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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 11620/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE

SIGNATURE

In the matter between:

N[...] M[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAPHELELA AJ:

1. The plaintiff is an adult male person who was born on the 08th November 2001 and has instituted a claim against the defendant resulting from the injuries sustained in a motor vehicle accident which occurred on the 06th January 2015. It is alleged that at the time of the accident the plaintiff was a passenger in a vehicle with registration numbers and letters C[...] when the driver lost control of the vehicle. As a result the plaintiff sustained serious bodily injuries.

2. At the beginning of the trial I was informed by counsel for the plaintiff that, the defendant is around court and has been in court since the calling of the roll call. The counsel indicated that the defendant's counsel told him he has no instruction to settle the matter and that should the plaintiff be willing to call the matter and proceed with the hearing he may proceed to do so. I have stood the matter down and requested the counsel for the plaintiff to call the defendant's counsel and attorneys to court, however, when the matter was recalled again I was told that the counsel and or the legal representatives for the defendant are not in court and the attorney indicated that he has become sick and will not be able to attend court. It must be indicated that the defendant never reported any sickness and inability to attend court until the matter was stood down for the plaintiff to look for them. There is also no reason advanced to court as to why no counsel was appointed to represent the defendant nor to inform the court of any of the allegations as indicated. On that basis the matter proceeded on unopposed basis.

3. The plaintiff informed the court that the merits of the claim was previously settled between the parties at concession in favour of the plaintiff. On the quantum aspect, general damages was settled and an interim payment in respect of the loss of earnings was also agreed between the parties which interim payment should be deducted on any amount to be awarded to the plaintiff in respect of loss of earnings if any. The court was also provided with draft orders reflecting the settled issues as referred to above. The plaintiff has appointed a number of experts to quantify the plaintiff's claim.

4. The plaintiff among others sustained the following injuries in the accident which are described as the head injury which is referred to as moderate head injury from the linear Skull fracture. He also sustained a T3/T4 spine fracture and now presenting with significant long term mental disturbance and poor concentration. He remained an in-hospital patient until he was discharged after ten days from the hospital. The plaintiff alleges to still be seriously struggling with accident related sequelae of the injuries sustained.

5. The counsel for the plaintiff indicated that, the plaintiff completed a grade 12 level of education pre-accident according to the educational psychologist, and post the accident and after spending a gap year not doing anything relating to his studies, he registered for an LLB with the university of Limpopo and only attended for one week and then dropped out due to the sequelae of the injuries sustained in the accident. It was further indicated that according to the assessment by the educational psychologist, he was of average intellectual ability who worked hard to achieve his dreams and was capable of passing a Bachelor's degree and or a post-graduate studies.

6. In the post accident, the plaintiff suffers from constant executive headaches which makes it difficult for him to concentrate and focus, study easily and remember things. He suffers from pain on his back as a result of the spine fracture and as a result among others he struggle to sleep as he only sleeps with one position. He also feels that his personality has changed as well as physically and mentally. His intellectual capacity has dropped from average performing learner to below average intellectual ability. He now struggles with his studies and as a result will no longer be able to study beyond matric level. The educational psychologist further indicated that he forgets details of what he has read which suggests inadequate comprehension as well as short and long term memory impairment.

7. In conclusion the counsel for the plaintiff submitted that the plaintiff would have entered the open labour market in jobs graded at Paterson Scale B4/B5/C1 and progressed to jobs graded at Paterson E1+ as a career ceiling. In the post accident he

will no longer be able to study beyond matric and that he has already dropped out of studying law and will only remain with a matric level of education. The counsel also made reference to the actuarial calculations and indicated that based on the submissions made he is of the view that the plaintiff should be compensated with the amount of R12 076 200.00 less the R1000 000.00 interim payment already made and be compensated with an amount of R11 076 200.00. It was further submitted that the plaintiff be awarded party and party costs including counsel's fees on scale B of the costs.

8. Having considered the actuarial calculations made, note was taken of the fact that the calculations were done more than a year pre-the hearing of the matter. The plaintiff was requested to provide a recalculations with the adjusted contingency fee at 30% in the pre-accident. The re-calculations were subsequently received and will be discussed later in this judgement.

9. According to the Neurosurgeon the plaintiff sustained Moderate head injury with linear skull fracture. He now present with post injury recurrent headaches and significant long term mental disturbances. He also sustained a T3/T4 spine fracture and his whole person impairment was assessed at 24%. It is further indicated that at the time of the accident he had a brief loss of consciousness and an amnesia for one hour which confirms a moderate head injury. He was taken to Letaba Hospital and later transferred to Polokwane hospital for advanced medical treatment.

10. The orthopedic surgeon also noted the injuries sustained by the plaintiff in that he wore a neck brace for one week and was furthermore treated conservatively with analgesics. He can not carry heavy loads and experiences pain over the fractured area when sitting for long. He is unable to walk longer than 1km and can only sleep with his back. The orthopedic surgeon in his assessment indicated a discrepancy between the patient's medical history and the latest radio-logical findings. He however indicated that both indicate that there could have been a relatively minor injury to the T-spine at one or more levels.

11. According to the neuropsychological assessment by the clinical psychologist to establish the nature and severity of any cognitive impairment, the results of the assessment revealed that deficits in most areas of cognitive functioning; poor sustained attention and concentration, poor executive dysfunction, poor inadequate planning and problem solving, poor abstract reasoning, poor concentration on numerical task, poor verbal reasoning, poor immediate recall span, poor cognitive flexibility, poor psychomotor speed and poor short-term memory.

12. With respect to the impairment assessment and results it is indicated that his self reported BDI completed indicate moderate levels of depression and presented with anxiety symptoms and feels scared inside the speeding car. The self reported BAI also indicates moderate levels of anxiety and the self reported IES-R and PCL-5 indicates likely levels of PTSD. He now present with sustained cognitive impairment limitations.

13. According to the educational psychologist, the plaintiff had just passed Matric (Grade 12 with entry to University) and had taken a gap year before proceeding with his studies. The educational psychologist had taken note of his two failures in the pre-accident (Grade 5 and 11) and the fact that he eventually passed grade 12 with matric exemption. In 2021 which is post the accident, he had registered at the University of Limpopo (Law degree) and dropped out after just one week upon realizing that he was not coping with his studies due to challenges with attention and concentration.

14. In the pre-accident, the educational psychologist indicates the following "An analysis of M[...]’s grade 12 results suggests average and adequate scholastic performance of someone who would go on to pass his Bachelor’s degree and even post-graduate studies. When one understands one’s material, one gets motivated to study further for self-actualization and self-enhancement. According to normal curve and normal distribution, 68% of people are of average intelligence, which suggests that it is most people out of every hundred, who go on and succeed in life. The same would

go for M[...]. This means that he used to understand stuff easily, pay adequate attention and remember information adequately”.

15. It is further indicated that it does not seem probable that he will persists with his studies, it is therefore clear that he has loss of earnings potential that he would have earned should he had completed his university studies. It is indicated by the educational psychologist further that “He would sail easily at tertiary and gain adequate employment that relates with his studies had it not been for the accident. In addition and in view of his pain and physical challenges, M[...] would not be able to participate in skills development programs as those offered in TVET institutions, as these require physical fitness, which he does not have in view of his shoulder injury and general back pains and headaches. He now functions as one with below Average IQ, which would not motivate him to pursue his studies”.

16. In the post accident educational assessment the results showed cognitive, neurocognitive and neurobehavioural challenges; PTSD and emotional difficulties, which have posed the following functional difficulties for M[...]: “Compromised concentration, attention and mental control, poor verbal and non-verbal concept formation and reasoning; poor immediate and delayed memory and working memory, poor psycho-motor and processing speed; highly inadequate Executive functions like planning; organization; cognitive flexibility and inhibition; below Average IQ and compromised scholastic skills like spelling; reading comprehension and arithmetic skills.

17. In conclusion the educational psychologist indicated the following: “It does not seem feasible and probable that M[...] can succeed with his tertiary studies as he feels motivated to pursue them, in view of all the challenges that befell him, wholly accident related. M[...] will end up with his Matric, and may not attain any further University or even University of Technology or TVET qualification, as the latter two require even physical abilities”.

18. The occupational therapist indicates that due to his limited educational attainment, he was therefore reliant on his physical skills to gain employment and as a result of the injuries sustained he has been precluded from work exceeding light physical strength. He is now considered a vulnerable employee in the open labour market due to the nature and sequelae of the injuries sustained.

19. The occupational therapist further indicated that: "Taking into account the injuries sustained and the neurocognitive and psycho-emotional difficulties experienced, his vocational prospects have been significantly negatively affected by the accident. He will not be able to participate in work exceeding light physical demand nor will he be able to obtain skills to allow him to work in light physical demand due to the cognitive difficulties reported by the clinical and educational psychologists".

20. Based on his educational attainment as postulated by the educational psychologist, it is noted that he registered for an LLB Degree in 2022 which would have been the case in the pre-accident. It is indicated that LLB is on the NQF level 8 which would have allowed him to enter the open labour market at Paterson B4/B5/C1 and progress to Paterson E1+ as his career ceiling. Before entering the open labour market it is noted that he would have taken four years of study and then another 2 years for article-ship and law school to enable him to get his admission as a legal Practitioner. After completion of his article-ship he would therefore have entered the open labour market on a permanent basis.

21. In the post accident scenario, it is indicated that after attaining appropriate skills he should have been able to work in such places as protective workshops which are safe, disability-friendly environments providing opportunities for people with disabilities from the local communities to develop and improve their skills and to earn an income through the products that they make to supplement their disability grants for those who are receiving grants. Skills provided in Protective Workshops include wood-working, Metal-Working and Textiles(Sewing).

22. The Industrial psychologist further indicated that within the protective environment, the plaintiff would have earned in the form of regulated stipend, most likely comparable to the lower quartile of the unskilled worker band per annum. An annual inflationary increases would then be applicable until he reaches retirement age and qualifies for state's pension at the age of between 60 and 65 years.

23. Having considered all the experts reports and opinions including the plaintiff's submission in this regard, it is clear that the plaintiff will not be able to reach his career ceiling as per the pre-accident educational attainment. In that instance one will therefore have to compare the plaintiff's earnings now that the accident had occurred with his earnings if the accident did not occurred to establish his loss of earnings.

24. Wherefore it is clear that the plaintiff's loss will be the differences between his pre-accident and post accident educational attainment. Mark Allan Roe (un-reported) case no. 2009/16157 South Gauteng High Court by Judge FHD van Oosten where the issue regarding this heading was considered with reference to different case laws(paragraph 11) Rudman vs RAF 2003 (2) SA 234 (SCA) 241H-242B where the following was indicated: "The general principle applicable in this regard has been succinctly stated by Chetty J in Prinsloo vs RAF 2009 (5) SA 406 (SE)with reference to the leading cases of Santam Versekeringsmaatskapy Bpk v Byleveldt 1973 (2) SA 146 (A) 150B-D and Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A) 917B-D as follows:

25. "A person's all-round capacity to earn money consists inter alia of an individual's talents, skill, including his or her present position and plans for the future and of consideration of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate on the one hand the total present monetary value of all that the plaintiff would have been capable of bringing into his/her patrimony had he/she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring in to his/her patrimony while handicapped by the injury. When the two hypothetical totals have been compared the short fall in value if any is the extend of the

patrimonial loss. At the same time evidence may establish that an injury may in fact have no appreciable effect on earning capacity, In which event the damages under this will be nil”.

26. Regarding the contingencies reference is made to the case of *Southern Insurance Association v Bailey NO 1984(1) SA 98 (A)*, the court indicated that in order to assess the plaintiff's future loss of earnings a comparison should be made between what would the plaintiff earned pre-morbid and what he is likely to earn post-morbid. Experts are frequently called in to assist the court, but courts are not bound by the opinion of experts. It is the duty of the expert to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusion to enable the court to form an independent judgement by the application of the criteria to the facts.

27. In the case of *Mashaba v Road Accident Fund 2006 (5C3) QOD 179 (T), Prinsloo J, referring to the Bailie case above held, among others, that “where career and income details are available, the actuarial calculation approach is more appropriate and a court Must primarily be guided by the actuarial approach, which deals with loss of income or earnings before applying the robust approach, which normally caters for loss of earning capacity. This, so said the learned Judge, would help the court to ensure that the compensation assessed and awarded to the plaintiff is as close as possible to the actual facts relied upon”.*

28. See *Corbett, The Quantum of damages*¹, where the following appears: “In this regard the distinction is drawn (In principle and not without difficulties) between causation and quantification: it has never been the approach of the courts to resolve the inescapable uncertainties by the application of the burden of proof. Mere difficulty in assessing this amount will not absolve the court from arriving at an estimate. The onus of showing that there is sufficient likelihood of such loss rests on the plaintiff. This does not, however, mean that where the evidence suggests a range of possibilities, the

¹ Volume 1: fourth edition, Gauntlett at Page2-4

courts will not select the one least favourable to the plaintiff because he bears the onus, and has not proved that a more favourable ought to be preferred”.

29. Again as pointed out by Corbett at page 30, *“before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant’s wrongful act...”*

30. *“...disability which is likely to impair the injured person’s earning capacity or to cause a loss of the amenities of life. Such disability may be temporary or permanent. Where it is temporary and has in fact disappeared at the time of trial, it is not normally of great importance as an independent factor.... On the other hand, where it is permanent or where, though temporary, it extends beyond the time of trial, then it may cause prospective losses, such as diminution in the injured persons earning capacity or impairment of the amenities of life, for which compensation should be made by the award of damages. moreover, a permanent disability may be present at the time of the trial or it may be one which will only manifest itself at some future date”.*

31. I am therefore satisfied that the injuries sustained by the plaintiff in the accident resulted in the sequelae as indicated by various experts and that the plaintiff will not be able to reach his pre-accident potential due to the injuries sustained in the accident. One must also note that at the time of the accident, the plaintiff was not attending school and it is indicated that he had taken a gap year. However, the information before court is that post the accident he registered with the University to study LLB, however, he only attended for one week and realized that he will not cope with his studies. As a result he had dropped out of university as a direct result of the injuries sustained in the accident.

32. Wherefore, it is clear that there is a difference between the plaintiff’s pre-accident earnings and post accident earnings and the difference constitute the plaintiff’s loss. An actuarial calculations was provided by the plaintiff with contingency deductions of 15% uninjured and 25% injured deductions. There was also a cap applied to the calculated

loss which the actuary indicated that it amounts to a 43.10%. The actuarial calculation was dated 07th June 2023 which is more than 1 year since the calculations. On that basis the court requested that a revised calculations be done and that contingencies should also be revised in that a 30% deduction should be applied in the pre-accident.

33. *Van der Plaats v Southern African Mutual Fire & General Insurance Co Ltd 1980 (3) SA 105 (A) at 115-115.* where it was indicated that, “The underlying rationale is that contingencies allow for general hazards of life such as periods of general unemployment, possible loss of earnings due to illness, savings in relation to travel to and from work now that the accident has somewhat incapacitated or impaired him as well as the risk of future retrenchment. The general vicissitudes of life are taken into consideration when contingencies are considered”.

34. In the matter of *Sethole v Road Accident Fund*² the issue regarding contingencies was considered, and it was held that it is settled law that contingency deduction is a matter which falls within the discretion of the court. A court may be entitled, in qualifying an amount of damages, to form an estimate of the plaintiff's chances of earning a particular figure. This figure will not have to be proved on balance of probability but will be a matter of estimation. The figure is not compounded on any logical basis.

35. The plaintiff have provided the court with the revised calculations as instructed. It is also clear that the original claim has now been reduced by 37.34% after the application of the contingencies as requested by the court, the plaintiff present with a total loss of earnings in the amount of R11 980 700.00 on which an interim payment of R1000 000.00 should be deducted leaving a total loss of earnings in the amount of R10 980 700.

² (1487/2014) [2018]ZALMPPHC 11 (17 April 2018)

36. The Court is therefore satisfied that the amount as calculated by the actuary and after the deduction of the interim payment constitutes the plaintiff's future loss of earnings.

37. In the circumstances the court makes the following order

A) The defendant to pay the plaintiff an amount of R10 980 700.00 in respect of the plaintiff's future loss of earnings,

B) The plaintiff to pay the defendant's party and party costs on a high court scale including the counsel's fees on scale B of costs.

T C MAPHELELA
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : T P MOTLATLE
INSTRUCTED BY : T MAMITWA ATTORNEYS

FOR THE DEFENDANT : NO APPEARANCE
INSTRUCTED BY : STATE ATTORNEYS(NO APPEARANCE)

DATE OF HEARING : 11 DECEMBER 2024

DATE OF JUDGEMENT : 28 JANUARY 2025