4 September 2024

Appearances:

On behalf of the plaintiff: Adv HM Mokale

Instructed by: Mkwanazi MI & Associates Attorneys

On behalf of the defendant: Mr D Sondlani

Instructed by: State Attorney, Johannesburg