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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable / Not
reportable**

Case no: 3098/2021

In the matter between

THAMSANQA LINCOLN MVIMBI

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: Thamsanqa Lincoln Mvimbi v Road Accident Fund

Coram: Chesiwe J

Heard: 21 June 2024

Delivered: This judgment was handed down in open court and electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 13h00 on 17 October 2024.

Summary: General damages – left ankle injury (united bimalleolar fracture) – determination of quantum based on undisputed facts – court's duty to ensure that just and fair compensation is awarded.

ORDER

1. Prayers 1, 2 and 3 of the Plaintiff's application in terms of Uniform Rule 38(2) are granted;

2. The Defendant is liable to pay 80% (eighty percent) of the Plaintiff's proven or agreed damages;

3. The Defendant shall pay the Plaintiff the sum of R1 147 721-00 (one million one hundred and forty-seven thousand seven hundred and twenty- one rand) in respect of general damages and loss of earning capacity set out as follows:

Loss of Earnings: R834 651-00

General Damages: R500 000-00

Less 20% apportionment: R268 930-00

Total: R934 651-00

4. The defendant shall pay the abovementioned amount into the Plaintiff's attorney's trust account;

5. The Plaintiff's attorney's trust account details are as follows:

ACCOUNT HOLDER: VZLR INC

BRANCH: ABSA BUSINESS BANK HILLCREST

BRANCH CODE: 632005

TYPE OF ACCOUNT: TRUST ACCOUNT

ACCOUNT NUMBER: 3[...]

REFERENCE:**MAT161379**

6. The Defendant shall furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 8 March 2020;

7. In the event of default on the payment of the costs, interest shall accrue on such outstanding amount at the statutory more rate on the date of taxation/settlement of the bill of cost, as per the Prescribed Rate of Interest Act 55 of 1975, as amended, per annum, calculated from the due date until the date of payment;

8. In the event that the Defendant does not, within 180 (one hundred and eighty) days from the date on which this order is handed down, make payment of the capital amount, the Defendant will be liable for payment of interest on such amount at 11, 75% (eleven percent) (the statutory rate per annum) compounded and calculated 14 (fourteen) days from date of this order;

9. The Defendant is to pay the Plaintiff's taxed or agreed party and party cost, up to and including the date, when this order is made an order of court;

10. The reasonable qualification fees of all the Plaintiff's experts whose reports had been furnished to the Defendant and/or its experts:

Dr JP Marin: - Orthopaedic Surgeon

Ms Joenita - Rita van Biljon Occupational Therapist

Dr AC Strydom - Industrial Psychologist

Mr J Sauer - Actuary

11. Cost of Counsel on scale B including the drafting of settlement submissions to the Defendant, the Plaintiff's initial heads of argument, supplementary heads of argument and replying heads of argument;

12. In the event that cost is not agreed, the parties agree as follows:

12.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

12.2 The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed cost.

JUDGMENT

Chesiwe J

[1] The Plaintiff instituted a claim for damages against the Road Accident Fund (RAF) for injuries sustained when the insured driver collided with the Plaintiff who was a pedestrian on 8 March 2020 in Kroonstad.

[2] The Defendant conceded the merits at 80% (eighty percent) for the Plaintiff's proven and agreed damages as well as an undertaking in terms of s 17(4)(a), limited to 80% (eighty percent).

Background

[3] Plaintiff lodged an application in terms of Rule 38 to have the evidence of experts be admitted in form of affidavits. Before the application could be granted, Counsel for the Defendant submitted that the application is not opposed, provided that the Plaintiff testified *viva voce* as there were issues on which Counsel for the Defendant wished to

cross-examined the Plaintiff. The Rule 38 application was therefore granted. The Plaintiff's expert reports were filed and accepted into the record.

[4] The only issue for determination by this Court, is the claim for general damages and loss of earning capacity.

Plaintiff's Evidence

[5] Plaintiff took to the witness stand and testified as follows: That on 8 March 2020, he was involved in a motor vehicle accident. He sustained an injury on the left ankle. He was immobilized with a back slab. He was operated on his ankle on 13 March 2020 and discharge on 24 March 2020.

[6] Plaintiff stated that when the accident occurred, he was unemployed, but was selling food and fruits at a school as a vendor. He was previously employed at an old age home as a general worker, but could not recall the year. After his employment at the old age home, he was employed at PVC Ceilings where he was later retrenched in December 2019. At PVC Ceilings, he earned R38 134,00 per annum. He did not find any employment thereafter.

[7] Plaintiff's further evidence is that, before the accident he used to play soccer. However, after the accident, he cannot walk fast nor stand for long periods. Further that, when it is cold, the operated side is painful and he cannot bend down to lift heavy objects.

[8] Under cross-examination, Plaintiff stated that as a food and fruit vendor, he used to earn R700-00 (seven hundred rand) to R1000-00 (one thousand rand) per month if it is was a busy month that is. As he was selling at a school, when schools were closed, he did not have any income. Plaintiff denied that he resigned at PVC Ceilings, but was retrenched and that the experts would be incorrect if they were to say that he did gardening after the accident. Plaintiff explained that the gardening work was at the old age home and before the accident. Plaintiff confirmed that he is currently still selling food and fruits at Mtha Primary School and that it was the only way to earn an income at this stage. That was the evidence of the Plaintiff.

[9] The Defendant did not call any witnesses and closed its case.

[10] Both parties submitted heads of argument on 7 June 2024 and 14 June 2024 respectively, a reply if any was to be filed on 21 June 2024.

Submission

[11] Counsel on behalf of the Plaintiff submitted in written heads argument as follows: That the Plaintiff is wholly reliant on his physical ability to work and has been severely truncated. That the Plaintiff's injuries and treatment have impacted on his life amenities and that Plaintiff cannot be gainfully employed post-morbidity. That the injured operated ankle must not be understated as the ankle is needed for standing, walking and bending.

[12] Counsel on behalf of the Defendant submitted in the written heads of argument as follows: That the Plaintiff's injuries are not of a serious nature and the comparable cases in respect of general damages. Where the Court granted just and fair awards with regard to loss of earning capacity, Counsel submitted that the Plaintiff did not provide any proof of income. Further that, Plaintiff contradicted the information that is contained in the experts' reports. Moreover, the Court ought to dismiss the Plaintiff's claim as the Plaintiff did not show on the balance of probabilities, that he has suffered a loss of income.

General damages

[13] An award for general damages should be reasonable and fair. The Court takes cognizance of the fact that it has a discretion when awarding general damages. On the other hand, the Court in *Pitt v Economic Insurance Co Ltd*¹, cautioned not to pour largesse from the horn of plenty at the defendant's expense.

[14] The Court has to take into account the nature, severity and permanency of the injuries sustained together with the pain, suffering, disfigurement, permanent disability and the effect thereafter on the person's lifestyle.

¹ 1957 (3) SA 284 (N) at 287 E-F

[15] The Orthopedic Surgeon, Dr J P Marin in his report, diagnosed the Plaintiff with a united bimalleolar fracture treated with plate and screws that resulted in post-traumatic osteoarthritis of the ankle joint and causing residual pain.

[16] Dr Martins concluded as follows ²:

“11.2.13 The patient will be advised not to do physical labor.

11.2.14 It is my opinion that the patient will be able to work to the normal retirement age of 65 (sixty-five) years.

11.2.15...

12 LONGEVITY

12.1 The accident and accompanying injury did not have a detrimental effect on the patient's life expectancy.”

[17] Ms. Joenita Friedrichs, the Occupational Therapist in her report ³ stated as follows:

“1. The symptoms in Plaintiff's leg had a negative impact on his mobility, dynamic, postural ability and weight handling ability.”

[18] Ms. Fredericks mentioned further that: “Plaintiff's physical ability is best suited to sedentary employment as his physical ability is suited to frequent sitting.”

[19] The report of Dr Strydom, Clinical Psychologist, he opined ⁴ that: “It is well known that a person, who is constantly exposed to pain and discomfort, is unable to perform at their best or perform at the required standard and may thus be at risk of losing their employment, i.e., either be dismissed for poor performance or to resign prematurely or by taking early pension.”

[20] These expert reports stand uncontested as the Defendant did not file any reports to dispute those of the Plaintiff.

² Index: Expert Notices Vol 1, page 39

³ Index: Expert Notices Vol 1, page 56

⁴ Index: Expert Notices Vol 1, page 14 at para 16.5

[21] Plaintiff in his oral evidence indicated that he used to play soccer, but cannot play any more as the accident affected his life amenities. The Plaintiff said he cannot walk fast or stand for long periods and when it is cold, the operation pains nor can he carry heavy objects.

Comparable cases

[22] The following comparable cases are considered in respect of the case that is before this Court:

*Gatya v Member of the Executive Council, Department of Education, Eastern Cape and Another*⁵. Plaintiff in this case sustained a bi-lateral ankle fracture and presented with a limp and had no restricted movement. An award of R574 000-00 (five hundred and seventy-four thousand rand) was granted.

*Storm v Road Accident Fund*⁶. Claimant in this case sustained additional injuries compared to the Plaintiff in this case with a possibility of an amputation of his right leg. The Court therefore consider an amount of R450 000 (four hundred and fifty thousand rand) to be fair and adequate compensation to the injured party in respect of his general damages.

*Alla v Road Accident Fund*⁷. Claimant suffered a fracture of the ankle with displacement of the tibial-fibula joint and soft tissue injury, had removal of internal fixtures and still had dislocation of the ankle joint and was awarded R370 000-00 (three hundred seventy thousand rands).

[23] Indeed, the Plaintiff has to be compensated for injuries sustained in the accident. However, the award must be fair, just and reasonable to both parties. The Plaintiff's injuries are not of such a serious nature that he was to be awarded a high amount as

⁵ (3671/2014) [2019] ZAECPHC 51 (29 August 2019)

⁶ (17949/2018) [2021] ZAGPJHC 12 (29 January 2021)

⁷ 338/2010 QOD Vol VI E8-1

the principle on awarding damages is not to pour out largesse from the horn of plenty in favor of the Plaintiff.⁸

[24] Having considered the above comparable cases, as well as the expert reports, in my view a fair and reasonable amount for general damages to be awarded is R500 000-00 (five hundred thousand rand).

Loss of earning capacity

[25] Indeed, it is difficult to quantify the loss of earning or earning capacity of an unskilled self-employed individual such as Plaintiff in this case. Plaintiff testified that he was a vendor selling food and fruits at a local school and that his income varied between R700-00 (seven hundred rand) and R1000-00 (one thousand rand). The Plaintiff confirmed that even post the accident, he is still self-employed as a vendor and still functions in the same way except that he is unable to find employment.

[26] Plaintiff did not provide this Court with any proof of income. The Court takes cognizance of the fact that as a vendor and that he is self-employed, there may be no proper keeping of his financial records.

[27] It is clear that Plaintiff has suffered loss of earning and evidently with no case law which can be compared for a vendor such as him. Had the Plaintiff been in a position of formal employment, it would have assisted the Court to compare the loss of earnings. The Court can only rely on mathematical calculations of the actuarial report of the Plaintiff as the Defendant did not file an actuarial report to dispute that of the Plaintiff's.

[28] Counsel for Defendant could only dispute the loss of earnings through calculations attached to the written heads of argument⁹, where there is uncertainty in respect of the actuarial report.¹⁰

[29] In *Southern Insurance Association Ltd v Bailey NO*¹¹, the court said:

⁸ (See *Pitt Supra*)

⁹ *Defendant's Heads of Argument*, page 34

¹⁰ (See *Enslin v Meyer* 1960 (4) SA 520 (T))

“Any enquiry into damages for loss of earning capacity is to its nature speculative because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of a loss.”

[30] Indeed, the Plaintiff testified that he was employed as a general worker at an old age home and at PVC Ceilings and that at the time of the accident he was a vendor and has since went back to vending post the accident.

[31] The Plaintiff in my view did not sit underlying on fears, anxieties, traumas, emotions, or stressors and avoiding real life. He created something for himself. I cannot agree with Counsel for the Defendant that the Plaintiff was dishonest in his evidence with regard to his employment history. There may be a discrepancy in respect of his employment history, bearing in mind that the Plaintiff only went to school up to standard nine and indeed the, background is that of an unskilled worker ¹². The Plaintiff cannot be faulted for not giving detailed information and in sequence form.

[32] The updated actuarial report of Mr. John Sauer ¹³, indicates the Plaintiff's past loss of earnings as R215 905-00 (two hundred and fifteen thousand nine hundred and five rand) and future loss of earnings as R632 053-00 (six hundred and thirty-two thousand fifty-three rand) with total loss of earnings at R847 958-00(eight hundred and forty-seven thousand nine hundred and fifty-eight rand). Counsel for the Defendant on the other hand indicates in the written heads of argument the past loss of earnings at R227 268-00 (two hundred and twenty-seven thousand two hundred and sixty-eight rand) with a contingency of 50% (fifty percent) and future loss of R665 319-00 (six hundred and sixty-five thousand three hundred and nineteen rand) with a contingency of 50% (fifty percent). Total loss of earnings being at R133 888-05 (one hundred and thirty-three thousand eight hundred and eighty-eight rand and five cents).¹⁴

¹¹ 1984(1) SA 98 (A) at 113F – 114

¹² Index: Expert Notices Vol 1, page 7

¹³ Index: Expert Notices Vol 1, page 74

¹⁴ Defendant's Heads of Argument, page 34

[33] However, the Court has before it the actuarial calculations and these cannot be ignored even though these calculations are a formal guess work into the future however, have the advantage of logical application.

[34] The Court has to accept that the Plaintiff will have difficulty to compete in the labor market and cannot therefore not compete as a result of the injury and his level of education. Counsel or the Defendant submitted that a higher contingency be applied up to 50% for both past and future loss of earning capacity. Counsel for the Plaintiff submitted that a contingency of between 5% (five percent) and 7% (seven percent) be applied.

[35] It is trite that contingency deductions are within the discretion of the Court and are dependent upon the Court's impression of the case. Contingency is normally calculated at 5% (five percent) for past loss of income and 15% (fifteen percent) for future loss of income.¹⁵

[36] The factors the Court has to consider when determining contingency are the probability that Plaintiff may have a less than normal life expectancy which the experts agree that the accident has not affected. Whether Plaintiff will experience periods of unemployment by reason of incapacity due to the accident, labor unrest or general economic conditions.

[37] "It is now settled that contingencies, whether negative or positive are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to both parties. There is no hard and fast rule regarding contingency allowances."¹⁶

[38] In my view a fair, just and reasonable contingency of 5% (five percent) for past loss and 25% (twenty five percent) for future loss should be applied.

Costs

¹⁵ *Southern Insurance Supra*

¹⁶ *Masemola v Road Accident Fund [2023] ZAGPPHC 553; 17336/2017 (2 July 2023)* at para [41]

[39] The general rule is that costs follow the event and with costs being the discretion of the Court. The Court therefore awards costs on a party and party scale B.

Order

[40] Accordingly, the following order is made:

1. Prayers 1, 2 and 3 of the Plaintiff's application in terms of Uniform Rule 38(2) are granted;
2. The Defendant is liable to pay 80% (eighty percent) of the Plaintiff's proven or agreed damages;
3. The Defendant shall pay the Plaintiff the sum of R1 147 721-00 (one million one hundred and forty-seven thousand seven hundred and twenty- one rand) in respect of general damages and loss of earning capacity set out as follows:

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Total:	R934 651-00
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4. The defendant shall pay the abovementioned amount into the Plaintiff's attorney's trust account;
5. The Plaintiff's attorney's trust account details are as follows:

ACCOUNT HOLDER:	VZLR INC
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BRANCH:	ABSA BUSINESS BANK HILLCREST
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BRANCH CODE:	632005
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TYPE OF ACCOUNT: TRUST ACCOUNT

ACCOUNT NUMBER: 3[...]

REFERENCE: MAT161379

6. The Defendant shall furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 8 March 2020;

7. In the event of default on the payment of the costs, interest shall accrue on such outstanding amount at the statutory more rate on the date of taxation/settlement of the bill of cost, as per the Prescribed Rate of Interest Act 55 of 1975, as amended, per annum, calculated from the due date until the date of payment;

8. In the event that the Defendant does not, within 180 (one hundred and eighty) days from the date on which this order is handed down, make payment of the capital amount, the Defendant will be liable for payment of interest on such amount at 11, 75% (eleven percent) (the statutory rate per annum) compounded and calculated 14 (fourteen) days from date of this order;

9. The Defendant is to pay the Plaintiff's taxed or agreed party and party cost, up to and including the date, when this order is made an order of court;

10. The reasonable qualification fees of all the Plaintiff's experts whose reports had been furnished to the Defendant and/or its experts:

Dr JP Marin: - Orthopaedic Surgeon

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12.2 The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed cost.

CHESIWE J

Appearances

For the Applicant:

Instructed by:

Adv. A Sander

Du Plooy Attorneys

Bloemfontein

For the First and Second Respondents:

Instructed by:

Ms J Gouws

Road Accident Fund

Bloemfontein