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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No.: 2046/16

28/10/2019

In the matter between:

R MUVHIMI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MNGQIBISA-THUSI, J

- [1] The plaintiff, Mr R Muvhimi, has instituted an action against the defendant, the Road Accident Fund, in terms of section 17 (l)(a) of the Road Accident Fund Act 56 of 1996 ("the Act") for loss suffered as a result of injuries sustained in a collision which occurred on 28 February 2015 at the corner of Von Hagen and Transoranje Streets, Danville, Pretoria. At the time of the accident the plaintiff was a pedestrian. The motor vehicle that hit him was identified as bearing registration number [...] ("the insured vehicle"). Mr Muvhimi alleges that the collision was caused by the sole negligence of the insured driver.
- [2] Inasmuch as the defendant admits the negligence of the insured driver, it is, however, the defendant's contention that the plaintiff's negligence contributed

to the cause of the collision. The defendant seeks an apportionment of damages in terms of the Apportionment of Damages Act 34 of 1956.

- [3] There is agreement with regard to the amount to be awarded for loss of earning capacity and the defendant has agreed to provide the plaintiff with a certificate as envisaged in s 17(4)(a) of the Act for future hospital and medical expenses.
- [4] The issues to be determined are whether there should be an apportionment of liability and to what extent, and general damages.

Merits

- [5] A sketch plan of the accident scene was drawn and admitted as exhibit "Y". The sketch plan roughly reflects the following:
 - 5.1 Von Hagen and Transoranje streets are dual carriage streets with two lanes in each direction;
 - 5.2 Von Hagen Street runs from east to west and Transoranje Street from south to north;
 - 5.3 both streets are controlled by robots; and
 - 5.4 on the south eastern side of Transoranje Street where the collision allegedly occurred, there is a road island depicted by yellow lines.
- [6] The plaintiff was the only witness who testified during the trial.
- [7] The plaintiff's evidence is as follows. On 28 February 2015 at around 05h00 he was coming back from church walking along Von Hagen Street. Although it was still a bit dark outside, the street lights were on. He was wearing a white top and blue jeans. When he crossed Transoranje Street, walking from west to east, the robot was green in his favour. As he entered the island with yellow stripes with an intention to speak to a person standing on the eastern side of Transoranje, he was hit by the insured vehicle which was travelling from North to South along Von Hagen Street. The plaintiff testified that at the time he was hit he was standing on the island and not on the pavement. He further testified that by the time he had crossed Transoranje Street, the robot had turned from green to red. With regard to the point of impact, the plaintiff indicated a point which was outside the island and more or less on the pavement. However, in a

photo contained in a photo album taken during an inspection *in loco* during which the plaintiff was present, the plaintiff is reflected as pointing to point inside the island as the point of impact. The plaintiff however denied that the position he is standing at in the photo is the point of impact and requested the court to accept the position he pointed out in the sketch plan as the correct point of impact.

- [8] After the plaintiff closed its case, the defendant closed its case without calling any witness.
- [9] In *Kruger v Coetzee* 1966 (2) SA 429 (A) the court stated that the test for determining negligence involves the questions whether (a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her conduct causing harm resulting in patrimonial loss to another; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such reasonable steps.
- [10] The plaintiff came across as a credible witness when he testified about the events leading to the insured vehicle colliding with him and his evidence is accepted as being true and reliable. The only contradiction appeared to be in relation to where he was standing at the time he was hit by the insured driver. However, the plaintiff testified that the point of impact was as reflected in the sketch plan. One thing is certain that at the time of the collision, the plaintiff was not standing on the pavement. However at the same time he was not on the road in the vehicular path but was someone on the traffic island.
- [11] Even though-1 the insured driver was not available to testify, I am of the view that this matter falls within the purview of the *Galante* principle. In *Galante v Dickinson* 1950 (2) SA 460 (A) the court at 465 held that:

"It is not advisable to seek to lay down any general rule as to the effect that made properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally

open on the evidence, that one which favours the plaintiff as opposed to the defendant".

- [12] It is expected that a reasonable driver would be more cautious when travelling on a road where he is likely to encounter pedestrians. The insured driver did not testify. In the absence of the defendant's version as to how the collision occurred, However, I am of the view that the insured driver was negligent in that he failed to keep a proper lookout for pedestrians and it appears that he collided with the plaintiff not on his pathway but on the traffic island.
- [13] Counsel for the defendant submitted that in view of the fact that by his own version the insured driver collided with the plaintiff on the traffic island, the plaintiff contributed to the loss suffered as the traffic island is not meant for pedestrian to stand.
- [14] In order to make a finding that there is contributory negligence, both parties must have acted negligently to cause the damage; the parties must have deviated from the behaviour of a reasonable person; and there must be a connection between the negligence of the parties and the damages suffered.
- [15] I am of the view that plaintiff also contributed to the collision by standing on the traffic island in circumstances when it was not reasonable for a pedestrian to stand. Had he been on the pavement when the insured vehicle came, it is possible that he might have avoided being hit by the insured vehicle.
- [16] I am therefore satisfied that the plaintiff and the insured driver were responsible for the cause of the collision and would apportion their negligence on a 90% and 10% basis in favour of the plaintiff.

Quantum

- [17] It is common cause that as a result of the accident, Mr Muvhimi sustained the following injuries:
 - 17.1 a fracture to the left femur ;
 - 17.2 a fracture of the skull and facial bones;
 - 17.3 right ankle/distal tibia pylon fractures;

- 17.4 blunt abdominal trauma;
- 17.5 fracture of the left clavicle and scapula;
- 17.6 superficial injuries including a number of, abrasions and lacerations;
- 17.7 soft tissue injury to the neck; and
- 17.8 fracture of the pelvis, superior and inferior pubic rami.

- [18] As a result of the injuries sustained the plaintiff had to undergo various surgical procedures. The most serious sequelae the plaintiff suffers is that the length of his left leg is now shorter. According to the occupational therapist's report, the plaintiff displayed limitations due to his left shoulder, left knee and lower leg symptoms. The occupational therapist is of the opinion that taking the plaintiff's physical limitations as a result of the accident, he is unlikely to cope with strenuous physical work. Furthermore, the plaintiff sustained serious scarring on his face and body.
- [19] Besides the physical *sequelae* of his injuries, he also suffers from psychological and emotional fallouts. According to Dr Truter, a clinical psychologist, reported that the plaintiff was suffering from severe depression and post-traumatic stress. He is currently taking medication in order to deal with the pain experienced as a result of the injuries sustained.

Loss of earning capacity

- [20] The parties are in agreement on an amount of R90, 454.00 to be awarded as calculated by the actuaries with regard to loss of earnings. From the reports of the experts, the plaintiff completed Grade 3 at school in Zimbabwe. After leaving school in Zimbabwe due to financial constraints, over the years he worked as a general worker at various places. At the time of the accident he was employed as a gardener /handyman at a creche in Booyens earning approximately R3, 910.27 per month (R46, 923.24 per annum). In their joint minute the orthopaedic surgeons are in agreement that plaintiff can still work until he reaches his retirement age at 65 years. The plaintiff's industrial psychologist reported that the plaintiff but for the accident would have continued working in a position of a similar complexity level within the general sector of the labour market. Although the plaintiff is still working with the same

employer as before the accident, his injuries have rendered him to be a vulnerable worker in the open market particularly if for one reason or the other he were to leave his employment with the current employer.

- [21] Having considered the experts reports admitted and perused the calculations by the actuaries and the contingencies applied, I am satisfied that the amount agreed upon for loss of earnings is fair and reasonable.

General Damages

- [22] The plaintiffs' counsel suggested that a sum of R 1,000,000.00 should be awarded as general damages. On the other hand the defendant's counsel has suggested an amount between R700, 000.00 and R500, 000.00. The court was referred to a number of cases comparative purposes. I found that only the case of *Benade & Benade v The Road Accident Fund*, unreported judgment, case number 2009/16157, Eastern Cape High Court, is the closest in terms of the injuries sustained although the *sequelae* appear to have been more serious. The court in the *Benade* case awarded an amount of R600, 000.00 (the equivalent of R1, 038,000.00).

- [23] In *Sandler v Wholesale Suppliers Ltd* 1941 AD 194 the court stated at 199 that:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case."

- [24] At the time of the accident the plaintiff was 53 years old and is currently 57 years old. Before the accident the plaintiff enjoyed jogging and lifting weights, activities he no longer partakes in as a result of his injuries.

- [25] Taking into account the injuries that plaintiff sustained and the *sequelae* thereof and the loss of amenities he has suffered as a result, I am satisfied that an amount of R1, 000, 000.00 (subject to an apportionment) should be awarded as general damages.

- [26] In the result, an order is made in terms of the draft order marked "X".

NP MNGQIBISA-THUSI

Judge of the High Court

Appearances

For Plaintiff: Adv S Maritz (instructed by Spruyt Attorneys)

For Respondent: Adv M Boikanyo (instructed by Maponya Inc)

“X”

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Before the Honourable Judge MNGQIBISA-THUSI J. on 28 OCTOBER 2019.

Case number: 2046/2016

In the matter between:

ROBERT MUVHIMI

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

ORDER

After having heard the parties, **IT IS ORDERED THAT:**

1. The Defendant shall pay 90% of the Plaintiff proven or agreed damages.
2. The Defendant shall pay to the Plaintiff the sum of R900, 000. 00 (nine hundred thousand rand only) in respect of general damages.
3. The Defendant shall pay to the Plaintiff the sum of **R 90 454-00 (NINETY THOUSAND FOUR HUNDRED AND FIFTY-FOUR RAND)**, in respect of past and future loss of income/earning capacity.
4. The amounts mentioned in paragraphs 2 and 3 in the sum of R990, 454. 00 (nine hundred and ninety thousand four hundred and fifty-four rand) is to be paid to the Plaintiff within 14 days of the date of this court Order.
5. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10% per annum, calculated from the 15th calendar day after the date of this Order to date of

payment.

6. The Defendant shall furnish the Plaintiff with an undertaking limited to ____
____%, in terms of section 17(4)(a) of act 56 of 1996 for payment of the future accommodation for the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him resulting the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on **28 February 2015**, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof.
7. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on a High Court scale, subject thereto that:
 - 7.1 In the event that the costs are not agreed:
 - 7.1.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;
 - 7.1.2 The Plaintiff shall allow the Defendant 7 (SEVEN) Court days from date of allocator to make payment of the taxed costs.
 - 7.1.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10% per annum on the taxed or agreed costs from date of allocator to date of final payment.
 - 7.2 Such costs shall include but not be limited to:
 - 7.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 3 and 6 above;
 - 7.2.2 The costs of and consequent to the employment of counsel, including counsel's charges in respect of her full day fee for 06 august 2018 as well as reasonable preparation;
 - 7.2.3 The costs of all medico-legal, radiological, actuarial, accident reconstruction, pathologist, joint minutes and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles, including, but not limited to the following:
 - 7.2.3.1 Dr P Engelbrecht, Orthodontic Surgeon;

- 7.2.3.2 Greef Doran Inc., Occupational Therapist;
- 7.2.3.3 Dr K Truter, Clinical Psychologist;
- 7.2.3.4 Dr JPM Pienaar, Plastic and Reconstructive Surgeon;
- 7.2.3.5 Dr GB Irsigler, Pulmonologist;
- 7.2.3.6 Mr M du Plooy, Orthoist;
- 7.2.3.7 Dr C van Zyl, Ophthalmologist;
- 7.2.3.8 JJ Prinsloo & Associates, Industrial Psychologist;
- 7.2.3.9 Argen Actuaries (present at Court).

7.2.4 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the following experts;

- 7.2.4.1 Dr P Engelbrecht, Orthodontic Surgeon;
- 7.2.4.2 Greef Doran Inc., Occupational Therapist;
- 7.2.4.3 Dr K Truter, Clinical Psychologist;
- 7.2.4.4 Dr JPM Pienaar, Plastic and Reconstructive Surgeon;
- 7.2.4.5 Dr GB Irsigler, Pulmonologist;
- 7.2.4.6 Mr M du Plooy, Orthoist;
- 7.2.4.7 Dr C van Zyl, Ophthalmologist;
- 7.2.4.8 JJ Prinsloo & Associates, Industrial Psychologist;
- 7.2.4.9 Argen Actuaries (present at Court).

7.2.5 The reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties.

7.2.6 The costs consequent to the Plaintiff's trial bundles and witness bundles, if any;

7.2.7 The cost of holding all pre-trial conferences, inspection in loco, as well as round table meetings between the legal representatives for both the Plaintiff and Defendant, including counsel's charges in respect thereof;

7.2.8 The costs of and consequent to compiling all minutes in respect of pre-trial conferences;

7.2.9 The reasonable travelling costs of the Plaintiff, who is hereby declared a necessary witness.

7.2.10 The reasonable costs incurred by and on behalf of the Plaintiff for the translator, Mr Pesly Maleka, whom is present at Court.

8. The amounts referred to above will be paid to the Plaintiffs attorneys, Spruyt Incorporated, by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number: [...]

Branch code: Hatfield (01 15 45)

REF: 502303

9. There is no contingency fee agreement between the Plaintiff and his attorney.

BY ORDER OF THE COURT

REGISTRAR OF THE HIGH COURT
PRETORIA

Adv. Sophia Maritz

082 825 9462

(PLA NTIFF'S ADVOCATE)

Adv. Mothepana Boikanyo

083 716 7200

(DEFENDANT'S ADVOCATE)