REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:3864/2020

(1) REPORTABLE: ~~YES~~ / NO

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

(3) REVISED.

Signature:

Date: **15 NOVEMBER 2024**

In the matter between:

MUKHITHI JOHANNES MUKWEVHO **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MONENE AJ

INTRODUCTION

[1] The plaintiff instituted action proceedings against the defendant for damages arising from a motor vehicle accident which occurred on 30 June 2018. The plaintiff was a driver of

a motor vehicle which collided with the motor vehicle of the insured driver, one Mr. Makgathi Sathekge.

[2] The defendant defended the action, in the first place denying that the accident occurred, in the first alternative blaming the accident on the sole negligence of the plaintiff and in the second alternative pleading contributory negligence.

[3] What is to be determined before me is who is liable for the accident, the general damages suffered by the plaintiff and the plaintiff's loss of earnings if there be any as well as a future medical expenses assurance or undertaking.

[4] To prosecute his undefended claim for both general damages and loss of earnings the plaintiff sought this court's leave to invoke uniform rule 38(2) and thus proceed to lead evidence under cover of affidavit. Such leave was granted as sought by this court. However, as regards liability the parties led oral evidence, with the plaintiff leading two witnesses and the defendant only one.

THE DEFENDANT'S POINTS IN LIMINE

[5] In its amended plea the defendant prefixed its plea over with two special pleas challenging the availability of general damages to the plaintiff in casu, to wit:

> 5.1 That the plaintiff had not timeously claimed general damages as this head of damages had appeared in neither the RAF 1 form nor the initial pre-amendment particulars of claim in circumstances where the addition of general damages was done outside three years and had thus "prescribed".
>
> 5.2 That the plaintiff's general damages claim was non-compliant with regulatory instruments in that it offends section 24(6)(a) of the Road Accident Fund 56 of 1996 to the extent that 120 days had not lapsed from the lodgment date of the claim to the issuing of summons.

[6] Upon being addressed by both counsel on the points *in limine* which in effect were argued as one, I promptly dismissed them on attenuated reasons about which I further briefly outline as follows:

6.1 It is not our law that if a party does not list a particular head of damages at lodgment of a claim or subsequent pleading, such a claim as it arises from the same facts or cause of action prescribes as separate from other claims or the main cause of action. In ***Nonkwali v Road Accident Fund (105/2007) [2008] ZASCA 3(6 March 2008)*** the SCA per Maya JA (as she then was) clarified this point as follows:

> "Authorities *are legion to the effect that a plaintiff who claimed for damages sustained as a result of wrongful and negligent driving under the Act's predecessors had but a single, indivisible cause of action and that the various items constituting the claim were thus not separate claims or separate claims or separate causes of action. The interpretation, in my view, necessarily extends to claims brought under the Act as it has the same objective and effect as these previous statutes.*
>
> *The effect of this finding cannot be articulated better than Corbett JA did in Evins v Shield Insurance Co Ltd 1980(2) SA 814(A) at 836 C-E. There, the court dealing with the concept of a single cause of action in the context of prescription with regard to the amendment of a plaintiff's claim as originally pleaded by him, said: 'Where the plaintiff seeks by way of an amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages."*

6.2 Quite clearly therefore it is the cause of action which may prescribes and not further quantifications or additional claims arising from the same cause of action. The cause of action is one and is indivisible for prescription purposes and portions

thereof cannot be excised and be said to have prescribed when the cause of action to which they belong has not prescribed.

6.3 The section 24(6) (a) portion of this point *in limine* taken by the defendant, even though incongruously stated and devoid of meaning as articulated should, in my view, also fall on the same indivisibility sword referred to supra in ***Nonkwali*** as well as to the clear wording of that section which is not peremptory but merely directory such that substantial compliance should be enough to help a claim escape fatality.

6.4 Worse still, the defendant has on the papers before me, already made an offer for general damages, albeit that it was not accepted by the plaintiff. This on its own completely defeats the defendant's non-availability of general damages stance on whatever footing as the defendant cannot approbate and reprobate at the same time by denying the existence of general damages while making an offer in regard thereto.

[7] It was for the above reasons that this court dismissed the points in limine raised by the defendant which points, in my view, were reflective of nothing less than hapless clasping at straws.

LIABILITY(MERITS)

[8] In testifying before the court on liability the plaintiff stated that he was on 30 June 2018 at around 20h00 driving a white Polo Vivo motor vehicle on the Mmarobala to Tibane road when the insured driver's mini-bus or "taxi" motor vehicle drove from opposite the direction he was going and encroached onto his lane and collided with his motor vehicle. He stated that the minibus had only one headlamp on at the time of the collision and blamed the entire accident on the negligence of the minibus driver.

[9] The plaintiff then called, as a second witness, his brother Mr. Ralefatane who testified that he was a passenger in the front passenger seat of the plaintiff at the time of the collision. He corroborated the plaintiff on the version that the minibus approached the

plaintiff's motor vehicle from the front and that it only had "one eye", that is, only one of its headlamps was on. He could not speak to the encroachment of the insured driver into the plaintiff's lane as testified to by the plaintiff.

[10] For its part, the defendant called Mr. Sathekge, the insured driver who testified that the collision happened the plaintiff's motor vehicle while trying to avoid a collision with another car, an Isuzu bakkie, rammed into his minibus. He denied that his minibus had "one eye". He countered the plaintiff's version that he encroached into the plaintiff's lane and thus denied any negligence on his part, averring that it was the plaintiff who was solely responsible for the collision.

[11] It is correct as pointed out by Mr. Phaswana, counsel for the defendant, that the plaintiff did not dispute that he had, at the time of the accident, been driving at a speed of 20 above the 60 km per hour regulated for the scene of the accident.

[12] The speed alone points, in my view, to some contribution by the plaintiff to the negligence behind the accident.

[13] It being so that the versions of the plaintiff and the insured driver are mutually exclusive of each other and nothing else helps to untie that knot, I must tilt the scales in the plaintiff's favour on account of the following considerations:

13.1 The plaintiff's version on a key and germane aspect of negligence in this matter, to wit, the one headlamp on, is corroborated by his passenger and was not scathed by any cross-examination. It is not a recently fabricated version as it has been there from both witnesses from the beginning as per their initial accident statements.

13.2 This court was generally not impressed by the insured driver's evidence who appeared uncertain of the events of the day and exaggerated his answers.

13.3 The attitude of the defendant in pleading first that there was no accident and then that there was contributory negligence does not sit well with this court as it is reflective of a litigant treating a trial as a fishing expedition which, for this court, dents credibility.

[14] The test on contributory negligence is, in my view, best captured in the following words from ***Ntsala v Mutual & Federal Ins Co Ltd 1996(2) SA 184(T) 190***:

"*I am satisfied that the onus rests throughout on the plaintiff to prove negligence on the part of the defendant. Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary: he must tell the remainder of the story, or take a risk that judgement be given against him."*

[15] It thus is, in my view, so that the onus to prove contributory negligence and its extent is on the defendant. In casu, all that was proven against the plaintiff was that he drove at a speed of 20 above the speed limit of the area. The balance of the negligence involved in the matter appear, on the evidence led before me, to be with the insured driver.

[16] Following upon a question posed by the court as to whether the insured driver in *casu* had not himself lodged a claim with the defendant and some kind of reversed roles where the plaintiff in casu would have been the insured driver, counsel for the defendant informed this court, in his heads of argument, that the insured driver had indeed had his claim settled on an 80/20 percent apportionment in his favour. I do not know what evidence was led in the other matter and how it was led. I am unable to take anything that allegedly happened in the other matter under consideration as such was not tendered as evidence to me. Even if evidence led before the other court was presented to me it would still have had to be assessed and evaluated together with what was led before me. The question of which matter happened to be settled before another would, in my view, be an unhelpful and unfair exercise akin to the biblical pool of Siloam into which the first to jump in was the only one advantaged. Suffice to say that this situation presents an anomaly whose curing is urgent but can only become to be addressed by a vigilant and less supine defendant who should

be able to identify such matters and perhaps ensure that they are heard simultaneously or jointly in some way. One wonders exactly how many of this kind of matters are out there where parties have exchanged roles to both benefit from the fund in a manner which is clearly untenable. Something must give. We cannot continue to have saints and devils conveniently exchanging roles so easily and call that justice.

[17] Back to the matter I am seized with and solely on the evidence led before me, I find that all things considered, the merits or liability in this matter must be apportioned 70/30 percent in favour of the plaintiff.

GENERAL DAMAGES

[18] I am persuaded that on account of the common cause fact that the defendant did make an offer on general damages to the plaintiff, this court's jurisdiction to determine general damages is engaged because such an offer, although rejected by the plaintiff, means that the defendant has accepted the seriousness of the injuries sustained by the plaintiff.

[19] In ***Chetty v Road Accident Fund(A91/21)[2021] ZAGPPHC 848(7 December 2021) at paras 19 to 20*** the court, after reflecting on what the SCA had stated on regulation 3 of the Regulations arising from Act 56 of 1996 in ***Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena[2012] ZASCA 169 at para 19*** to the effect that it is the defendant and not the court which must be satisfied about the seriousness of an injury for general damages purposes, stated as follows:

> "*Faced with uncertainty in respect of whether the Fund accepted the plaintiff's serious injury assessment form or not, I requested the plaintiff's counsel to file supplementary heads to address us on this aspect. Counsel for the plaintiff duly filed the heads and we are indebted to him. It appears from the supplementary heads that the Fund had offered an amount as compensation for general damages and therefore we are satisfied that the Fund had accepted the plaintiff's injury as serious.*

The court a quo was therefore correct in dealing with the issue of general damages."

[20] The injuries suffered by the plaintiff have been testified to, under cover of affidavit in terms of uniform rule 38(2) by Dr Lou van Wyk, the Orthopaedic Surgeon, as being the following:

20.1 Traumatic mild head injury.

20.2 Severe lower back injury.

20.3 Cervical spine subluxation at C4 and C5 with a unifacet dislocation

20.4 Subluxation with fractures of the facets at C6 and C7.

20.5 Soft tissue chest injuries

20.6 Cervical vertebral subluxation of C6 and 7.

[21] Arguing for general damages in the amount of R700 000.00 the plaintiff referred me, inter alia, to the following comparative authority:

21.1 ***Mbalathi v Road Accident Fund [2017] ZAGPPHC 951; [2019] JOL 41449 (GP)*** where debilitating injuries to the T10 and L1, rib fractures at rib 9 and 11 and a pneumothorax to a 22-year-old attracted an award of R450 000.00 equivalent to R773 864.00 currently.

21.2 ***Oosthuizen v RAF 20-16(7C4) QOD(GNP)*** where a 24-year-old had, in 2016, been awarded R 520 000.00 arising from a compression fracture of the L3 vertebral area which currently equates to R750 000.00.

21.3 ***Mohale v RAF 2015 (7A4) QOD 15 GNP*** involving a brain and neck injury which saw the plaintiff therein compensated at R650 000.00 in 2015 which amount equates to R948 181.00 this today.

[22] I need not belabor the obvious debilitating sequelae of continued pain and loss of amenities of life attendant to the injuries suffered by the plaintiff in casu, particularly the spine, back and neck injuries.

[23] Taking guarded counsel from the above comparative authorities within an understanding of the trite principle that previous awards are not to be slavishly followed, I have no hesitation in finding the amount suggested by the plaintiff as fair for general damages to be fair and reasonable in the circumstances and am inclined to so order.

LOSS OF EARNINGS

[24] Pursuant to quantification of loss of earnings the following evidence was led by the plaintiff under cover of affidavit:

24.1 Dr. Manesh Pillay the neurologist found the plaintiff to have suffered no significant neurological injuries.

24.2 The occupational therapist, Elsabe Krone opined that owing to the Whole-Body Impairment of 15 percent as determined by the Orthopaedic Surgeon the plaintiff suffered from continuous pain and fatigue which would occupationally call for him to be accommodated with intermittent short breaks from any workday. The plaintiff was regarded by this expert to have suffered physical deficiencies which rendered him to be an unequal competitor in the open labour market.

24.3 Karin Pulles, the plaintiff's industrial psychologist, observed that at the time of the accident the plaintiff was employed as a truck driver on a one-year contract having previously worked in various other driving jobs. He was earning R8999.99 per month. This witness noted further that, post the accident, the plaintiff had

returned to work for about three months only to see his contract terminated. However, he has since, it was noted by this expert, managed to secure a similar driving job at R2 775.15 per week.

24.4 The industrial psychologist determined that past loss of income should be computed from 1 August 2018 to 24 October 2018 at R11 019.11 per month.

24.5 Informed in the main by the industrial psychologist's report which had been fed into by the other expert reports Gregory Angus Whittaker, an actuarial scientist, postulated a gross loss of earnings at R1 308 075.00 having factored contingencies at 5 percent for past loss and 15 percent on future loss of income. uninjured income

[25] It is trite that the principle underlying our law on compensation in Road Accident Fund matters is that the plaintiff who has been harmed by the negligence of an insured driver must, as far possible, be placed by a compensation award given, in the position such a plaintiff would have, but for the injuries suffered, been. Trite as that principle is, I cannot resist the temptation to, in that regard, defer to the time-tested counsel of Rumpff J in ***Dippenaar v Shiel Insurance Co Ltd 1979(2) 904(A),*** which went this way:

"*In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.*"

[26] In so far as this court is concerned, the approach in assessing loss of earnings can, in this court's view, be put no better than it was stated in **Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F** where the following was stated:

"*Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augururs 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 the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment by y way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative."

[27] I am not inclined to deviate from the uncontested expert evidence tendered before me, more so the actuarial computations. To so deviate I would need something better or a counterview or at least a reasoned view that the expert evidence led is irrational or otherwise not to believed for another reason. All that is lacking in casu. I thus cannot fault any of the experts in casu in any manner.

[28] In his heads of argument counsel for the plaintiff intimated that in the light of the plaintiff's age at 40 years, who was 34 at the time of the accident, and postulating his year of retirement at 65 years added to unknown future circumstances the pre-morbid 15 percent contingency deduction done is fair and reasonable. I agree.

[29] I was further invited by the plaintiff's counsel to, in the backdrop of the occupational therapist's expert recommendation, that a higher than normal post-morbid be applied, a 35 percent contingency deduction on post morbid future loss of income be factored in. This, it was submitted by counsel in his written submissions, is premised on an educated guess that the plaintiff may in the future remain unemployed for long periods with the possibility of securing short intermittent contracts, which may be few and far in between on a lower income level. I find that reasoning persuasive.

[30] Arguing on the plaintiff's expert reports, as none were forthcoming from the defendant, counsel for the defendant, Mr. Phaswana, submitted that instead of a 35 percent on post-morbid future loss he would have preferred a contingency deduction of between 20 and 30 percent. While I appreciate that a percentage of 20 to 30 percent is also higher than

normal, I restate that, for reasons already advanced above, a 35 percent deduction is fairer and more reasonable.

[31] In rands and cents the total loss of earnings prayed for by the plaintiff and which I am inclined to award is **R1 758 289.05**.

[32] When the gross loss of earnings amount determined immediately above is added to the **R700 000.00** for general damages a sum of **R2 458 289.05** as total damages suffered by the plaintiff results. From that, 30 percent apportionment arising from this court's determination of liability supra must be subtracted resulting in R1 720 802,33.

FUTURE MEDICAL CARE

[33] According to the Orthopaedic Surgeon there is a need for extensive surgery to be performed on the plaintiff in the future as well as physiotherapy, more consultations and medication.

[34] According to the Occupational Therapist the plaintiff will need assistive devices such as a shower stool, pedestal stool and a small two-wheel trolley for shopping and work.

[35] A case for an undertaking for future medical care has, in my view, been made.

ORDER

[36] Premised on all the above, I make the following order:

[36.1] The defendant shall be liable 70/30 percent for damages suffered by the plaintiff arising from the motor vehicle accident of 30 June 2018

[36.2] The defendant shall pay an amount R 1 720 802.33 (**ONE MILLION SEVEN HUNDRED AND TWENTY THOUSAND EIGHT HUNDRED AND TWO RAND AND**

THIRTY-THREE CENTS) to the plaintiff in respect of total damages suffered by the plaintiff arising from a motor vehicle collision of 30 June 2018.

[36.3] The said amount mentioned in 33.2 above shall within 180 days of this order being granted be paid by direct transfer into the following trust account:

ACCOUNT HOLDER: BADENHORST ATTORNEYS

BANK : ABSA BANK

TYPE OF ACCOUNT : TRUST

ACCOUNT NUMBER : 4[...]

BRANCH CODE : 632005

REFERENCE NUMBER: NATALIE/DER 1/O771

[36.4] The defendant shall pay the plaintiff's taxed or agreed to party and party costs on a high court scale which costs shall include the costs attendant to obtaining expert reports and the costs of counsel on **scale B**

[36.5] Should the defendant fail to pay the amount in 33.2 above within the 180 days and/or the agreed to or taxed costs within 30 days of taxation and/or agreement; the plaintiff shall be entitled to recover interest thereon on the prescribed rate of interest from the date of mora to date of final payment.

[36.6] The defendant is ordered to, within 14 days of this order, furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of which all future medical expenses of the plaintiff arising from the injuries

and sequalae of the accident of 30 June 2018 shall upon proof be paid by the defendant.

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MALOSE S MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	*: 16 July 2024*
Judgment delivered on	*: 15 November 2024*
For the Plaintiff	*: Adv. JRF Ernst* *: Instructed by Badenhorst Attorneys* *: Tel: - 015 296 4063* *: Email: lit1@badenhorstlaw.co.za*
For the Defendant	*: Mr K Phaswana* *: Instructed by Office of the State Attorney, Polokwane*