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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 22151/17

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 11-12-2024

Signature:

In the matter between:

PHILLIP NTAMBO NHLAPO

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY/ELECTRONICALLY
AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E-MAIL/
UPLOADING ON CASELINES AND/OR COURT ONLINE. ITS DATE OF HAND
DOWN SHALL BE DEEMED TO BE DECEMBER 10, 2024**

NTANGA AJ:

Introduction

- [1] Plaintiff instituted an action against the Road Accident Fund (“the Defendant”) for damages suffered as a result of injuries he sustained in a motor vehicle accident which occurred on May 8, 2016, along Moagi Road Spruitview, Germiston, Gauteng. At the time of the accident, Plaintiff was a pedestrian when an unknown motor vehicle, driven by an unknown driver collided with Plaintiff.
- [2] It is not in dispute that as a result of the collision, the Plaintiff sustained the following injuries:
- 2.1 amputation of the left toe.
- [3] Prior to trial proceedings, Plaintiff filed a notice in terms of Rule 38(2) seeking an order in the following terms:
- 3.1 that reports and affidavits and/or affirmations of the following experts, notices of which were furnished in terms of Rule 36(a) of the Uniform Rules of the Court, be admitted into evidence at the hearing on affidavit in terms of Rule 38(2):
- 3.1.1 Dr E.A. Mjuza (Orthopaedic Surgeon);
- 3.1.2 Dr Z. Radebe (Clinical Psychologist);
- 3.1.3 L. Mashishi (Occupational Therapist);
- 3.1.4 T. Tsiu (Industrial Psychologist); and
- 3.1.5 GW Jacobson (Actuary).
- [4] Plaintiff’s application in terms of Rule 38(2) was not opposed to by the Defendant and an order was granted as prayed for in terms of Plaintiff’s notice of motion.

[5] Defendant conceded merits at one hundred percent and an offer was made by the Defendant in the sum of R350 000.00, which offer was accepted by the Plaintiff.

[6] What is left for determination is whether there has been any Past and Future Loss of Earning Capacity, if so, quantification of damages in respect thereof.

The sequelae of the injuries

[7] Plaintiff engaged five experts to support his claim. The Orthopaedic Surgeon noted that Plaintiff suffered traumatic amputation on his left big toe as a result of the injury. The Clinical Psychologist noted that Plaintiff's intellectual function is within the borderline range. Plaintiff presented emotional difficulties which may have existed prior to the accident and exacerbated after the accident. Plaintiff demonstrated a feeling of being disabled and this affected his psychological well-being. The Clinical Psychologist recommended that Plaintiff be compensated.

[8] The Occupational Therapist report states that Plaintiff has physical difficulties. These include: (i) observed body scars; (ii) restricted active range of movement; (iii) inability to balance on and bear weight through one leg; (iv) protective extension reactions were delayed to the left; and (v) lower tolerance for prolonged standing and walking.

[9] From a functional perspective, the Occupational Therapist opined that Plaintiff has suffered a decline in earning capacity, particularly in physically demanding occupations.

[10] The Industrial Psychologist report states that given his age of 54 years at the time of the accident, his Grade 11 level of education, work experience and current labour trends, it is projected that in uninjured state, Mr Nhlapo may have continued working in his pre-accident role or similar occupations, receiving his premorbid earnings with annual inflationary increases until retirement age of 65.

[11] The Industrial Psychologist report concludes by stating that:

“Mr Nhlapo is likely to find it difficult to secure suitable employment in his current form. He is likely to remain unemployed with a total loss of past and future earnings indicated until the end of his working life”.¹

Submissions

[12] Plaintiff's Counsel argued that Plaintiff was 53 years old when he was injured. The Past loss of income is calculated at 7.5% of R308 096 and the amount claimed is R 150 000.00. Contingency has been calculated at a higher amount and this is enough penalty for the Plaintiff. She further argued that Plaintiff has been penalised by higher contingency of 10% for Future Loss of Income calculated at R103 963.00. She argued that the contingency of 10% is higher than normal. In total, Plaintiff argued for an amount of R412 059.00 for both Past and Future Loss of Income.

[13] It is important to note that as at the time that the matter appeared on trial, Plaintiff's particulars of claim were not amended. Notice of intention to amend particulars of claim was uploaded on Caselines on the date of hearing and after the matter was heard. The amended particulars of claim were uploaded on Caselines on the same day and after the matter was heard.

[14] In any event, when Plaintiff's Counsel indicated intention to amend the particulars of claim from the bar without any notice, Defendant's Counsel objected and indicated that Defendant is not waiving its rights in terms of Rule 28 of the Uniform Rules of the High Court.

[15] This attempted amendment of particulars of claim is not in compliance with Rule 28 of the Uniform Rules and is irregular. The amount claimed in the particulars of claim for Past Loss of Income is R150 000.00 and R1 000

¹ See page 033-133 on Caselines.

000.00 for Future Loss of Income. There is no effective amendment of the amounts claimed as I have indicated that there is no amendment of the particulars of claim in terms of Rule 28 of the Uniform Rules of the High Court.

- [16] Defendant's Counsel argued that Plaintiff was unemployed at the time of the accident and was receiving a government disability grant in the sum of R1680 per month from 2006 to date of accident which was ten years before the accident. She argued that it is not the accident that made him not to work, instead, he was unable to work because of his disability. Consequently, Plaintiff has not suffered any loss of earnings as he had difficulties to work prior to the accident. She argued further that as Plaintiff did not provide collateral information to support his claim, the court should apply a 50% contingency as was applied in *A.A. Mutual Insurance Association Ltd v Maqula*.² She further argued that there is no supporting information to substantiate the claim that Plaintiff was employed from 2006 to 2016 when the accident occurred. She further argued that there was no information supporting what Plaintiff earned when working for Dr Nhlapo in 2003.

Past and Future Loss of Income

- [17] The Occupational Therapist report states that Plaintiff sustained a broken left lower limb in 1981 and was admitted at Chris Hani Baragwanath Hospital. He was also diagnosed with a chronic illness, but he was never admitted in hospital for this.
- [18] The Industrial Psychologist report states that Plaintiff was involved in a motor vehicle accident in the mid-1980s and sustained an injury to his left thigh. He had to undergo surgery to his left thigh to insert internal fixations. He denied ever being diagnosed with chronic conditions prior to the accident.
- [19] Regarding Plaintiff's employment history, the Industrial Psychologist reported that Plaintiff completed Form 3 in 1980 at Senaoane Secondary School. He

² *A.A. Mutual Insurance Association Ltd v Maqula* 1978 (1) (A).

then acquired informal skills training in Electrical Engineering in 1981 during his employment at Thon Lighting. He does not have a drivers' licence. He first entered employment in 1981 and worked as an Assistant Electrician at Thon Lighting. In 1982 he secured employment as a Machine Operator at Bic Ball Pens. Vocational analysis of these positions indicates that his work required prolonged standing, frequent walking, frequent lifting and carrying of medium loads, as well as frequent below the knee level and above shoulder level reach. The Industrial Psychologist reports that due to his poor standing and walking endurance, the claimant does not possess the physical capacity to execute any of these duties.

[20] The Industrial Psychologist records Plaintiff's next employment to be in 1983 to 1991 where he worked as an Inserter at The Star Newspaper, it is however unclear as to how long did he continue with this position. The last employment is when Plaintiff worked for Dr Nhlapho as a General Worker from 2003 until 2004 when Dr Nhlapho passed away.

[21] There is also an indication in the Industrial Psychologist report that Plaintiff worked as a Casual General Worker from 1992 to date of accident and he earned R500.00 to R700.00 per week. What is not clear is how did Plaintiff work as a Casual General Worker while he worked for Dr Nhlapho. This is also in contrast with the Occupational Therapist report which states that at the time of the accident the Plaintiff was unemployed and was actively job-seeking.³

[22] The Actuarial report has taken note of other expert reports indicating that Plaintiff was unemployed at the time of the accident.⁴ The report indicates that Plaintiff received disability grant from 2006 and that this was converted to old age pension when he turned sixty years old.

[23] Taking into account the contradictory reports on whether Plaintiff was employed or unemployed at the time of the accident, I have a difficulty in

³ See page 033-77 on Caselines.

⁴ See page 033-135 on Caselines.

accepting a version that he was employed. It appears that the Actuary whilst acknowledging these contradictions, he proceeded to make calculations for Past Loss of Income. There is no evidence to support that Plaintiff was employed at the time of the accident. There is no reliable evidence of what services he rendered, amounts charged and received. The amount indicated as Plaintiff's income is not supported by any evidence. There was no evidence at all to substantiate existence of this income. It is important to indicate that if this amount is based on casual or part time jobs, this does not make it regular income. The Court was not placed in a position to determine existence of this income. The amount indicated as weekly income appears to be a thumb suck amount. Considering that this would have been a casual work, there is no certainty of whether Plaintiff would receive this amount every week. The probabilities are in my view very slim.

[24] Section 9 of the Social Assistance Act No. 13 of 2004 provides that:

“ ...

9. A person is, subject to section 5, eligible for a disability grant, if he or she-

(a) has attained the prescribed age; and

(b) is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance”.⁵

[25] In order for Plaintiff to qualify for the government disability grant, he should have met the requirement of Section 9 of the Social Assistance Act. He should have suffered disability that qualified him for the social security grant. Secondly, this disability should have made him unfit to obtain employment which would enable him to provide for his maintenance. The argument that he was still able to find employment is illogical as this is in contrast with the statutory requirements for a person to be eligible for disability grant.

⁵ Social Assistance Act No. 13 of 2004.

[26] In *Dippenaar v Shield Insurance Co Ltd*⁶ the Court stated that:

“In our law, under lex Acquilina 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”.⁷

[27] The Court in *Dippenaar v Shield Insurance Co Ltd* accepted the argument that *“the Court must calculate, on the one hand, the present monetary value of all that the plaintiff would have brought into his estate had he not been injured, and, on the other hand, the total present monetary value of all that the plaintiff would be able to bring into his estate whilst incapacitated by his injury”.⁸*

[28] In *Rudman v Road Accident Fund*⁹ the Supreme Court of Appeal stated that:

“ ...

A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss”.¹⁰

[29] In *Z.P.M v Road Accident Fund*¹¹ the Court followed the matter of *Grewal v Nauman* where the Court of Appeal for British Columbia stated that:

⁶ *Dippenaar v Shield Insurance Co Ltd* 1979 (2) (AD).

⁷ See note 6 supra at page 917 para A-B.

⁸ See note 6 supra at page 917 para E.

⁹ *Rudman v Road Accident Fund* 2003 (2) SA 234 SCA.

¹⁰ See note 9 supra at page 241-243 at para H-I.

¹¹ *Z.P.M v Road Accident Fund* (29281/22) [2024] ZAGPHC 421 (6 May 2024).

“The essential purpose of an award for past loss of opportunity diminished earning capacity is to provide the plaintiff with full compensation for all of his pecuniary losses, subject to rules of remoteness...”

As an initial threshold issue, the plaintiff must demonstrate both impairment to his or her earning capacity and that, in this case there is a real and substantial possibility that diminishment in earning capacity will result in a pecuniary loss”.¹²

[30] The court in Z.P.M V Road Accident Fund followed the decision of Mvundle v Road Accident Fund¹³ where the court stated that:

“It is trite that damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff’s performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or be limited in the number and quality of his/her choices should he/she decide to find other employment”.¹⁴

[31] Regarding future Loss of Income, it is reported that Plaintiff was 54 years old at the time of the accident. He was left with few years before attaining retirement or old age pension stage. When dealing with how Plaintiff’s Past and Future Loss of Income is calculated, the actuarial report states that having regard to the accident the income is taken as nil, since it is assumed that Plaintiff would also have collected the same social grant pre-morbidly due to his low level of income. They calculated Plaintiff’s loss as the difference between the value of his income but for the accident and the value of his income having regard to the accident and his life expectancy.

[32] I have a difficulty in accepting existence of additional income arising from casual general work performed by Plaintiff prior to the accident. As indicated

¹²See note 11 supra at para 24.

¹³ Mvundle v Road Accident Fund (63500/2009) [2012] ZAGPHC 57 (17 April 2012) at para 42. See also Scheepers v Road Accident Fund (893/2021) [2023] ZAFHSHC 248 (20 June 2023).

¹⁴ See note 13 supra.

above, there is no evidence provided to substantiate this claim of additional income to the disability grant.

[33] As indicated above, Plaintiff was a recipient of disability grant for a period of ten years before being involved in an accident. Other than the disability grant, there is no evidence to substantiate a claim that Plaintiff was doing casual work at the time of the accident. I struggle to understand how the actuary concluded that Plaintiff is entitled to a Past and Future Loss of Income, considering the conflicting report from the Industrial Psychologist, one part saying he was unemployed and job seeking at the time of the accident and the other part saying Plaintiff was doing casual general work at the time of the accident.

Conclusion

[34] In my view there is insufficient evidence to sustain the claim for Past and Future Loss of Income. The Industrial Psychologist and Actuarial reports were of no assistance to the resolution of the Past and Future Loss of Income claim.

[35] Plaintiff has failed to adduce evidence demonstrating that his income earning capacity was diminished because of the accident.

[36] In the result I make the following order:

1. Plaintiff's application in terms of Rule 38(2) of the Uniform Rules of the Court is granted.
2. The claim for Past and Future loss of earning capacity is dismissed.
3. Defendant is liable to the Plaintiff for 100% of the damages suffered by Plaintiff arising from the motor vehicle collision which occurred on May 8, 2016.

4. Defendant shall pay Plaintiff the amount of R350 000.00 (Three Hundred and Fifty Thousand Rands) in respect of General Damages.
5. The amount referred to in paragraph 3 and 4 above shall be paid into the Trust Account of Plaintiff's Attorneys of record being SS Ntshangase and Associates, Account Number:

Account Holder: SS Ntshangase Attorneys

Bank : Nedbank

Branch : Business Eastrand

Branch Code : 128842

Account Type : Trust Account Number: 1[...]

6. The Defendant shall furnish the Plaintiff with an undertaking up to 100% in terms of section 17(4)(a) of Act 56 of 1996 to pay the costs of future accommodation in a hospital or nursing home and such treatment, services or goods as he may require, as a result of the result injuries that he sustained as a result of the accident, upon proof thereof.
7. Defendant shall pay Plaintiff party and party either as taxed or agreed, in the High Court scale B, which costs shall include the costs of counsel for 13-14 November 2024 and qualifying experts if any.
8. In the event that costs are not agreed Plaintiff and Defendant, Plaintiff shall serve a notice of taxation on the Defendant's attorneys of record.
9. Plaintiff shall allow the Defendant 180 (One Hundred and Eighty) court days to make payment of the taxed costs.
10. There is no contingency fees agreement between the Plaintiff and his attorney.

M NTANGA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 14 November 2024

Date of Judgement: 11 December 2024

Appearances:

Plaintiff's Counsel: Adv Z Buthelezi

Instructed by: S.S. Ntshangase Attorneys

Defendant's Counsel: Ms Nziyanziya

Instructed by: State Attorney - Johannesburg