

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

Case No: 20082/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED YES

14/11/2024

In the matter between :

MULINDWA EDWARD

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

WANLESS J

Introduction

[1] In this matter, one MULINDWA EDWARD, adult male (*“the Plaintiff”*), instituted an action against THE ROAD ACCIDENT FUND (*“the Defendant”*) for damages arising from a motor vehicle collision which took place on the 13th of November 2020.

[2] The issues to be decided by this Court at the commencement of the trial, were the following:

2.1 whether the Defendant was entitled to a postponement;

2.2 whether the Plaintiff had the requisite *locus standi* to institute the action;

2.3 whether the Defendant was liable to compensate the Plaintiff in respect of the damages suffered by him as a result of the injuries sustained in the collision and the sequelae thereof;

2.4 the quantum of those damages.

Orders

[3] The first order made by this Court was that the issue of the Plaintiff's *locus standi* to institute the action was separated, in terms of subrule 33(4) from the remaining issues of liability and quantum and that this Court would, in the first instance, determine that issue.

[4] Pursuant thereto, this Court heard legal argument (*the facts being common cause between the parties*) in respect thereof, together with an application by the Defendant for a postponement of the trial. Arising therefrom, this Court made a further order that:

4.1 the Plaintiff did have the requisite *locus standi* to institute the action;

4.2 the application by the Defendant for a postponement was refused;

4.3 the trial would proceed on the issues of both liability and quantum.

The Plaintiff's application in terms of subrules 38(2) and (3)

[5] In terms of, *inter alia*, a Notice of Motion dated the 10th of May 2024 (*together with a Founding Affidavit deposed to by the Plaintiff's attorneys*) the Plaintiff sought to place all of the evidence in support of his case (*in respect of both liability and quantum*) before this Court by way of affidavit. This was not opposed (*at the trial*) by the Defendant. In the premises, the evidence of the Plaintiff was introduced in terms of subrules 38(2) and (3).

[6] At this stage, it is imperative to note that the Defendant elected not to place any evidence before this Court in rebuttal thereof.

The issues of liability; undertaking in terms of subsection 17(4)(a) of the Act and general damages

[7] Following the order made by this Court in paragraph [4] hereof the issue of the Defendant's liability to compensate the Plaintiff in respect of the Plaintiff's damages was settled between the parties on the basis that the Defendant would be liable to compensate the Plaintiff in respect of 80% of the Plaintiff's agreed or proven damages.

[8] It was further agreed between the parties that the Defendant's claim for general damages was the amount of R 650 000.00 and that, in the premises, the Defendant would compensate the Plaintiff (*after the apportionment*) in the amount of R 520 000.00 in respect of this head of damages.

[9] With regard to the provision by the Defendant to the Plaintiff of a certificate in respect of future medical expenses incurred as a result of the collision, it was also agreed between the parties that the Defendant would provide same on the basis that the Defendant would be liable for 80% of those costs.

Remaining issues to be determined by this Court

[10] The sole remaining issue requiring determination by this Court is the Plaintiff's claim in respect of past and future loss of earnings/ earning capacity. In that regard, there was no dispute between the parties as to the amounts claimed under this head

of damages. Only the contingencies to be utilised in the final calculation thereof remained in dispute.

[11] Arising therefrom, the only remaining issue to be determined by this Court are the applicable contingencies to be applied, in the discretion of this Court, in the Actuary's calculation (*where the method of calculation and assumptions used were not in dispute between the parties*) of the Plaintiff's claim in respect of past loss of earnings, together with future loss of earnings/ earning capacity.

Contingencies

[12] The applicable principles to be applied when deciding contingencies are fairly trite and this judgment will not be burdened unnecessarily by dealing with those principles. Of course, this does *not* mean that this Court has failed to have regard thereto. In that regard, this Court is grateful for the detailed Heads of Argument prepared by Plaintiff's Counsel which dealt extensively therewith.

Past loss of earnings

Plaintiff's submissions

[13] With regard to the Plaintiff's claim for past loss of earnings, it was submitted, on behalf of the Plaintiff, that the "*usual*" contingency in respect thereof, namely 10%, should be applied in the present matter.

Defendant's submissions

[14] Relying on, *inter alia*, the difficulties the Plaintiff had experienced in proving actual earnings the Defendant submitted that this contingency should be as high as 50%. This was in light of the fact that, *inter alia*, there was no real collateral evidence to support the Plaintiff's claim as to the date when he first became employed as an "*Uber Eats*" delivery man and that he was unemployed prior to moving to the Republic of South Africa. In this regard, the Defendant pointed out the lack of any

real evidence from Uber Eats and the fact that the bank statements did not appear to reflect the Plaintiff's income as claimed.

Future loss of earnings/earning capacity

Plaintiff's submissions

[15] With regard to the Plaintiff's claim in respect of future loss of earnings/earning capacity, it was, in the first instance, submitted on behalf of the Plaintiff that the "*usual*" contingency, calculated at half a percent until the agreed age of retirement (*65 years old*) would give rise to a contingency of 17.5 % in respect of earnings in an "*uninjured*" state (*prior to the collision*). However, it was conceded by the Plaintiff (*correctly in the opinion of this Court*) that, in light of, *inter alia*, the difficulties the Plaintiff had experienced in proving actual earnings, this contingency should be higher.

[16] Arising therefrom and with reference to various authorities cited by the Plaintiff in the Plaintiff's Heads of Argument, Counsel for the Plaintiff submitted that an appropriate contingency would be between 20% to 25% but should not exceed 35%.

Defendant's submissions

[17] The Defendant once again relied on the lack of collateral evidence placed before this Court (*as set out above*) and submitted that, having regard, *inter alia*, thereto, an appropriate contingency to be applied would be 50%.

Discussion

[18] In light of the fact that all of the Plaintiff's experts agreed (*and this could not be disputed by the Defendant*) that the Plaintiff, in his injured state post the collision, is essentially unemployable, he will have no earning capacity and, therefore, no future earnings, it is only necessary for this Court to decide on a contingency in respect of earnings in his "*uninjured*" state. This is obviously in addition to a suitable contingency in respect of past loss of earnings.

[19] When this Court decides (*in the exercise of its discretion*) the appropriate contingencies to be applied the same factors (*as set out above*) will apply in respect of both the Plaintiff's past and future loss of earnings/earning capacity. As set out earlier in this judgment, neither the figures proposed by the Industrial Psychologist and utilised by the Actuary are in dispute.

[20] That said, this Court is obliged to take into account the factors relied upon by the Defendant who argues for a larger contingency to be applied in respect of both. Whilst this Court has done so, it must, at the same time, have regard to the expert medico-legal report of the Industrial Psychologist and the Addendum thereto. In that addendum, not only was the Industrial Psychologist provided with further information pertaining to the Plaintiff's earnings (*which was not seriously disputed by the Defendant, if at all*) but the Industrial Psychologist also relied upon extraneous and well-accepted sources to classify the Plaintiff's ability to be employed and to generate an income.

[21] Having had regard to the reports of the Industrial Psychologist, as placed before this Court on behalf of the Plaintiff, this Court is satisfied that these reports are not only unbiased and well-reasoned but that they enable this Court to decide on suitable contingencies. In this regard, the Industrial Psychologist has taken into account most, if not all, of the factors which are relevant to the issue of appropriate contingencies. In addition, there is nothing "*exaggerated*" in those reports and/or the ultimate scenario as presented to the Actuary to calculate the Plaintiff's damages.

Conclusion

[22] This Court finds, having considered the contents of the various medico-legal reports (*with particular reference to those of the Industrial Psychologist*) that the appropriate contingencies in this matter are:

22.1 Past loss of earnings	20%
22.1 Future loss of earnings/earning capacity	30%

[23] In the premises, the Plaintiff is awarded the total sum of **R 1 382 640.00** in respect of his claim for loss of earnings/earning capacity, calculated as follows:

Past loss of earnings	R 254 800.00
Contingency	20%
Amount	R 203 840.00
Future loss of earnings/earning capacity	R 2 177 800.00
Contingency	30%
Amount	R 1 524 460.00
TOTAL	R 1 728 300.00
Less 20% (apportionment)	R 1 382 640.00

Order

[24] This Court makes the following order:

1. The Defendant is liable for **80%** of the Plaintiff's agreed and proven damages.
2. The Defendant shall pay to the Plaintiff an amount of **R520 000.00 (FIVE HUNDRED AND TWENTY THOUSAND RANDS ONLY)** in respect of the general damages sustained as a result of a motor vehicle collision that took place on the 13th of November 2020.
3. The Defendant shall pay to the Plaintiff an amount of **R1 382 640.00 (ONE MILLION THREE HUNDRED AND EIGHTY TWO THOUSAND, SIX HUNDRED AND FORTY RANDS ONLY)** in respect of the Plaintiff's loss of earnings/earning capacity sustained as a result of a motor vehicle collision that took place on the 13th of November 2020.

4. The amounts as set out in paragraphs 2 and 3 hereof are payable by the Defendant to the Plaintiff on or before 180 days from the date of this order, into the Trust account of the Plaintiff's attorneys of record with the following details:

KRUGER & POTTINGER ATTORNEYS

ABSA – TRUST ACCOUNT – CLEARWATER BRANCH

ACC. NR: 4[...]

BRANCH CODE: 6[...]

REF: T[...]

5. In the event of the Defendant failing to make payment to the Plaintiff within the 180 day period as set out in paragraph 4 hereof, then the Defendant shall be liable to pay to the Plaintiff interest thereon, calculated from the 181st day from the date of this order, at the *mora* rate of interest, until the date of final payment.

6. The Defendant shall furnish the Plaintiff with an undertaking as envisaged in subsection 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, for **80%** of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment or rendering of a service, or supplying of goods to the Plaintiff, arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on the above-mentioned date, after such costs have been incurred and upon proof thereof.

7. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the **High Court Scale**, which costs shall include the costs attendant upon the obtaining of all the Medico-Legal Reports, including any serious injury report, Addendum Medico-Legal Reports, Translator Fees, Preparation and Reservation Fees (if any), as allowed by the taxing master.

8. In the event that costs are not agreed:

8.1 the Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record; and

8.2 the Plaintiff shall allow the Defendant 180 days to make payment of the taxed costs.

**BC WANLESS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Date of Hearing: 17 May 2024
Date of Judgment: 14 November 2024

APPEARANCES

On behalf of the Plaintiff: Adv B Bodhania
Instructed by: Kruger and Pottinger Attorneys

On behalf of the Defendant: Moipone More - Tladinyane
Instructed by: The State Attorney