IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable

Case no: 1089/2021

In the matter between

KOTEDI JOHN QHAMOKOANE Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Neutral citation: *Kotedi John Qhamokoane v The Road Accident Fund (1089/2021)*

Coram: **Mpama AJ**

Heard: **20 NOVEMBER 2024**
29 NOVEMBER 2024 (FILING HEADS OF ARGUMENT)

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 **06 February 2025** on **15H00**.

Summary: liability of the defendant for loss of past and future income-plaintiff's duty to prove loss of income-contingency deductions at the court's discretion.

ORDER

The amended draft order marked 'X' is made an order of court.

JUDGMENT

Mpama AJ

[1] The plaintiff instituted action proceedings against the defendant pursuant to some injuries he sustained in a motor vehicle accident that occurred on 26 April 2016 at Voortrekker Street, Senekal. At the time he was 26 years old when he was, as a pedestrian knocked down by a motor vehicle bearing the registration number DGL […]. The defendant is the Road Accident Fund, a statutory body established in terms of s 2 of the Road Accident Fund Act 56 of 1996.

[2] On 19 June 2024, this court per Nemavhidi AJ made an order to the effect that the defendant was liable for the payment of 50% of the plaintiff's proven or agreed damages arising from this accident.

[3] At the commencement of the proceedings, Ms Booysen appeared for the defendant and she placed the following on record:

'(i) the court found the defendant liable for 50% of the plaintiff's proven damages.

(ii) the defendant admits that the plaintiff's injuries are serious injuries as contemplated in Regulation 3 (1)(a) of the Road Accident Fund Regulations, 2008 and leaves it to the court to determine a fair and just amount payable as compensation for general damages.

(iii) the defendant was tendering an undertaking in terms of section 17(4) of the Road Accident Fund Act, 56 of 1996 (the Act)

(iv) costs of the matter to be costs in the cause.

Ms Booysen went further and placed on record that she had no further instructions from the defendant and due to lack of instructions she requested to be excused from the proceedings. I assented to her request.

[4] The plaintiff had on 14 November 2024 served on the defendant and filed in court an application in terms of rule 38(2) of the Uniform Rules of the Court. There was no opposition from the defendant. The plaintiff applied in court for the experts' evidence to be dealt with by way of affidavits. Exercising my discretion, I granted the application

[5] Pursuant to my order the following reports, accompanied by affidavits were handed in on behalf of the plaintiff and they form part of the evidence before this court:

Dr Louis Francois Oelefse – orthopedic surgeon
Dr AJ Richardson – specialist neurologist
Dr Keith Cronwright – plastic and reconstructive surgeon
Dr Michael Kennethy Ostrofsky – maxilla-facial and oral surgeon
Dr Rosa Bredekamp – counselling psychologist
Ms Estie Snyman – occupational therapist
Ms Arabella van der Bijl – earning specialist
Mr Wim Loots – actuary.

[6] The plaintiff testified and no further evidence was presented.

[7] I intend to deal first with the plaintiff's *viva voce* evidence. The evidence can be succinctly summarized as follow: On 26 April 2016 he was hit by a vehicle and sustained injuries on the face, neck, chest, interior of the mouth, upper leg, knee and ankle. Immediately after the accident, he was transported to a local hospital at Senekal and on the same day airlifted to Pelonomi Hospital, Bloemfontein, where he was cared for until 7 June 2016. In hospital he underwent surgery on the leg.

[8] Consequent to his injuries, he can no longer open his mouth properly. He

cannot swallow large food quantities and struggles to move or twist his neck. Furthermore, he suffers from a painful leg and can no longer run or play soccer. He can only walk short distances at a very slow pace. He struggles to stand for more than 30 minutes.

[9] At the time of the accident, he was doing odd jobs transporting groceries in a trolley for customers at Shoprite Supermarket (supermarket), Senekal. From this job he generated on average between R200.00 and R250.00 daily on busy days. When it was not busy, he supplemented his earnings by washing cars at a carwash opposite the supermarket. From this he generated between R40 and R80 a car and he washed between 3 and 4 cars a week.

[10] Due to his injuries, he did not return to his previous jobs as he can no longer carry heavy weights and struggles with mobility. He performed these jobs for three years prior the accident. He dropped out of school in Grade 11, three years before the accident. He aspired to be a security guard, an ambition he would have fulfilled but for the accident.

[11] He testified further that after the accident in 2023 he managed to secure some work as an assistant to an appliance repair technician that worked with refrigerators. Within three months he had to quit this job as he could not lift heavy weights or move around as required. In both 2023 and 2024, he managed to secure work as a guard in a horse show. His duties were to guard some properties. Each show ran over a period of a week and he was remunerated R120 daily, for the duration of the show. In August 2024 he sustained further injuries, however, this was an incident unrelated to the accident as he was robbed whilst coming from a tavern.

[12] During court’s questions, when asked to explain how he intended to qualify as a security guard, his response was that there are test that one can write at either Kroonstad or Bethlehem in order to qualify.

[13] I now turn to deal with the experts' reports. I will refer to certain salient features on these reports.

(i) Dr Oelofse is an orthopedic surgeon and he examined the plaintiff on 13 August 2019. From the hospital documents he noted that the plaintiff was admitted at Pelonomi Hospital with Glasgow Coma Scale 11/15, had sustained multiple facial lacerations and was diagnosed with severe traumatic brain injury, Le Fort Type ll fractures, bilateral condylar fractures, right femur and tibia fractures. At the time of examination, the plaintiff complained of constant headaches, decreased hearing in his left ear, pains and difficulty when chewing hard food, decreased concentration span, forgetfulness, loss of short memory and anxiety. With examination there was moderate pain on palpitation of bilateral temporomandibular joints, moderate pain with opening of the mouth, slight pain on palpitation over the right anterior hip, decreased range of movement of the right hip and slight restriction in the movement of the right knee. The radiological examination of the right hip, femur, knee, lower leg and ankle revealed that there was an intramedullary nail right femur anchored with screws proximal and distal for mid-shaft femur and excessive callus formation. The right lower limb had a mid-shaft tibia fracture. He concluded that the plaintiff suffered an injury to the cervical spine with residual pain and muscle spasms, a united right femur fracture with painful instrumentation, a united right tibia fracture, an injury of the right knee with residual pain and visible scars. There was a possibility that the conservative treatment will not be effective for the plaintiff's neck and knee injuries. The plaintiff needed to be placed in a permanent light duty friendly environment. The injuries had an impact on the plaintiff's amenities of life and were serious injuries.

(ii) Dr AJ Richardson, a specialist neurologist, examined the plaintiff on 10 October 2019. The plaintiff disclosed that he has a chronic illness and collects medication from a local clinic. During the examination he noted that the plaintiff was not depressed or anxious and was perfectly cooperative and behaviourally appropriate throughout the consultation. He concluded that the plaintiff would be able to do his previous work, however, the orthopaedic injuries may preclude him from hard manual labour.

(iii) Dr Keith Cronwright, a plastic and reconstructive surgeon, examined the plaintiff on 08 October 2019. The plaintiff disclosed to him that he struggles to eat, walk long distances and his right ear is not properly functioning. His observation of the plaintiff showed that his mid-face or nasion region had “stoved in”, he had traumatic telecanthus and a puckered hypertrophic lower lip. He concluded that the accident was life changing for the plaintiff, the injuries were serious as his facial bone anatomy was “out of kilter” and he looked abnormal. He opined that people in his condition were generally less successful in their relationships and promoted less in workplace. At the time of examination, the Maximum Medical Improvement (MMI) in respect of skin, soft tissue and scarring had been attained.

(iv) Dr M Ostrofsky, a maxilla facial surgeon, examined the plaintiff on 10 October 2019. The plaintiff complained of pains when attempting to chew. On examination he noted that the plaintiff showed extreme hypertrophy of masseter muscles, his inter-incisal opening of the teeth was 18 mm whereas an average opening for a person of plaintiff’s age and racial group was between 45&55 mm and there was scarring of the lower lip. The radiological examination revealed a gross destruction of the left mandibular condyle as well as ankylosis with involvement of the external auditory meatus on the left-hand side. There was a malunited fracture of the left parasymphysis of the mandible. There was evidence of fracture of the maxilla at a Le Fort II level with a probably midline split and a gross fracture of the posterior aspect of the nasal septum. The plaintiff required an urgent surgery to the temporornandibular joints. He also needed to see an ear, nose and throat surgeon to assess the loss of hearing on the left ear. He concluded that the plaintiff sustained, amongst other injuries severe maxilla-facial injuries resulting in fractures of maxilla, mandible and the nose and there was an extreme limited jaw opening.

(v) Dr Rosa Bredekamp, a counselling psychologist, examined the plaintiff on 09 October 2019. He subjected the plaintiff to a psychometric evaluation. He noted that the plaintiff was self-conscious of his scars and no longer wore shorts. The plaintiff reported that at home they were complained of his changed personality, that he was argumentative and stubborn. The plaintiff informed him that he was depressed by his unemployment, injuries, lack of memory and decreased hearing. He concluded that the plaintiff suffered from depression, low self-esteem and changes in personality. His cognitive abilities indicated that he is forgetful, cannot remember instructions and is slow in reacting. He performed within normal limits on the screening test, although he displayed difficulty with memory and attention when tasks became more complex. Furthermore, he demonstrated difficulty with identifying and naming objects, constructional ability, calculations and social judgment. He concluded that the plaintiff's cognitive difficulties may impact his workability, ability to learn and production levels at work and he would benefit from psychotherapy to improve his psychosocial functioning.

(vi) Ms Estie Snyman, an occupational therapist, assessed the plaintiff on 11 October 2019. She noted that the plaintiff completed Grade 10 and failed Grade 11. The plaintiff reported to her that he worked as a part-time manual worker for the local municipality, pushed trolleys for customers to the parking lot when not at work and washed vehicles at the time of the accident. He worked for about 3 days a week earning R120.00 a day and on days he was not doing this work, he was self-employed assisting customers pushing trolleys to their vehicles at the supermarket or washing vehicles at a carwash opposite the supermarket. He made about R50 a day mid-month and R200 a day at the beginning of the month, from pushing trolleys. From a carwash he made R40 per vehicle and washed about six vehicles a day. Furthermore, he was unable to return to work at the municipality or continue with self-employment post-accident. The plaintiff also reported that he was employed as a security guard at a horse show for a period of seven days during 2016, 2017 and 2018. He was remunerated R120 per day. She concluded that the plaintiff can handle loads ranging between 4-4 kg frequently, 5-7 kg occasionally and 7-9 kg rarely. The plaintiff fully met the physical strength for sedentary physical loads and partially met the criteria for light physical loads, however due to his limited walking he would not be able to carry loads. The plaintiff was also limited by his crouching and forward bending ability, standing tolerance and partially by his lifting ability. The injuries he sustained in the accident affected his abilities and he could no longer perform his pre-accident self-employment of washing cars and pushing trolleys. He would also be limited in high mobility jobs, such as that of a security guard.

(vii) Ms Arabella Van Der Bijl, an earning expert, compiled a report on 17 August 2021. She conducted a career and an earning's assessment of the plaintiff. She reported that at the time of the accident the plaintiff earned in line with the Construction Labourer's Median scale's lower level, the Koch Unskilled Scale's lower level, the Trolley Collector Minimum Wage Level and the ceiling level of the Grade 10 lower national scale. She concluded that the plaintiff would have continued to work as trolley driver and his income would have increased as he gained work and reached the upper level of the Koch Unskilled scale by the time he retires at the age of 65 years.

(viii) Mr Wim Loots, an actuary, calculated the plaintiff's loss of earnings relying on the earning expert's report. Based this report, the actuary postulated the plaintiff's loss of earnings. He did not apply any contingencies and left that to the court to decide.

[14] Turning to general damages, the plaintiff referred the court to previous decisions and argued that an amount of R 1 400 000 was a just and reasonable.

[15] The issues around this case revolve around whether the plaintiff has proved his claim for loss of earnings and the amount of general damages to be awarded to the plaintiff.

[16] It is trite that the plaintiff bears an onus to prove the extent of his loss and damages on a balance of probabilities. When it comes to award of compensation for bodily injuries, a court has a discretion to award what it deems fair and

adequate. The court was referred to the case of *AA Mutual Insurance Association Ltd v Maqula* 1978 SA 805 (A) where the court held at 809:

'It is settled law that a trial court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured person for his bodily injuries and their sequelae.'

[17] The plaintiff must adduce evidence of his income in order to enable the court to assess his loss of earnings. In addition, the plaintiff must prove the amount of income he will reasonably lose in the future as a result of the injury. In *Mvundle* v *RAF* [2012] ZAGPPHC 57, an unreported North Gauteng High Court judgment, the court per Kubushi AJ held at para 42:

'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 or her current job and/or be limited in a number and quality of his or her choices should he or she decides to find other employment.'

[18] Moreover, 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 she would likely have earned after the accident. In *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) it was said at 113F:

'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, augers or oracles. All that the court can do is to make an estimate, which is often a very round estimate, of the present value of a loss'.

[19] The plaintiff testified that for three years prior the accident he pushed trolleys at the supermarket for customers. To the occupational therapist, he reported that he was employed by the municipality at the time of the accident and he earned R120 a day. He informed the occupational therapist that it was only on days when he was not working for the municipality that he would push trolleys and wash cars at the carwash. This contradicts the plaintiff's evidence. He did not

mention any form of employment he was engaged in at the municipality. In addition, there is no collateral information to substantiate this claim when the plaintiff could have easily done so. My view is that the plaintiff has never been formally employed by the municipality or by any other employer.

[20] The plaintiff testified that he was self-employed pushing trolleys at the supermarket at the time of the accident and washed cars opposite the supermarket. He had been doing these jobs for a period of three years prior the accident. He contradicted himself on how much he generated. He testified that from pushing trolleys, he made between R200 and R250 a day and washed 3-4 vehicles a week at R40 -R80 per vehicle. He reported to the occupational therapist that he generated R50 a day during mid-month, R200 at the end of the month from pushing trolleys and washed 6 vehicles a day at R40 per vehicle. This is also not supported by any other
evidence, it is the plaintiff's 'say so'.

[21] Assuming for once, that the plaintiff operated for a period of three years pushing trolleys for customers for such a well-known supermarket, it is unlikely that he was not known by the employees at the supermarket or by any other person working in and around the supermarket. If one considers the issues of safety around the supermarkets, individuals assisting customers as the plaintiff alleged are definitely known. The nature of the work allegedly done by the plaintiff was very informal but he did not operate in a vacuum. There is no credible evidence presented by the plaintiff to prove that he was doing this kind of work. In the absence of evidence to corroborate the plaintiff's presence at the supermarket, I am not persuaded that he performed any of the above duties.

[22] I am mindful that there is no evidence presented to counter the plaintiff's version, however having considered the evidence presented by the plaintiff I am not satisfied that the plaintiff was self-employed at all at the time of the accident. It is my view that the evidence does not prove on a balance of probabilities that the plaintiff suffered any past loss of earnings.

[23] The plaintiff was 26 years old at the time of the accident. His highest level of education is Grade 10. He had dropped out of school three years prior the accident.

With the plaintiff's level of education, the reality is that without a Grade 12 certificate or further education he was most likely going to work in an environment of high physical nature. I accept that the plaintiff's injuries make him unsuitable for work of high physical demand and this diminishes his employment opportunities. It is my view that the plaintiff's claim for future loss of income must succeed.

[24] The earning specialist postulated the plaintiff's earnings in line with the Construction Labourer Median scale's lower level, the Koch unskilled scale's lower level and the ceiling level of the Grade 10 lower national scale. The actuarial calculations are based on this report and I have no qualms about the technique used to arrive at these calculations. The actuary left the determination of contingences to be applied to the court. The plaintiff has argued that the normal contingency deduction of 15% be applied to future earnings.

[25] The application of contingencies is at the discretion of the court. In the case of *Road Accident Fund v Kerridge* [2018] ZASCA 151; 2019 (2) SA 233 (SCA), Nicholls AJA writing for the majority, expressed as follows at para 44:

> 'Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger the claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in pre-morbid scenario, generally awarded higher contingencies, the younger the claimant.'

[26] Our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies have to be accounted for. The longer the period over which unforeseen contingencies can have an influence over the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies have to be applied.

[27] The plaintiff is in his youthful age, living with a medical condition and other injuries he sustained after the accident. The rate of unemployment is very high in South Africa and the Covid-19 pandemic aggravated the situation. Its impact can still be felt by many businesses and this has exerted its impact on job opportunities. I am of the view that a 25% (pre-accident and post-accident scenario) deduction, higher than the normal contingency deduction, must be applied to the plaintiff's loss of future income. In the result, the total loss of future income is R1 094 354.25.

[28] Coming to the quantification of general damages, I have considered the authorities referenced by the plaintiff. The injuries sustained by the plaintiff bear a closer resemblance to the injuries referred to in these cases. An amount of R1 200 000 is a fair and reasonable amount for the plaintiff's general damages.

[29] In the circumstances, I order as follows:
The amended draft order marked 'X' is made an order of court.

L. MPAMA, AJ

Appearances

For the plaintiff:	Adv M. Steenkamp
Instructed by:	Messrs Venters Inc. Century City c/o Messrs Venters Bloemfontein
For the defendant:	No appearance