

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 42879/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

31 August 2021

In the matter between:

MGUNI MELUSI

Plaintiff

and

ROAD ACCIDENT FUND

defendant

JUDGMENT

Mdalana-Mayisela J

[1] The plaintiff instituted an action in terms of the Road Accident Fund Act, 56 of 1996 (as amended), against the defendant for delictual damages. The claim arises from an identified motor vehicle collision that occurred on 17 May 2017, at corner Oxford and Glenhove streets in Rosebank, at which time the plaintiff was a pedestrian.

[2] The plaintiff in his amended particulars of claim is suing the defendant for general damages, future medical expenses and future loss of earnings. The defendant is opposing the action and has filed a plea through its former attorneys of record, Molefe Dlephu Attorneys. On 13 August 2020 the defendant's attorneys withdrew as attorneys of record. As a results thereof, the plaintiff seeks a default judgment against the defendant.

[3] On the first day of the hearing of this matter I stood it down for a possible settlement on request by the plaintiff and the defendant's claim handler. The parties then settled the issues of liability and future medical expenses at 80/20 in favour of the plaintiff. Ms Dladla, a claim's handler confirmed the settlement on behalf of the defendant. I was advised by the plaintiff's counsel that the issue of general damages has been abandoned by the plaintiff. The only remaining issue to be determined by this court is future loss of earnings.

[4] Both parties have filed the reports of orthopaedic surgeons, occupational therapists, industrial psychologists, and their joint minutes. The plaintiff has also filed the reports of the clinical psychologist and actuary. The plaintiff relies on an actuarial calculation prepared on the basis of the joint minute of the industrial psychologists. The experts did not give oral evidence. The plaintiff filed the affidavits of all his experts confirming their reports. The plaintiff's counsel submitted that I may consider all the joint minutes as part of the record in determining the issue in dispute. The plaintiff has submitted his evidence by affidavit.

[5] It is common cause between the parties that the plaintiff was involved in a motor vehicle collision on 17 May 2017 as a result of which he sustained a left medial malleolus fracture. It is also common cause that he received the plaster cast and conservative treatment for this injury at Hillbrow clinic and Johannesburg General Hospital.

[6] The plaintiff was born on 27 February 1978 in Zimbabwe. He was 39 years old when the motor vehicle collision occurred in 2017. It is not clear from the evidence whether he completed grade 11 or grade 12 at school. He has not submitted proof of qualifications. He is a self-employed Newspaper Salesman. He commenced his

business in 2009. He buys The Star, Sowetan, Business Day, Daily Sun, Sunday Times and Saturday Star newspapers with his cash at the Daily Sun Offices in Johannesburg CBD, and thereafter travel to Rosebank to sell them.

[7] During his medical assessment he informed the Industrial Psychologists that at the time of the motor vehicle collision, he was earning R25,000.00 pm and he spent R10,000.00 – R15,000.00 pm to buy newspapers. He filed proof of service and earnings from Courtyard Hotel, Doppio Zero, Lisa Mackay, tashas Rosebank, Allan Bulmer, Winston Hotel, Megan Tilney and Holiday Inn Hotel Rosebank which show that his total monthly turnover is R16,694.00. He did not file proof of invoices for the newspaper purchases. He alleges that he does not own a bank account with any of the banking institutions in the Republic of South Africa.

[8] In order to succeed on a claim for future loss of earnings the plaintiff must prove on a balance of probabilities that he suffered a significant impairment giving rise to a reduction in earning capacity. There must be proof that the reduction in earning capacity gives rise to pecuniary loss (*see Rudman v Road Accident Fund 2003 (2) SA 234 SCA; Masiza v Road Accident Fund (A163/16) [2021] ZAGPJHC 94 (7 January 2021)*).

[9] The plaintiff alleges that he experiences stiffness and pain in his left ankle after walking a long distance. Dr Ngobeni, plaintiff's orthopaedic surgeon opines that he is prone to develop post traumatic arthritis on the left ankle, as the fracture is intra articular and it is a weight bearing joint. Dr Ngobeni further opines that the left ankle pain will make it difficult for the plaintiff to work in a standing position for a long period of time. His duties will have to be amended to accommodate his injuries.

[10] Dr Schepers, defendant's orthopaedic surgeon and Dr Ngobeni in their joint minute note that the results of the radiology examination show that there is cortical incongruence and a dorsal aspect bony exostosis of the talus bone, and marginal osteophyte changes are demonstrated at the dorsal aspect of the talonavicular joint. The talonavicular joint is a joint formed by the talus, the bottom half of the ankle joint. It is critical in allowing the foot to move inwards and outwards, as well as in circulation motion. Dr Ngobeni opines that the plaintiff is not disabled but has

impairment of left ankle function. He recommends the left ankle arthrodesis at a later stage when the plaintiff develops significant degenerative changes.

[11] Mrs Hleziphi Matlou, the plaintiff's clinical psychologist in her addendum report states that the plaintiff's scholastic and vocational history suggests that his pre-morbid neurocognitive level of functioning was fairly average. His assessment scores on concentration, attention, processing speed, memory, social and abstract reasoning, language functioning, visual motor and visual memory, planning and performance, are suggestive of neurocognitive difficulties and impairment. His emotional assessment suggests anxiety and severe symptoms of depression. She opines that his neurocognitive functioning is likely adversely affected by his clinical depression and the residual physical pain. She states that plaintiff is concerned about the impact of his physical residual symptoms on his ability to do jobs that require him to stand and walk for long periods, which points to a worry about his viability and competitiveness in the open labour market. She opines that this is a reasonable concern as he has largely served in unskilled to semi-skilled jobs. She further states that his loss of work also acts as a perpetuating factor to his emotional disturbances. She concludes that the combined effects of his neurocognitive deficits, his emotional difficulties and physical symptoms would jeopardize his prospects of attaining employment in the open labour market, and his ability to maintain employment once secured.

[12] The occupational therapists, Mr Mbhekiseni Dhlamini and Ms Nicole de Bree in their joint minute opine that the plaintiff's occupation as a Newspaper Salesman, falls within light with some elements of medium-physical demands in nature with significant standing and mobility demands. Post-accident the therapists opine that the plaintiff's overall physical capacity falls within the sedentary to medium physical demands. He will however, as a result of the accident struggle to execute duties that require prolonged periods of standing, walking and below knee level reach work. They further opine that the injury has somewhat affected the plaintiff's vocational potential and employability, more particularly should he develop degenerative changes and undergo the left ankle arthrodesis at a later stage when indicated.

[13] Pre-morbid the Industrial Psychologists, Ms Zaheerah Fakir and Ms Pat Matla disagree on the earnings assumptions. Ms Fakir opines that the plaintiff was working and earning within the semi-skilled capacity at the time of the motor vehicle collision. She classifies his earnings at that time to be at the semi-skilled non-corporate level: R20 600 – R59 000 – R151 000 per annum. She further opines that he would have in all likelihood continued to work as he had, or in similar positions, earning in the above capacity towards the upper quartile of the aforementioned salary scale. The 2020 salary scales for semi-skilled, non-corporate worker's earnings are R37 900 - R86 000 – R186 000 per annum (Quantum Yearbook, 2020). Ms Matla opines that given his level of education and work history, he was employable as an unskilled worker in the non-corporate sector or in the informal sector as a self-employed person, and that he would have most probably remained working as a self-employed person in the informal sector for most of his life if he had not encountered the accident in question. The 2017 suggested earnings assumptions for a self-employed person in the informal sector are R8 100 – R20 600 – R59 000 per annum (Quantum Yearbook, 2017). The Industrial Psychologists agree that he would have been able to work up until normal retirement age of 65.

[14] Post-morbid the orthopaedic surgeons noted that the results of the radiology examination show that there is cortical incongruence and a dorsal aspect bony exostosis of the talus bone, and marginal osteophyte changes are demonstrated at the dorsal aspect of the talonavicular joint. Ms Fakir opines that should the plaintiff continue to experience the pain he does, he may be unlikely to continue working, and should he attempt to work he will be unlikely to earn as he did. Ms Matlou opines that he will struggle to find employment in the open labour market due to neuropsychological (depression and anxiety), neurocognitive and orthopaedic injuries. Ms Matla opines that his future employability is largely dependent on whether he develops degenerative changes in his left ankle. In the event that he does develop degenerative changes in his left ankle, he will not be suited to work in any of his pre-accident occupations as these occupations require frequent walking and thus he would be rendered as a greatly disadvantaged and vulnerable job seeker in the open labour market. Ms Matla proposes that should he develop degenerative changes he may stay self-employed and employ an assistant to do the deliveries and sales. However, this will require an extra expense incurred.

[15] The Industrial Psychologists agree that when the plaintiff receives the necessary treatment and pain management he may continue to work but will not earn as he did before the accident, considering his reported difficulties, thus suffering a partial loss of income for which he should be compensated.

[15] Considering the opinions of the aforementioned experts, I am satisfied that the plaintiff has proved on a balance of probabilities that post-morbid he suffered a significant impairment giving rise to a reduction in earning capacity, and resulting in pecuniary loss. What remains to be determined is the amount of damages.

[14] Regarding the approach in the adjudication of future loss of earnings, in the *locus classicus of Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)* it was stated as follows:

“Any enquiry into the 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, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss...”

[15] The plaintiff is claiming R3 000 000.00 for loss of future earnings. The onus rests on the plaintiff of proving, not only that he has suffered damage, but also the quantum thereof (*Erasmus v Davis 1969 (2) SA 1 (A) 9E*). The plaintiff has filed an actuarial report prepared by Algorithm. The actuary calculated the loss of future earnings in accordance with the joint minute of the Industrial Psychologists. The plaintiff informed the Industrial Psychologists that at the time of the motor vehicle collision his turnover was R25,000.00, the expenses for newspaper purchases were R10,000.00 – R15,000.00 and his average profit was R12,500.00 pm. In the actuarial report dated 23 February 2021 the actuary used the average monthly profit of R12,500.00 for basis I and III. Basis I is for retirement age of 65 and basis II is for retirement age of 70. For basis II he used the upper quartile earnings for self-employed persons in the informal sector. Counsel for the plaintiff submitted that I should award the damages for future loss of earnings for the amount of R488,499.00 stated on basis 1A.

[16] During the preparation of my judgment I noticed that the amount of R25,000.00 used by the actuary in the preparation of the aforementioned actuarial calculation was not in accordance with the proof of earnings filed by the plaintiff. I then made a request that a revised actuarial calculation be prepared in accordance with the proof of earnings of R16,694.00 filed by the plaintiff. I am indebted to the plaintiff's legal representative for acceding to my request.

[17] In the revised actuarial calculation dated 27 August 2021 the plaintiff's average monthly profit is R4,194.00. His earnings have been taken as R50,328.00 per annum from 17 May 2017, increasing in line with headline inflation to R59,608.00 on 1 September 2021. His earnings would have increased in future as per the inflation of earnings assumption until retirement age. The actuary has prepared two basis of calculations based on the retirement age of 65 and 70. I am not considering the retirement age of 70 because the Industrial Psychologists in their joint minute agreed on a retirement age of 65. Counsel for the plaintiff also submitted that the court should consider a basis of the retirement age of 65.

[18] The value of income uninjured is R828,386.00 and is the same amount for the value of income injured. The actuary was instructed by the plaintiff's attorney to apply a higher than normal contingency deduction on the value of income injured. He applied 10.50% on uninjured income and 30.50% on injured income. The net future loss of income on basis I is R165,678.00. The revised actuarial calculation also provides for a past loss of income, however the plaintiff in his original particulars of claim and the amended particulars of claim has not claimed past loss of income.

[19] I am satisfied with the assumptions and the higher than normal contingency deduction applied by the actuary to provide for the future uncertainties on the following reasons. Professor Schepers opines that the plaintiff's prognosis seems good. The orthopaedic surgeons in their joint minute do not indicate when the plaintiff is expected to develop significant degenerative changes in his ankle which will render him unsuited to work as a Newspaper Salesman or any of his previous occupations. Thus, allowing for contingencies is one of the elements in exercising

the discretion to award damages (*Southern Insurance Association Ltd v Bailey supra at 116H*).

[20] The plaintiff seeks costs of the action. He is successful on liability, future medical expenses and future loss of earnings. I find no reason why the costs should not follow the event.

[21] In the premises I make the following order:

ORDER

1. The defendant shall pay the plaintiff the capital sum of R132,542.40 post apportionment of 80/20% for future loss of earnings suffered as a result of the motor vehicle collision which occurred on 17 May 2017.
2. The amount referred to in paragraph 1 above shall be paid into the Trust account of the plaintiff's attorneys of record, NT Mdlalose Incorporated, Nedbank branch code 198765, account number [....].
3. The defendant shall furnish the plaintiff with the undertaking in terms of section 17(4)(a) of Act 56 of 1996 limited to 80% for the costs of future accommodation of the plaintiff in a hospital or nursing home and such treatment, services or goods as he may require as a result of the injuries he sustained from the aforesaid motor vehicle collision.
4. The defendant shall pay the plaintiff's taxed or agreed party and party costs which costs shall include counsel's fees on the applicable High Court Scale.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 31 August 2021

Appearances:

On behalf of the plaintiff: Adv N Mabena

Instructed by: N.T Mdlalose Inc

On behalf of the defendant: No appearance