IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 002641/2024

DATE: 14-02-2025

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 14/2/2025
SIGNATURE [redacted]

In the matter between

MAKOSA PIETER Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

WEIDEMAN, AJ: The matter of Makosa, case number 002641/2024, was called earlier this week and very ably argued by Mr Schoombie. I indicated, at that stage, that I wanted an opportunity to consider the matter, and in particular wanted to have a look at some of the case law which Mr Schoombie referred to in support of his argument.

The accident from which this claim arose occurred on 25

October 2021 when the plaintiff was a pedestrian. The aspect of liability had previously been resolved between the parties on the basis that the defendant accepts liability for 80% of such damages as the plaintiff may be able to substantiate.

At the commencement of the matter, and before presenting any evidence, counsel moved an application in terms of Rule 38(2) for the tendering of evidence on affidavit. That application was granted.

The defendant had not made an election in respect of general damages and I was requested to postpone general damages *sine die*. This left only the aspects of past and future loss of income for debate before this Court. According to the plaintiff's particulars of claim, paragraph 10 on CaseLines 03-7, the plaintiff's claim in respect of past loss of income amounts to R1 300 and the claim for future loss of income to R2 964 100.

These two amounts are as per the plaintiff's actuarial calculation. The injuries forming the basis of this claim are set out in paragraph 6 of the Particulars of Claim and consists of the following:

- A brain injury;

- a fracture of the left temporo-parietal bone;
- a left epidural (extradural) haemorrhage; and
- various abrasions and lacerations.

The plaintiff is a foreigner and as a result the evaluation of the claim for loss of income cannot be dealt with on the same basis as if he was a South African citizen. As a foreigner, a guest in South Africa, it is necessary, not only for this plaintiff but for all foreigners, to comply with all the applicable legislation governing their residency in South Africa and their participation in the labour market.

Thus, to enable a foreigner to prosecute a claim for future loss of income in South Africa, evidence must be presented which addresses his status in the country, the nature of the work which it is anticipated that he would do in future, as well as the probabilities that he would be able to secure the necessary visas to perform such work.

Considering this plaintiff, a significant amount of documentation has been presented, far more than in most matters which come before this Court in respect of foreigners. These are uploaded on CaseLines at pocket 18. The Court was advised, during argument, that the passport which had been uploaded was lost and that a further passport, a current passport, appears on CaseLines18-35.

This passport is valid from 23 May 2022 to 22 May 2032. A number of asylum seeker permits have also been uploaded. There is no indication of what the status of the plaintiff was between August 2023 and January 2025. On 14 January 2025, the plaintiff had applied for a visa, albeit that the nature of the visa is not reflected on the receipt for payment of the application for the visa.

What is clear from the documentation referred to, as well as the fact that the plaintiff was employed as a general worker in the formal economy and was registered with the South African Revenue Services for income tax, was that it was his intention and desire to remain in South Africa.

There is however no evidence that the plaintiff would have been able to remain in South Africa indefinitely. I believe that the documentation is sufficient to enable a claim for future impairment of capacity to be considered in terms of South African income scales.

The amount as per the actuarial report, but for the collision, is R2 992 900, which is slightly different from the amount in the plaintiff's Particulars of Claim. It seems that in calculating the projected future income, the actuary took into consideration a basic wage, overtime and an annual bonus. These might form part of the plaintiff's income currently, but it would be wrong to project overtime and bonuses into the future on the same basis as one would a basic wage, as overtime is directly linked to the employer's needs, economic factors and the availability (*in casu*) of construction contracts. It is not a right that the employee is entitled to for the duration of the period of the calculation.

It should be born in mind that the plaintiff is currently approximately 27 years of age and that the calculation is for a lengthy period. Simply taking the plaintiff's current income and projecting the basic wage, overtime and bonus over the complete period of the calculation without distinguishing between the basic wage and the other elements would, in my opinion, overstate the loss.

Different contingencies should, if the calculation is done correctly, be applied to discretionary amounts such as overtime and bonus. A higher contingency (than that applicable to a basic wage) should be applied, given the discretionary and uncertain nature of overtime and bonusses.

There is no guarantee that the visa application of 14 January 2025 will be successful and there is no evidence that he will be able to renew or extend that work visa if it is granted.

It should further also be taken into consideration that the work that the plaintiff is engaged in might be relatively easy for a 27-year-old but, it is physically demanding work and as age takes its toll, he might not be able to continue doing the same kind of general labouring work. It should also not be forgotten that, as workers in the lower echelons of the employment market get older, a large pool of younger job seekers with more energy and more strength become available to step in.

There is therefore no guarantee that plaintiff would have been able to either secure or maintain employment as a general labourer until his projected retirement age. If one looks at the combination of all of these uncertainties then the calculation has to be adjusted by a significant margin.

Having re-looked at all the documentation it is my view that a 50% contingency deduction would adequately address this basket of uncertainties. The nett effect is that the plaintiff's claim in respect of past loss of income is allowed in the sum of R1 300 and the plaintiff's claim in respect of future loss of income or impairment of earning capacity is allowed in the sum of R1 496 450.

This renders a subtotal of R1 497 750 before the apportionment on negligence is deducted. Reducing the above by 20% yields a nett result of R1 198 200 in respect of loss of income. My order is as follows:

<u>ORDER</u>

1. The plaintiff's application in terms of Rule 38(2) is granted.
2. The defendant is liable to pay the plaintiff the net amount of R1 198 200 in respect of loss of income.
3. The plaintiff's claim in respect of general damages is postponed *sine die*.
4. The defendant is liable to provide the plaintiff with an Undertaking, as provided for in section 17(4)(a) of the Road Accident Fund Act, for 80% of such future hospital, medical and ancillary expenses as the plaintiff may require and arising from the injury sustained in the accident.
5. The plaintiff is awarded his party and party costs as taxed or agreed. Counsel's fees to be on scale B.

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WEIDEMAN, AJ

JUDGE OF THE HIGH COURT

DATE: 14/2/2025