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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER : 4817/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE:.....SIGNATURE:.....

In the matter between :

**D, S**

Applicant

and

**ROAD ACCIDENT FUND**

Respondent

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**JUDGMENT**

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BHOOLA A J:

Introduction

[1] The plaintiff issued and served summons on the defendant on 11 February 2019 in which he claims damages, *inter alia*, for past and future loss of earnings and general damages arising out of a motor vehicle collision that occurred on 14 November 2017.

[2] At the outset I must note that this determination of the merits and quantum is made on an unopposed basis. When the matter was enrolled for trial on 4 August 2020, it was postponed to the following day to enable the attorneys for the defendant to participate. Given that the defendant had in the months prior to hearing of this matter, terminated the mandates of its attorneys on record for most of its matters, Plaintiff's attorneys had made numerous attempts to discuss the matter with claims handlers of the defendant in order to establish their attitude to the trial proceeding or the possibility of settlement. These efforts had not been met with any response. When I commenced hearing of this matter I requested that the plaintiff's attorney should file an affidavit explaining the efforts made to secure co-operation from the defendant and having received this, I am satisfied that the matter should proceed notwithstanding the absence of the defendant. It is clear from the pleadings that the plaintiff's attorney invited the defendant's representatives to a pre-trial conference in May 2020 but even then no co-operation was forthcoming. Thereafter, he sent numerous emails as well as proposed settlement terms to the defendant's senior claims handlers and emailed the notice of set down to them, but no response was received.

### The issues

[3] The issues for determination in this trial are:

3.1 the merits of the claim;

3.3 the *sequelae* of the injuries and their resultant impact on the plaintiff's employability;

3.4 the amount to be awarded for general damages; and

3.5 the plaintiff's past and future loss of earnings and loss of earning capacity.

### Merits

[4] The accident report provided when the plaintiff reported the collision to the South African Police Services on the same day, records that:

4.1 On 14 November between Owl Road and Barry Hertzog Road, Auckland Park, he was the driver of a motorcycle;

4.2 He was travelling along Empire Road in a westerly direction in the left lane;

4.3 A BMW that was driving parallel to him started to move towards him without indicating;

4.4 He attempted to avoid colliding with the BMW, and in the process went over a cab line and collided with a pedestrian.

[5] In his statutory affidavit which accompanied his RAF1 form the plaintiff recounted the collision as follows:

5.1 On 14 November 2017 he was the driver of a motorcycle travelling along Empire Road in a westerly direction;

5.2 There was a BMW with unknown registration number travelling next to him in the right hand lane;

5.3 The BMW changed lanes into the lane in which the plaintiff was travelling without indicating;

5.4 In an attempt to avoid colliding with the BMW, the plaintiff swerved and lost control and collided with a pedestrian.

[6] The plaintiff pleads that the collision was caused solely by the negligence of the insured driver in that he, *inter alia*, changed lanes by moving the BMW into the plaintiff's lane without observing safety rules, which caused him to swerve and lose control of his motorcycle.

[7] The defendant, in its plea, denies the occurrence of the motor vehicle collision. It is however established on the facts and evidence, including hospital and police records, that the plaintiff was involved in a motor collision on the date, time and place as stated above. No statement from the insured driver or any witness has been presented by the defendant to gainsay the version of the plaintiff or to indicate that there was contributory negligence on the part of the plaintiff. I am therefore satisfied that the plaintiff has established on a balance of probabilities that the collision was caused solely by the negligence of the insured driver of the BMW which moved into the lane in which the plaintiff was riding his motorcycle, without it being safe to do so, causing him to take evasive action and lose control. The plaintiff's reporting as set out above to the defendant and the police are consistent with his version of the collision and are in any event not disputed given the non-appearance of the defendant.

### Quantum

[8] The plaintiff pleads he sustained the following injuries for which he obtained medical treatment at the Netcare Milpark hospital where he was admitted: a T7-T10 spinal process fracture, a T8 anterior compression fracture, a fractured right femur, abrasions on his right elbow, right thigh and right foot.

[9] He pleads that as a result of the injuries set out above:

9.1 he experienced pain and suffering, discomfort, loss of the amenities of life and will in future continue to experience these as a result of the motor vehicle collision;

9.2 he currently experiences pain in his back and right leg, cannot run, cannot walk, sit or stand for extended periods, and cannot lift or carry any heavy objects;

9.3 he will continue to require medical treatment and will incur costs in that regard.

[10] The plaintiff filed medico-legal reports from its medical experts and an actuarial report. The defendant did not appoint any medico-legal experts nor did it file an actuarial report.

[11] Dr Preddy, the orthopaedic surgeon records that the plaintiff sustained the following injuries:

11.1 A midshaft fracture of the right femur that resulted in shortening of the right leg;

11.2 A soft tissue thoracic spine injury comprising of a compression fracture of T8 with residual symptoms;

11.3 A soft tissue lumbar spine injury resulting in space narrowing, with spondylolytic changes most pronounced at L2/3 and L3/4 levels;

11.4 A left tibial plateau fracture of the left knee;

11.5 Various abrasions.

[12] Dr Preddy's report notes that the spinal injuries result in persistent daily pain in mid and lower back, and that pain is aggravated by sitting for long periods of time and climbing stairs and ladders. The femur fracture has also resulted in shortening of the leg. Dr Preddy determined the plaintiff's combined whole person impairment ("WPI") to be 14%, as a result of which he does not have serious injuries qualifying him for general damages. However, Dr Preddy's opinion is that his injuries are sufficient serious to

qualify him for general damages under the narrative test. Dr Preddy filed an RAF4 report in this regard.

[13] In terms of the 2008 Regulations to the Road Accident Fund Act, 56 of 1996 ("the Act") when the defendant is not satisfied with an assessment of serious injury assessment in terms of section 17(1A) of the Act, it can either reject the serious injury assessment and the matter is then referred to the Health Professions Council of South Africa, or it appoint its own medical experts to conduct an assessment. Counsel for the plaintiff, Mr Kilian submitted that the defendant exercised neither of these options hence it can be accepted, based on Dr Preddy's report, that the plaintiff qualifies under the narrative test for general damages.

[14] At the time of the collision the plaintiff was 49 years old and was employed as a Building and Facilities Supervisor. He was absent from work for ten months and returned to his pre-accident employment on 3 September 2018.

[15] The report of the occupational therapist, Ms. N Doorsammy, indicates that when the plaintiff returned to work after ten months he experienced a number of difficulties including: being unable to climb stairs and scaffolds and being unable to handle heavy objects; being accommodated with light work duties; and being accommodated with administrative duties, reduced load handling and reduced number of sites to supervise. The occupational therapist's conclusion, based on his physical assessment, is that he is compromised in meeting the inherent requirements of his pre-accident job demands as a Building Supervisor due to his postural tolerance deficits, and load handling as a result of the injury to the axial spine and both lower limbs.

[16] The Industrial Psychologist, Ms C. Williams, confirms in her report that the plaintiff has been vocationally compromised as a result of the collision and should be compensated.

[17] The plaintiff suffered past loss of earnings. He will suffer future loss of earnings as he is expected to retire early at the age of 59 ½. The orthopaedic surgeon and occupational therapist agree that he will have to retire between three to five years early. His total loss of earnings was calculated in the actuarial report as R 1 186 169.00, consisting of past loss at R 67 345.00 and future loss R 1 118 824.00. The contingencies calculated in the actuarial report favour the defendant and it was submitted by Mr Kilian that for purposes of settlement the plaintiff had proposed the sum of R 900 000.00 to the defendant for total future loss of income, and for purposes of this trial it would not deviate from this.

[18] In respect of the claim for general damages, Mr Kilian relied on the following authorities:

*Dicks v Union and National Insurance* 1971 (2E6) QOD 211E- the plaintiff sustained a fracture of the right femur, tibia and fibula with infection and thrombosis resulting for long periods thereafter. The tibia and fibula fractures were treated by internal fixation and reduction and fixation of the femur. An amount of R 7000 was awarded, current value R528 000.00

*Mgudlwa v RAF* 2011 (6E3) QOD 1 (ECM) - a 43 year old teacher sustained fractures of the femur and tibia. The plaintiff was in traction for three months and left with deformity of the end of the femur with the left leg 5cms shorter than the right. Numerous future surgeries were indicated. An amount of R300 000.00 was awarded in 2011 - current value R496 000.00.

*Van Reyneveld v Santam* 1976 (2J2) QOD 6390 - a 16 year old boy sustained multiple injuries, including an injury to the left hip joint, a comminuted fracture of the lower half of the shaft of the left femur, an open fracture of the bottom third of the tibia and fibula of the right leg and a fracture of the radius of the left forearm. Various operations were performed. An amount of R9250 was awarded in 1976 - current value R433 000.00.

[19] Counsel relied on the following cases to provide guidance on the quantum spinal injuries:

*Oosthuizen v RAF* 2016 (7C4) QOD 5 (GNP) - a 24 year old male sustained a compression fracture of the L3 vertebral area resulting in pain the lumbar spine area with the possibility of future surgery to the lumbar spine. The plaintiff also sustained soft issue injuries and a concussion. An amount of R520 000.00 was awarded in 2016 - current value R671 000.00.

*Shongwe v RAF* 2013 (6C4) QOD 34 (GNP) -a 41 year old plaintiff sustained a back injury consisting of a fracture of the T8 vertebrae with severe consequences, pain and discomfort which contributed to her suffering and also a loss of future earnings. An amount of R300 000.00 was awarded in 2013 - current value R 453 000.00.

[20] On the above authorities, Mr Kilian submitted that an award in the sum of R 450 000.00 for the plaintiff's general damages would be appropriate, however an amount of R 400 000.00 was proposed to the respondent for settlement purposes and would continue to be relied upon.

### Order

[21] In the premises, the draft order marked "X" is hereby made an order of court.

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U. BHOOLA

ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG



Date of hearing: Heard on 5 August 2020 by videoconference in terms of the Judge President's extended Consolidated Directive of 11 May 2020 extended to 15 August 2020.

Date of judgment: 1 September 2020 - handed down electronically and emailed to parties, uploaded onto caselines and made available to saflii.org

Appearance:

Counsel for the plaintiff: J M Kilian

Instructed by:

Mouton and Williams

Pretoria

c/o Gordon Holtmann

Parktown