

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2016/33357

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

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...08/10/2024.....  
DATE

In the matter between:

**LEKOTE PULE KENNETH**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**Manoim J**

[1] On 24 April 2015, the plaintiff was out riding on his motorcycle with friends when a car insured by the defendant knocked him down.

[2] In a judgment dated 15 June 2021, the court settled the issue of liability holding the defendant liable for 100% of any damages he had suffered.

- [3] This hearing then is limited to the issue of past and future loss of earning. A separate issue of whether he has a claim for general damages awaits a decision of the HSPCA and is not before me.
- [4] The plaintiff is a dentist and at the time of the accident he was in private practice. Currently he is employed as a dentist in a government hospital in Sebokeng.

### **The trial**

- [5] I heard the matter over two days from – to – In the course of the trial the plaintiff led the evidence of Dr Annalie Strydom an industrial psychologist and Thandi Nape an occupational therapist. The plaintiff also testified. The defendant did not call any witnesses. The defendant accepted the reports of Dr J. Breitenbach an orthopaedic surgeon and a firm of actuaries Risk House Africa both of whom had been instructed by the plaintiff's attorneys.

### **Injury suffered**

- [6] As a result of the collision the plaintiff suffered a fracture to his right patella resulting in him undergoing surgery and having a patellectomy on 18 May 2015. A patellectomy in layperson's terms is the removal of a kneecap. For the purpose of the current case he has been examined by three orthopaedic surgeons, two instructed by the plaintiff's attorneys and one instructed by the defendant. The most recent report and the one that the defendant has not challenged, is by Dr Breitenbach. The plaintiff was examined by Dr Breitenbach seven years after the date of the accident. That doctor noted the following:

*“He has a loss of movement and weakness in the right knee.”* But he stated as regards his employment that: *“He will have a degree of restriction climbing stairs and handling heavy objects but no severe impairment.”*

- [7] He also commented on the likelihood that the plaintiff might experience Grade II osteoarthritis in the future. This is based on a radiologist report which observes post traumatic Grade II OA (osteo arthritis) of the medial tibiofemoral joint.
- [8] Dr Breitenbach notes this as a matter for future treatment. But he does not suggest that this has any effect on his occupation.
- [9] What does appear to be established as his sequelae, either because it is common cause or was unchallenged when the plaintiff testified is the following:
- a. The plaintiff is unable to sit or stand for prolonged periods without experiencing pain.
  - b. This effects his occupation in the following way –
    - i. Compromises his ability to perform certain procedures that require the dentist to remain seated for prolonged periods. He mentions two types – root canal treatment and inserting crowns.
    - ii. He testified that such procedures are more common in private practice than in public hospitals.
    - iii. These procedures in private practice are more lucrative for dentists than more standard procedures.

- [10] Two key issues need to be addressed in relation to his claim for future loss of earnings. The first is whether his move from private practice to practising in a public hospital resulted in a loss of future earnings. Related to this question is whether even if that answer is in the affirmative, whether his move was caused by the sequelae or for other reasons or might be a mixture of both.
- [11] The second issue is whether as a result of the sequelae and the discomfort he is experiencing the plaintiff's normal working life will be curtailed. The plaintiff had told Dr Strydom that at the time of the accident he earned R 100 000 per month and R1.2 million annually from his dental practice. This was a net amount after deduction of expenses.
- [12] In relation to the first issue, I find that the plaintiff has not made out a case on this aspect. First because he has failed to satisfactorily prove that his pre-morbid earnings amounted to R 100 000 per month after the deduction of expenses.
- [13] It is notable that Dr Strydom had asked for financial information from the plaintiff and despite her completing a second report two years later, that information was still not provided to her. Instead, she was given some bank statements in the name of a company called 2m and 1m Services Projects and Services Pty Ltd, for a period of some months in 2016, but that was the sum total of what was provided.
- [14] These bank statements do not establish any proof of earnings from the plaintiff's dental practice. Some entries indicate payment from medical aids, some large amounts of cash deposited (R 100 000 in one instance). The plaintiff when he testified claimed he did not administer the books for his own

practice at the time and hence had no better source as the proof of his earnings than the entries into this bank account.

[15] Dr Strydom, correctly, did not seek to re-construct these into any pattern but instead turned to other sources to ascertain what one could surmise might have been the plaintiff's pre-morbid income as I go on to discuss.

[16] What none of the experts were told, but which only emerged when he gave evidence, and I suspect surprised his own legal team, is that the plaintiff is still earning additional income from part-time after-hours work, he performs for private patients. He states that this gives him R 20 000 to R30 000 per month. If this is included on to his earnings from the public hospital, as evidenced by his payslip, this means his current earnings pre-tax exceed R 100 000 per annum.

**What needs to be decided.**

[17] It is not disputed that the plaintiff has suffered a permanent impairment caused by the collision. It is also not disputed that this impairment causes him constant pain that affects him professionally. What is in dispute is the following: did the collision cause him to forsake a more lucrative career in private practice for a lower paying position in public practice; how much does his injury impair his future career prospects and would it curtail its length. At present he is aged 42.

[18] Briefly the plaintiff's career path is this. He qualified as a dentist in 2010. His first job as a dentist commenced in 2011 when he worked for the Gauteng Department of Health as a grade 1 dentist.

- [19] In November 2014 he went to private practice working with a Dr Matlaila. His status in that practice is a matter of dispute. In his evidence the plaintiff testified that he was a partner in the practice but in his curriculum vitae ('CV') he describes himself as a locum. Put differently as per the CV he is an employee of Dr Matlaila not a partner profit sharing. Cross examined on this contradiction he stated that the CV incorrectly reflected he was a locum to suit Dr Matlaila's tax purposes.
- [20] Given that on his evidence Dr Matlaila managed the accounts and the plaintiff would have joined the practice early in his career, it is more likely he was a locum not a partner. Nor did he testify about how the partnership was dissolved given that he left Dr Matlaila in October 2016 to start his own practice. Thus, at the time of the accident (24 April 2015) it is probable that he was still a locum with Dr Matlaila's practice.
- [21] He then started his own dental practice together with a partner in October 2016. It is unclear from this evidence what the partner brought to the relationship – he does not appear to have been a dentist. Things did not work out. He gives two reasons for this – he had to pay high rentals which meant the practice was not sufficiently probable. But he also claims that his partner "cheated him". Whatever the real reason, perhaps it is a bit of both, he decided to relinquish his private practice.
- [22] He returned to government employment in February 2021. He went to work as a dentist at Sebokeng Hospital a position he still holds. The payslip given to Dr Strydom in 2022 shows he earned a gross annual salary of R 84 039 per month. This includes an amount called fixed overtime". He explained this was for

standard overtime work a dentist must do on occasional weekends and after hours. He confirmed that he does this overtime work so this amount can be included. However, it emerged following questions from the court and a fact not revealed to Dr Strydom that he also earns money from doing private work. He estimated that this brought in about R 20 000 to R 30 000 per month.

[23] The first issue is what the plaintiff earned in private practice prior to the collision. As I mentioned earlier, the plaintiff claims that pre-collision he was earning R 100 000 per month or R 1,2 million per year. I understand this to be his alleged gross earnings. However, he has been unable to prove that he earned this amount. His own expert concedes this point. No reason was given during his testimony why he could not produce more satisfactory proof. It would not have been difficult for him to do so were this the case. Dr Strydom did not then seek to rely on the plaintiff for proof of earnings but instead looked to other evidence on what dentists typically earned in private practice according to industry surveys. Dr Strydom referred to reports by Koch to establish that a dentist of his experience would have been earning between the R 368 300 (the median range) and R 447 900 (the upper quartile range).

[24] It is unlikely that his patients would have afforded fees that exceeded medical aid rates given the socio-economic profile of his practice, so this estimate is plausible.

[25] The one implication of this is that the plaintiff has not established that he is earning less now than he would have been had he been in private practice. If he was earning R 84 000 in his government job and was able to earn a further R 20 000 to R 30 000 per month in his 'side' private practice, then he was

earning more than when he was full time in private practice. One also needs to keep in mind that a private practice is subject to fluctuations whilst a government sector job gives the employee security and a pension.

[26] I must also consider the evidence of the occupational therapist Ms Nape. Her evidence comes in the form of her reports and her viva voce evidence. Ms Nape sought to establish that the plaintiff's earning capacity was compromised because he could not work for long hours nor perform certain procedures. But Ms Nape was correctly criticised in cross-examination for straying into areas for which she had no expertise (thus contradicting what Dr Breitenbach had stated about the plaintiff's condition) and exaggerating the extent that the plaintiff's injuries had constrained his earning capacity.

[27] Notably Ms Nape would have been unaware that the plaintiff was still doing private work and working overtime for the hospital. This is his current situation nine years after the accident. Rather I will rely on the plaintiff's own testimony of what he can no longer do without pain. He testified that certain treatments – he mentioned root canals and inserting crowns – were difficult for him as it required him to sit for long periods of time causing him pain as he needs to stand up. However, there is no indication that this has had any impact on his earnings or if it has, it was never quantified. He did not attempt to do so. Moreover, Ms Nape's thesis that he was forced post-accident to move to government practice is not supported by his own evidence. Indeed, he also testified that he is motivated to give back to his community something that working in the public sector enables him to do. This aspect of his altruism is missing from her account but was given in testimony to the court.

[28] She also made sweeping and unfounded remarks about the plaintiff now being more exposed to malpractice suits because of his compromised health. He made no such claim in his testimony. If this was the case doubtless, he would have said so since he testified after she had.

[29] My conclusion is that Ms Nape was an unreliable and partial witness whose evidence falls to be rejected.

### **Calculations**

[30] The plaintiff has reduced his original claim by relying on the figures submitted by his actuary but with a large contingency. Whilst originally claiming an amount of R 600 000 in terms of an amended plea this amount was increased to R R11 486 008.00. The plaintiff's legal team now relies on a figure of R2 710 337.70

[31] At the conclusion of the trial the difference between the parties on the calculation of future and past loss of earnings is not extensive. As noted, the plaintiff now claims an amount of R2 710 337.70. This is considerably down from the amount of R11 486 008.00 originally claimed in terms of an amendment to its particulars of claim dated 26 September 2018.

[32] Both parties have relied on the two scenarios supplied by the plaintiffs actuaries in a report dated 11 August 2022. Both these scenarios in turn rely on assumptions emanating from the report of Dr Strydom.

[33] The plaintiff has chosen what is termed scenario A. Under this scenario the assumption was made that the plaintiff would have remained self-employed and earned at the levels he claimed he did. Following a conventional approach to the loss and assuming a retirement age of 65, and after applying the RAF

Amendment Cap, the actuary came to a loss of earnings figure of R 3 404.607 (Here contingencies of 13% for uninjured income, and 33% for injured income, were applied.)

- [34] In final argument plaintiff's legal team conscious of the new evidence led by the plaintiff in particular, viz. his additional private earnings adopted the approach of taking the scenario A figure of the actuary but increasing the contingencies to reduce the amount claimed to R2 710 337.70. Most of this figure is for past loss (R 2 232 708.70) with only R 477 629.00 for net future loss.
- [35] The defendant has used scenario B posited by the plaintiff's actuary as its starting point. The assumption here is that the plaintiff would have followed a government career from February 2021. Here the actuary arrives at a figure of R4,498,763. The defendant based on this figure applied contingencies and got to a figure of R 973 74907. However, according to the actuarial report, on scenario B, most of the quantum was made up of past income which amounted to R1 085 942. The defendant has not included this amount because the defendant argues he has failed to prove he suffered a past loss of income.
- [36] But although the plaintiffs actuary appears to rely on Dr Strydom's report to find a past loss of income on her scenario B it is unclear how he came to this figure. For this reason, I consider it more reliable to go back to what she stated in her report.
- [37] She observed that after having the accident in April 2015 the plaintiff returned to work in December 2015. Given that he has not proved his earnings I will follow Dr Strydom's suggestion and use the figures supplied by Koch. Taking the most generous amount of the highest quartile of earnings this amounted to

R447,900 per annum. Assuming then an absence from work of seven months (April to December) plus making an allowance of earnings to pick up over the next few months, whilst he regained patients, I will recognise a years' earnings as past earnings in this amount. Apart from this I do not consider there is sufficient evidence to show that the plaintiff lost earnings for the remainder of the period until the actuary did his calculation. This again is because of his own evidence. Here the plaintiff has failed to make out a case that he was forced to leave more lucrative private practice because of his injury. Rather his own difficulties in private practice were caused by his relationship with his erstwhile partners, and his difficulties in managing his dental practice when he was the principal.

[38] But this was not his only difficulty. He also had difficulty as I mentioned earlier in proving his income. Thus, apart from where it was common cause that he was absent from work (the seven months) his remaining case for past loss of income suffers from these two flaws.

[39] For future earnings I consider the amount proposed by the defendant of R 973 749.07 is reasonable. This gives a total of R 1 201 559.07, calculated as follows;

|                  |                        |
|------------------|------------------------|
| Past loss:       | R 447,900              |
| Past loss Capped | R 227 810 <sup>1</sup> |
| Future loss:     | R 973 749.07           |
| Total:           | <u>R 1 201 559.07</u>  |

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<sup>1</sup> This was the cap in 2015 as per the actuary's report.

## **Costs**

[40] As far as costs are concerned the normal order of party and party cost is adequate. I will allow qualifying fees for the following experts. Dr J Breytenbach, Dr A. Strydom and Risk House Actuaries. I do not consider that the evidence of Ms Nape added anything to helping decide this matter and hence I have not provided for her qualifying fees.

## **ORDER:-**

[41] In the result the following order is made:

1. The defendant shall pay to the plaintiff the capital amount of **R 1 201 559.07** for loss of earnings arising out of a motor vehicle collision which occurred on the 24 April 2015, such amount payable on or before 180 (One Hundred and Eighty) days from the date of this order into the Trust Account for Plaintiff's attorneys of record.
2. The determination of general damages is postponed sine die.
3. Payment shall be made directly into the Plaintiff attorney's trust account, details of which are as follows:

|                |                                 |
|----------------|---------------------------------|
| ACCOUNT HOLDER | : MKWANAZI M & ASSOCIATES INC   |
| ACCOUNT NUMBER | : 6304 6336 219                 |
| BANK           | : FIRST NATIONAL BANK           |
| BRANCH         | : COMM ACCOUNT SERVICE CUSTOMER |
| BRANCH CODE    | : 210554                        |

4. The defendant shall make payment of the Plaintiff's agreed or taxed party and party High Court costs (**Scale B**) of the action to date of this order

attendant upon the obtaining of payment of the amount referred to in paragraph 1 above, costs of counsel and including the qualifying, reservation and/or preparation fees if any, of the plaintiff's experts:

- 4.1. Dr Breytenbach (Orthopaedic Surgeon):
  - 4.2. Dr A.C Strydom (Industrial Psychologist)
  - 4.3. Risk House Africa (Actuary)
5. The Plaintiff shall in the event costs are not agreed:
- 5.1. Serve the notice of taxation on the Defendant's attorney of record,  
and
  - 5.2. The Plaintiff shall allow the Defendant 14 (fourteen) court days to  
make payment of the taxed court days;
  - 5.3. The Plaintiff shall in the event of costs not being agreed upon, serve  
the notice of taxation on the Defendant.
6. The Defendant shall pay interest on the taxed or agreed costs fourteen (14) days from the date of agreement or taxation of costs to date of payment. The interest payable shall be calculated at the prescribed rate of interest applicable at the date of agreement of costs or taxation of costs.

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**N. MANOIM**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

Date of hearing: 04 September 2024

Date of Judgment: 08 October 2024

Appearances:

Counsel for the Applicant:

M H Mokale

Instructed by.

Mkwanazi M & Associates Inc

Counsel for the Respondents:

D Sondlela

Instructed by:

State Attorney