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

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 1560/2018

In the matter between:

POGISHO BRIAN BINGWA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

LINK NO: 4117481

HEARD ON: 06 AUGUST 2024

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 20 August 2024. The date and time of hand-down is deemed to be 11H00 on 20 August 2024.

[1] In this matter the defendant is being sued for damages relating to past and future medical and hospital expenses, general damages and past and future loss of earnings. The damages arise from injuries the plaintiff sustained as a result of a motor vehicle accident which took place on 20 June 2014.

[2] The plaintiff was a passenger in a motor vehicle with registration numbers and letters **DRX [...]** driven by **RUTH GERRIT HARMS** when it collided with another vehicle bearing registration numbers and letters **CFY [...]**. As a result of the said accident, he sustained a laceration of the forehead and a fracture of the left tibia and fibula.

[3] The injuries sustained by the plaintiff and their sequelae are not in dispute, it is in that regard that the defendant has conceded the merits 100% of the plaintiff's proven or agreed damages including the medical and hospital related damages. General damages have been rejected.

[4] The only issue that I have to determine is the contingency deductions to be applied to the award relating to past and future loss of earnings.

[5] By agreement between the parties, the matter was determined without the hearing oral evidence as provided for in rule 38(2) of the Uniform Rules of Court on the basis of the conclusions as expressed in the plaintiff's expert reports sourced from the Actuaries Munro Forensic Actuaries, Industrial Psychologist Dr Everd Jacobs, Occupational Therapist Nicky Potgieter and Orthopaedic Dr Ziervogel.

[6] The salient background facts of this matter are generally common cause: the plaintiff went to school until Grade 9 and has no formal education. At the time of the accident he was 28 years old employed as a technician a trade he learned on the job. He worked for Prestige Installation installing radio frequency towers for MTN and Cell C. His salary was R51 600.00 per annum which included a monthly salary of R3500.00 and R800.00 subsistence allowance. He was retrenched in 2016. Shortly thereafter, he obtained employment at Khabane where he was paid R8000.00 per month but was retrenched again in 2021. Then from January 2021 he worked for Cell C Towers where he was paid R8000.00 per month, this job also ended with retrenchment in April 2021. Since then he has been unemployed except for part time jobs between five and six days per month. He receives R300.00 per day.

[7] According to the experts, the fracture on the leg has healed but he still

suffers from pains which are exacerbated by cold weather conditions. He also experiences back pain caused by the uneven gait resulting from the leg fracture. The pains are aggravated by prolonged standing, walking and sitting and although they can be managed by domestic pain killers and his normal life expectancy has not been affected, the plaintiff is no longer able to work on heights or climb ladders as required by his trade as a result thereof, his capacity and ability to perform his trade as a technician has been restricted. The experts submit that this fact is also evidence by the series of retrenchments post- accident.

[8] The experts agree that there is no need for the plaintiff to retire early however, if he does work, he should only perform sedentary and light work duties where he can be granted sufficient resting periods. His lack of both formal qualifications and sedentary skills, the limited amount of job vacancies available as well as the injuries puts him at unfair disadvantage in competing in the open labour market.

[9] The experts postulate that the plaintiff would have been able to follow the same career path in the uninjured scenario earning R51 600.00 per annum until the age of 65 but due to the injuries, his ability to perform all the physical tasks required by his trade has been curtailed.

[10] Thus was in short the evidence presented on behalf of the plaintiff. No counter evidence was presented from the defendant's side.

[11] Counsel for the plaintiff Mr Jankowitz confirmed that the plaintiff continued to work after the accident however, it was against medical advice as he needed to earn a living. He argued that having regard to the facts of this matter and the actuarial calculations, the following contingency deductions should be applied with regard to the determination of the plaintiff's past and future loss of earnings:

11.1.	Pre-morbid past loss of earnings,	R742 000 00:	5%
11.2.	Post -morbid past loss of earnings,	R590 000 00:	5%
11.3.	Pre-morbid future loss of earnings,	R2 586 800.00:	25%

11.4. Post-morbid future loss of earnings, R1 655 400.00: 60%

[12] It was his submission that the amount that would be just and equitable under these circumstances would be an amount of R1 075 800.00 (One million seventy-five thousand eight hundred rand).

[13] It was the defendant's submission that on the available facts, the plaintiff does not require further treatment as the injuries have healed. There is also no need for the plaintiff to retire early in fact, post-accident the plaintiff resumed his duties and worked at no less than three different companies namely, Prestige Installation, Khabane and Cell C. The only collateral information provided was from the plaintiff's erstwhile employer Cell C. It indicates that the plaintiff worked well until he was retrenched in 2021 and the retrenchment was due to business closure and not due to the plaintiff's incapacity or inability to work. The employer was not even aware that the plaintiff had sustained injuries in an accident¹ accordingly, it cannot be said that the plaintiff's unemployment post-accident is attributable to the injuries he sustained in the accident.

[14] The defendant concedes that there is a residual loss of earnings and tenders the loss of earnings however, higher contingencies ought to be applied namely, 35% and 25% in respect of the pre-morbid and post-morbid future earnings respectively. The total amount suggested by the defendant in respect of the past and future loss of earnings is the amount of R544 470.00.

[15] It is trite that contingencies deductions are assessed at the discretion of the court taking into consideration that each case must be treated on its own unique facts including a wide range of factors which:

"...include such matters as the possibility the plaintiff may in the result have less than a normal expectation of life; ...and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount

¹ Paginated page 33, para 9.5 of the Industrial Psychologist's report.

of any discount may vary, depending on the circumstances of each case... The rate of discount account of course be assessed on any logical basis: The assessment must be largely arbitrary and must depend upon the trial judge's impression of the case." ²

[16] On the facts germane to this matter, the plaintiff's assertion that the injuries and their sequelae have contributed to his disablement from work which in turn is attributable to his past loss of earnings is not borne out by the collateral information relied upon by the experts in their reports. The examination of the experts' reports instead reveal that the plaintiff was retrenched due to the companies' closure. The plaintiff's evidence that due to the injuries and their sequelae, he is no longer able to do the work which he formerly did as a technician has not been gainsaid by evidence to the contrary.³ I am also alive to the general economic conditions prevailing which involve the limited amount of job vacancies available particularly to unskilled labourers. I am also taking into account the plaintiff's physical deficits and I agree that all these factors places him at unfair disadvantage in competing in the open labour market for that reason, I am not satisfied that the contingencies suggested by the defendant accord with what is fair and just.

[17] Having regard to the facts of this matter and the entirety of the plaintiff's evidence, a 25% contingency deduction in respect of the plaintiff's pre-morbid future loss of earnings and a 60% contingency deduction in respect of his post- morbid future loss of earnings is justified. In the circumstances I consider that a fair and reasonable award to be paid as compensation to the plaintiff is an amount of R1 075 800.00 (One million seventy-five thousand eight hundred rand).

[18] I make the following order:

ORDER

1. The defendant shall pay the plaintiff:

² *Southern Insurance Association v Bailey* NO **1984 (1) SA 98** AD page 99E-G.

³ **2003(2) SA 234** (SCA); *Road Accident Fund v Kerridge* **2019(2) SA 233** (SCA).

1.1. An amount of R1 075 800.00 (one million, seventy-five thousand eight hundred rand) in respect of past and future loss of earnings, within 180 days from the date of this order.

1.2. Interest a *tempore morae* calculated from 14 (fourteen) days after date of this order;

2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 20 June 2014.

3. The defendant shall pay the plaintiff's costs of the suit, as taxed or agreed, on a scale as between party and party within 180 days from the date of the allocator, such costs to include:

3.1 the reasonable qualifying fees of the following experts:

3.1.1 Dr Ziervogel, Orthopaedic Surgeon;

3.1.2 Nicky Potgieter, Occupational Therapist;

3.1.3 Dr Everd Jacobs, Industrial Psychologist; and

3.1.4 Munro Forensic Actuaries, Actuary.

4. All payments shall be made into the trust account of the plaintiff's attorney:

P JOUBERT INCORPORATED	-	Trust Account
BANK	-	Absa, Santyger branch
BRANCH CODE	-	632 005
ACCOUNT NO.	-	4[...]

NS DANISO, J

APPEARANCES:

Counsel on behalf of the plaintiff:

Instructed by:

Mr Jankowits

P JOUBERT INC.

C/O ROSENDORFF REITZ BARRY

BLOEMFONTEIN

Counsel on behalf of the defendant:

Instructed by:

Ms. Booysen

STATE ATTORNEY

BLOEMFONTEIN