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

Not reportable

Case no: 5719/2021

In the matter between

JACOB JOSIAS MEYER

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: Jacobus Josias Meyer & Road Accident Fund (Case no: 5719/2021)

Coram: Mgudlwa AJ

Heard: 25 April 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 11h30 on 04 December 2024.

Summary: Motor vehicle accident – claim for past hospital and medical expenses – general damages – future medical expenses – plaintiff's future loss of earning – contingencies.

ORDER

1. The defendant shall pay the plaintiff the amount of R9 767 958,99, which is made up as follows:

1.1 General damages: R900 000.

1.2 Past hospital and medical expenses: R1 405 251,99.

1.3 Past and future loss of income: R7 462 701

in terms of the order as set out in para 19 of the judgment.

JUDGMENT

Mgudlwa AJ:

Introduction

[1] On 18 January 2017, the plaintiff was a driver of a motorcycle that collided with a Toyota Hilux, at or near Piet Retief, Harrismith, Free State Province. At the time of the accident, he was 44 years old and a father of three children. He was self-employed as the Managing Director and Senior Tax Practitioner of JMK Group. He commenced employment in this capacity on 1 August 2001. At the time of the accident, he was the owner of JMK Financials, which had additional departments being JMK Dimensions Technologies, JMK Logistics, and JMK Pro-Business Management. Due to the injuries sustained as a result of the accident, the plaintiff was absent from his business and subsequently, on 31 May 2019, his company was closed due to financial difficulties. The plaintiff then proceeded to lodge a delictual claim for damages he suffered as a result of his injuries with the defendant on 16 March 2018. On 7 June 2023, Musi JP found the defendant 100% liable for the plaintiff's proven or agreed damages.

[2] As a direct consequence of the collision, the plaintiff sustained the following injuries:

- 2.1 Right tibial plateau fracture;
- 2.2 disruption of the lateral collateral and anterior cruciate ligaments at the right knee;
- 2.3 fracture of the greater tuberosity of the right humerus;
- 2.4 straining back injury; and
- 2.5 psychological issues.

[3] The court is called upon to adjudicate the outstanding claim in respect of:

- 3.1 Future medical expenses;
- 3.2 Past medical expenses;
- 3.3 General Damages; and
- 3.4 Past and future loss of earnings.

Future medical expenses

[4] It is apposite to mention that the defendant has tendered an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act) for the plaintiff's future medical expenses and agreed that an order be made for compensation for the plaintiff of 100% of the costs relating to future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred, and on proof thereof and arising from the collision which occurred on 18 January 2017, in accordance with the tariff contemplated in subsection (4B).

Past medical and hospital expenses

[5] The defendant has rejected the plaintiff claim for past medical expenses on the basis that the past medical expenses claimed were paid by Discovery Health medical Aid and that no loss was suffered by the plaintiff.

[6] The courts have, on many occasions, held that medical aid scheme benefits are a form of indemnity insurance and should accordingly be disregarded for the purpose of an

award for damages, in accordance with the principle of *res inter alios acta*. In *Zysset and Others v Santam Limited*,¹ the court made the following explanation:

‘... it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid premiums and (b) moneys and other benefits received by the plaintiff from the benevolence of the third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff’s own prudence in insuring himself or from a third party’s benevolence or compassion in coming to the assistance of the plaintiff.’²

[7] In *Discovery Health (Pty) Limited v Road Accident Fund and Another*³ (*Discovery*), Mbongwe J, at para 16 of the judgment, emphasized the purpose of the Act and similar legislation preceding, as aptly described in *Engelbrecht v Road Accident Fund & Another*,⁴ as to primarily give the maximum protection to persons who suffer loss or damages as a result of the negligent driving or unlawful conduct in the driving of a motor vehicle by the driver thereof. Most importantly, it was furthermore held that the Act does not provide for the exclusion of benefits where the victim of a motor vehicle accident has received from a private medical scheme for past medical expenses. In para 29,⁵ the court in *Discovery* reiterated the legal position that the Road Accident Fund (RAF) is not entitled to seek to free itself of the obligation to pay full compensation to victims of motor vehicle accidents.

[8] On consideration of the case law set out above, as well as on proper interpretation of s 17 of the Act, it is apparent that the defendant’s liability to a claim for past medical expenses is not affected by the fact that the plaintiff’s medical aid has already paid those expenses. It is clear from the decisions referred to above, that the

¹ *Zysset and Others v Santam Limited* 1996 (1) SA 273 (C).

² *Ibid* at 278B-D.

³ *Discovery Health (Pty) Limited v Road Accident Fund and Another* [2022] ZAGPPHC 768.

⁴ *Engelbrecht v Road Accident Fund & Another* [2007] (6) SA 96 (CC).

⁵ *Ibid*. *Discovery Health case*... Para.29.

res inter alios acta principle does not permit the defendant to deduct the amounts paid by Discovery from the quantum payable to the plaintiff in respect of past medical expenses. I interpose to mention that the counsel for the defendant, in her legal arguments, was unable to refer this court to any court decision and or authority which supports rejection of a claim for past medical expenses by RAF. Thus, I accordingly find the defendant liable for the past medical and hospital expenses incurred by the plaintiff as a result of the accident in the amount of R1 405 251,99.

General Damages

[9] The plaintiff claims an amount of R2 000 000 for general damages. The following background information is relevant: In order to prove damages, the plaintiff relied on the experts reports: Dr. S Bismilla and Dr. E Williams (Joint minutes between the Orthopedic Surgeon), R Hunter (Occupational Therapist), Dr. C Gordon and Mr. G Temane (Joint minute between the Clinical Psychologist), Talia Talmud (Industrial Psychologist), and Gerard Jacobson (Actuary). The parties agreed to submit all these reports as undisputed. I will now refer to certain salient features of these reports.

i) Dr. WE Williams

He completed an RAF 4. He examined the plaintiff on three occasions and the latest assessment was on 28 March 2023. He opined in his injury diagnosis, the following: right tibial plateau fracture, probably Schatzker type VI or AO type C3 (i.e comminuted bicondylar fracture); disruption of lateral collateral and anterior cruciate ligaments at the right knee; fracture of the greater tuberosity of the right humerus and straining injury of the back. He noted that the plaintiff sustained long-term physical impairment and serious permanent disfigurement.

ii) Dr. S Bismilla and Dr. E Williams (Joint minutes between the orthopedic surgeon)

In the joint minutes, both orthopedic surgeons recorded that the plaintiff sustained the following injuries as a result of the accident:

1) Injury of the shoulder

a) Dr Bismilla described the injury as anterior dislocation of the shoulder.

b) Dr Williams described the injury as fracture of the greater tuberosity of the humerus

c) The different descriptions are compatible with the same injury, as fracture of the greater tuberosity and dislocation of the shoulder are often seen as concomitant injuries.

2) Injury at the plaintiff's right knee/ proximal tibia

a) Dr Williams describes the injury on the right knee as a tibial plateau fracture, probably Schatzker type VI or AO type C# (i.e communicated bicondylar fracture). He opined that the patient had sustained disruption of the lateral collateral and cruciate ligaments of the right knee.

b) Gleaned from the report, there is no disagreement between the orthopedic surgeons on the plaintiff's nature of the right knee injury, irrespective of its exact description.

3) Dr Bismilla recorded that the plaintiff had sustained unspecified injuries of the chest and abdomen. He further noted that the X-ray images of the chest and CT scan of the abdomen had yielded normal findings.

4) Dr Williams also recorded that the plaintiff had sustained a straining injury of the back.

5) Past medical or surgical history:

a) Both examiners recorded that the plaintiff had previously sustained injuries of the lower limbs in a motor vehicle accident in 2005 or 2005, where he sustained a fracture of the left femur, which was treated by internal fixation and was injured on his right ankle, for which he underwent arthrodesis (fusion) of the ankle. Furthermore, both examiners recorded that the plaintiff sustained a fracture of the shaft of the right femur in a fall in 2019, for which he underwent internal fixation.

b) I deem it apposite to mention that the plaintiff disclosed the following pre-existing conditions during his testimony:

i) He broke his arm when he was 17 years old.

ii) During 2004, when he was involved in a previous motor vehicle collision, he fractured ribs on both sides, he fractured his right ankle (which culminated in orthodesis), he fractured his left femur.

iii) During 2015, he collapsed behind his desk and a psychologist prescribed a 3 months rest for him.

iv) During 2015-2016 he started taking *concerta* and *venior* (anti-depressants).

6) Loss of work capacity or early retirement:

(a) Dr Bismilla opined that there is no objective impediment in plaintiff's work capacity and that he is not permanently disable as a result of the accident – related injury.

(b) Dr Williams opined that the plaintiff will only be able to do sedentary work. He will be unable to do any work that would involve significant physical

Exertion. He should be able to continue working until normal retirement

Age, but the condition of particularly his lower limb will restrict his mobility

Substantially, therefore activities such as travelling to work and home will

be restricted. He will have to take sick leave from time to time, due to his symptoms and to undergo treatment, which will probably include surgery.

7) There appears to be a difference of opinions between the two doctors on what should be regarded as significant or substantial impairments.

(a) Dr Bismilla opined that no further treatment is planned, whereas Dr Williams felt quite certain that the plaintiff will need substantial ongoing treatment and likely to undergo major surgery of the right knee, amongst other treatment measures.

(b) Dr Bismilla opined that the plaintiff has not retained any serious impairment, whereas Dr Williams opined that the plaintiff has retained serious long-term physical impairment that should qualify him for compensation for general damages.

(c) The defendant initially rejected the plaintiff's injury assessment report and the matter was subsequently referred to the HPSA (Health Professional Council of South Africa). The letter dated 14 October 2023 indicates that the matter was served before the Appeal Tribunal on 11 September 2023 for consideration. After all available evidence was presented to the committee, it was found that the injuries sustained by the plaintiff may be classified as serious in terms of the narrative test.

8) I have also observed that the injuries sustained by the plaintiff at the time when he showed them to the court and through x-ray images attached to the radiological examination⁶. In my view, the injuries are serious and have left the plaintiff with a long-term physical impairment. Furthermore, it appears that the accident had physical,

⁶ See page 188 – 196 of the Diagnostic radiologist report, Bundle D.

mental, emotional and financial impact on the plaintiff's life. With regard to future medical treatment, the joint minute of the Orthopaedic surgeons noted the following;

- a) Plaintiff is likely to undergo a total right knee replacement.
- b) Plaintiff is likely to undergo revision of the total knee replacement on more than one occasion
- c) Plaintiff may undergo surgery of the right shoulder.
- d) Plaintiff should take analgesia.
- e) Plaintiff will be compelled to consult with medical practitioners repeatedly in the future.

iii) The occupational therapists, Kgomotso Montwedi and Robyn Hunter also compiled their joint minutes. These experts agree that the plaintiff is not suited for his pre-accident occupation and cannot meet the demands for the aspects of his occupation that involves travelling and securing clients. They also agree that the plaintiff has been rendered unemployable. With regard to future medical treatment, the following was noted; occupational therapy, physiotherapy, pain management and psychotherapy.

iv) The industrial psychological report compiled by Shenade Stevens was filed. She examined the plaintiff on 10 January 2019 and 26 April 2023.

Pre-accident performance

1) The report noted that the plaintiff has only accumulated experience in the taxation field since entering the open labour market. Since 2001, he has been working in

a self-employed capacity as Managing director and Tax practitioner. Furthermore, he officially registered his business as JMK Financials in 2006 and added additional departments to the company being JMK Dimensions Technologies, JMK logistics, and JMK Pro-Business Management in 2016.

2) Pre-morbidly, the report noted that the plaintiff was remunerated separately from each department for each capacity that he worked in January 2016. The following was noted regarding his earnings:

a) As Managing Director and Senior tax practitioner of JMK Financial service, the plaintiff earned a basic salary of R84 147,12 per month. He received additional monthly payments including travel allowance of R1 995 and variable annual bonus of

R42 073,56 in December.

- b) As Managing Director of JMK Dimension Technologies, the plaintiff earned R25 000 per month and variable annual bonus of R8 750.
- c) As Managing Director of JMK Logistics, the plaintiff was earning R37 500 per month and a travelling allowance of R12 500. Additionally, he received variable annual bonus of R17 500.
- d) As Managing Director of JMK Pro-Business Management, the plaintiff was earning R25 000 per month and a variable annual bonus of R8 750

Post-accident performance

1) Having taken account of various medical reports, the industrial psychologist noted that the plaintiff has not worked since the closing of his company and is currently surviving on income protection payment which started in October 2021 and will end in September 2038. Furthermore, he opines that the plaintiff is not suited to his previous work as a Tax Practitioner and it is impossible that he would be able to build a business to the level it was pre-accident.

2) The industrial psychologist opines that, *but for the accident*;

a) Plaintiff would have worked to the ages of 65-70.

b) Due to the fact that there are many unknown variables regarding the success of the running of a business, an appropriate pre-morbid contingency be applied to take possible period of fluctuating earnings onto account.

3) The industrial psychologist also opined that, *having regard to the accident*, plaintiff

is rendered unemployable in the open labour market.

4) The actuarial report

The actuary did actuarial calculations for the past and future loss by providing calculation for the scenarios *but for the accident* and also having *regard to the accident*. The calculations were also based on the information provided by various experts and the actuary's assumption, having regard to the accident, is that the retirement age of the plaintiff is 65 years. In calculating for past loss of income valued at R7 692 622, only scenario 1 is applied with a contingency reduction of 5% (R384 631) and the total past loss is R7 307 991. With regard to future loss of income, in scenario 1, the value of income but for the accident is R27 320 360, less the contingency reduction of 15% (R4 098 054) and the total value of income but for accident is R23 222 306. In scenario

2, the value of income having regard to the accident, the amount is R5 102 844, less the contingency reduction of 30% (R1 530 853) and the total is R3 571 991. The net future loss according to the actuary is R19 650 315 and the total net loss is R26 958 306.

Evaluation and legal framework

[10] The plaintiff's claim for damages resultant from the accident is aimed to recover the difference between the position, as it is after the act of damage, and as it would have been if the act were not committed. It is trite law that the plaintiff must prove the extent of his loss and damages on a balance of probabilities. The evidence of the experts explicitly established that the plaintiff's earning capacity has been impaired and this has resulted in a loss. In *Mvundle v RAF*⁷ an unreported judgment, the court said the following:

'It is trite that the 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 or her current job and or be limited in a number and quality of his choices should he or she decides to find other employment.'⁸

General damages

[11] It is not in dispute that the plaintiff sustained serious injuries as a result of the accident. The only issue for determination in regard to general damages is a fair and adequate compensation. In determining damages, the court may have regard to the nature and severity of the injuries, the amount of pain suffered by the plaintiff, length of his recovery and disruption of his life. In this instance the correct approach is to have regard to all the facts of the case and determine the quantum of damage for such facts. In *Road Accident v Marunga*⁹ the court said the following:

'This Court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises, a trial court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate

⁷ *Mvundle v RAF* [2012] ZAGPPHC 57.

⁸ *Ibid* para 42.

⁹ *Road Accident v Marunga* [2003] 2 All SA 148 (SCA).

compensation to the injured party.’¹⁰

[12] The plaintiff sustained multiple orthopaedical injuries and remains symptomatic as a result of the injuries sustained. He was hospitalized for a period of three days, however after his discharge he was mobilized with crutches and has been in and out of hospital with 14 surgeries conducted on him. He attended several follow-up consultations, where it was noted that his recovery period and return to work or normal duties were delayed because of the pre-existing right knee pathologically. He was off work for a period of 25 months. He will need to undergo surgery for knee replacement in the immediate future due to weakness of his knee ligament. Neuropsychological assessment reveals severe symptoms of depression and residual symptoms of post-traumatic stress disorder.

[13] An award for general damages, as was said by Holmes J in *Pitt v Economic Insurance Co Ltd*,¹¹ must be fair to both sides. It must give just compensation to the defendant’s expenses. In *Abraham v Road Accident Fund*,¹² the plaintiff, a 41 year-old male sustained multiple injuries, including a badly comminuted fracture of the femur, fractures of the fibula and patella, fracture of the right malleolus, severe soft tissue injuries of the hand and a mild concussive head injury. He underwent surgery in the form of an open reduction of the patella fracture with fixation, an open reduction and internal fixation of the malleolus. Subsequent surgeries for removal of the fixatives were performed. The right limb was shortened with the need for an assistive device. Osteoarthritis was present in the left knee and there was limitation of range of motion in the right hip, knee and ankle. Pre-existing generalized anxiety disorder was exacerbated. The plaintiff was rendered unemployable. An amount of R500 000 was awarded in 2014 for general damages, with a present value of R880 000, was made.

[14] In this matter, the legal representative for the plaintiff proposed R1,500,000 as an appropriate amount for general damages, whereas the legal representative for the defendant proposed an amount of R700, 000. Both parties have referred this court to number of authorities where similar injuries were sustained. In my view, having regard to the totality of facts and circumstances of this case and all the authorities, an amount

¹⁰ Ibid para 23.

¹¹ *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) 287E-F.

¹² *Abrahams v Road Accident Fund* 2014 (7J2) QOD 1 (ECP).

of R900 000 will be adequate compensation for general damages for compensation herein.

Loss of earning

[15] The enquiry into damages for loss of earning is by its nature speculative.¹³ In order to determine a plaintiff's claim for future loss of income the court must compare what the plaintiff would have earned if it was not for the accident with what he would likely have earned after the accident. The plaintiff, in amplification of his claim, testified that

pre-morbidly generated income from four businesses which required extensive travelling. At the time of the accident, he was earning a monthly income of R221 063,32. The plaintiff could have expanded his business and increased his income. Post-morbid, his business declined and concomitantly his earnings also decreased. The business had to be managed by his wife due to his absence. In 2019, due to financial difficulties, his business was closed down. The plaintiff received an income protector from Sanlam Insurance in the sum of R112 310 per month. I deem it apposite to mention that the income protector does not obliterate the plaintiff's claim for loss of earnings.

[16] When making an order for future losses, it is expected from the court to make use of contingency deductions to provide for any future circumstances which may occur, but which cannot be predicted with precision. When considering the suggested contingency, I have regard to *Road Accident Fund v Kerridge*¹⁴ where the Supreme Court of Appeal said:

'It is trite that general contingencies cover a wide range of considerations that vary from case to case. Five per cent and 15 per cent for past and future loss, respectively, have become accepted as "normal contingencies".'¹⁵

[17] In *Road Accident Fund v Guedes*,¹⁶ the court said that there are no fixed rules in regard to general contingencies. There are however some guidelines to identify a proper contingency to be used; ie 25% for a child, 20% for youth and 10% in middle age

¹³ *Southern Insurance Association v Bailey N.O.* 1984(1) SA 98 (AD) at 113G.

¹⁴ *Road Accident Fund v Kerridge* [2018] ZASCA 151; 2019 (2) SA 233 (SCA).

¹⁵ *Ibid* para 30.

¹⁶ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA).

with half a percentage added per year until retirement.¹⁷

[18] In calculating the loss, the actuary assumed that the retirement age of 67½ years and the plaintiff's total income being the salaries indicated in his personal income statement plus the profit and loss from his companies. He applied 5% contingency to past loss of earnings and 15% to the future loss of earnings in the pre-morbid scenario. Regarding the value of income having regard to the accident, he applied a 30% contingency deduction. In this scenario, the past loss of earnings is an amount of R4 833 351 and the future loss of earnings an amount of R19 361 408. I agree with the calculations of the actuary, and considering the RAF cap, that the plaintiff's past loss of earnings is R889 962, the future loss of earnings is R6 572 739 and the total loss of earnings is R7 462 701, I have no reason to reject the contingency percentages suggested by the actuary.

Order

[19] Having regard to the circumstances of this case, the following order is issued:

1. The defendant shall pay the plaintiff the amount of R9 767 958,99, which is made up as follows:

1.1 General damages: R900 000.

1.2 Past hospital and medical expenses: R1 405 251,99.

1.3 Past and future loss of income: R7 462 701

2. Payment of the aforesaid amount shall be made within thirty (30) days into the plaintiff's attorney of record, LEON JJ VAN RENSBURG's trust account with details as follows:

Name of account: Leon JJ van Rensburg (Trust account)

Bank: ABSA bank

Branch: President, Germiston

Branch code: 334-542

¹⁷ *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W).

Account number: 2[...]

3. The Defendant shall be liable for interest on the aforesaid amount at the rate of 11.25 % per annum, calculated fourteen (14) days from date of this order to date of payment, both dates inclusive.

4. 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, as amended, for 100 % of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 18 January 2017 after such costs have been incurred and upon proof thereof.

5. The Defendant shall pay the Plaintiff's taxed or agreed costs on the High Court party and party scale, the travelling costs of the Plaintiff to and from all medico-legal appointments, including all attendances therewith or in connection thereof, the costs on default judgment by trial of counsel, including counsel and/or attorneys' consultations with experts, the preparation, reservation and qualifying fees of the experts together with their consultations with counsel and/or attorney preparing their reports, addendum reports and statutory forms, in consulting with the attorney and/or counsel, if any, and as determined by the taxing master, namely, of the following experts:

5.1 Radiologist;

5.2 Dr Williams, orthopaedic surgeon;

5.3 R.Hunter, occupational therapist;

5.4 T.Talmud and Stevens, industrial psychologist;

5.5 Jacobson, Actuary

5.6 Dr.C.Gordon,Clinical Pshycologist.

6. The Defendant shall pay the Plaintiff's taxed or agreed costs pertaining to advocate fees on scale B in terms of rule 69, including but not limited to counsel's

consultations with the attorney, plaintiff, experts and witnesses and the drafting of a case summary, practice notes and/or heads of argument for the Plaintiff, and/or the appearance on 05,06 and 08 March 2024.

7. In the event that costs are not agreed, the Plaintiff shall: -

- a. serve a notice of taxation on the Defendant's attorneys of record; and
- b. allow the Defendant fourteen (14) court days to make payment of the taxed costs.

S.T Mgudlwa, AJ

Appearances

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