



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 14546/2018

In the application between:

**SIPHO NYAWOSE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

- |     |                                 |
|-----|---------------------------------|
| (1) | REPORTABLE: NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED.                        |

DATE : 10/08/2021    LENYAL AJ

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JUDGMENT

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*This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 09h00 on 10 August 2021.*

LENYAI AJ

- [1] The Plaintiff sues the Road Accident Fund ("RAF") for personal injuries sustained in a motor vehicle accident.
- [2] The defendant was not represented in court on the day of trial. Adv Mongwe advised me that with all the challenges that the RAF is experiencing currently, its entire system is compromised. In any event the saga between the RAF and the expulsion of its panel of attorneys is well known to the court.
- [3] Adv Mongwe submitted that the notice of set down was duly served on the defendant's attorneys of record as at that stage they were not yet dismissed. The defendant is therefore aware of the trial date. The attorneys of record have not withdrawn as attorneys of record. Seeing that the defendant's attorneys were no longer responding to them, the plaintiff's attorneys started dealing directly with Mr Sephika Mashao of the RAF, however this exercise was futile as he was also not engaging them.

- [4] Adv Mongwe argued that this matter should proceed as the RAF knew that the matter was in court. The RAF did not seek a postponement, they simply failed to appear or make any representation at all to the court.
- [5] It is my view that the RAF's actions appear to be denying the plaintiff access to court. Matters against the RAF, if not settled result in a stalemate either because the RAF does not have legal representation to conduct the trial or refuses to make any appearance on the day of trial. The plaintiffs are then left with the difficult choice of either postponing the matter or proceeding with trial in the absence of the defendant and run the risk that the RAF may take steps to rescind the judgment.
- [6] The court is mindful of the fact that we are dealing with public funds and a measure of caution should be applied. This matter has been dragging on since 2018 and to postpone it would delay it even further and that will not be in the best interest of justice. One must never lose sight of the saying that justice delayed is justice denied. In the matter of *De Waal Alberts v Louis Nel NO 2019 JDR 0671 (SCA)* at para [15], Tshiqi JA stated that "*These delays have to be avoided because they impact on the rights of litigants to have their disputes resolved in a fair and speedy manner.*"
- [7] I am of the view that a postponement has consequential effects on costs, which would mean that the RAF would have to bear those costs, placing a further burden on the state's fiscus. I am satisfied that counsel for the plaintiff has made

a compelling argument and a weighty consideration at this stage is that this matter has been dragging for four years, I have come to the conclusion that finalisation of this matter is imminent.

- [8] The matter was initially set down for hearing on the 10<sup>th</sup> of March 2020 but due to the challenges at the RAF and the delays caused by the advent of Covid-19, the matter eventually came before me on the 4<sup>th</sup> of April 2021.
- [9] The plaintiff proceeded with the trial and gave *viva voce* evidence. From the evidence led and supporting documents at the court's disposal, the facts in this matter are as set out in the paragraphs which follow.
- [10] The plaintiff was born on 20<sup>th</sup> of October 1997, a male adult with identity number 971020 6307 089, residing at Blifracombe area 4, Umkomaas, KwaZulu Natal Province.
- [11] The plaintiff testified that on or about the 4<sup>th</sup> of June 2017 along Brat Street, Umkomaas a motor vehicle accident occurred when an unknown motor vehicle with unknown registration numbers and letters knocked him down. He was a pedestrian at the time of the accident.
- [12] The plaintiff testified further that he was on foot walking by a parking lot. There was a motor vehicle, a Polo VW which had its engine on, he asked the driver if he could pass and the driver answered that he could, but to his surprise the car



suddenly reversed and hit him on his right leg and he got injured. The plaintiff received treatment at a hospital. The police report, identity document and hospital records were on CaseLines to be examined by the court.

[13] The plaintiff avers that the sole cause of the accident was the driver of the insured car in that he was negligent as he failed to keep a proper look out.

[14] Counsel for the plaintiff argued that a concession of merits should be made in favour of the applicant, seeing that the plaintiff was a pedestrian and the insured driver had a greater duty of care when driving on a busy road where pedestrians are walking about.

[15] In ***SA Mutual Fire and General Insurance Co Ltd v Mhlawuli* 1977 (1) SA 891 (A)** the court considered a case in which a motor vehicle collided with a pedestrian. The court held that negligence of the insured driver consisted of failing to keep a proper look out.

[16] In the matter of ***Nogude v Union and South West Africa Insurance Co. Ltd* 1975 (3) SA 685 (A)** at 685A-C a description ascribed to a proper look out was that: "*A proper look out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions*". This principle was further followed in the matter of ***Mmekwa v Road Accident Fund* (33275/09)[2012] ZAGPPHC 101 (13 June 2012)**.

[17] I am satisfied that the negligent driving of the insured driver caused the accident in that he failed to keep a proper look out when he reversed. Had he done so he would have noticed the plaintiff and the accident could have been avoided. The fund is clearly liable for the negligence of the insured driver and the injuries suffered by the plaintiff.

[18] The plaintiff is currently 24 years old and at the time of the accident he was 20 years old. He sustained a serious fracture on his right ankle and he was taken by ambulance to GJ Crookes Hospital for treatment. He had an operation and he stayed in hospital for a period of 16 days. The X-Rays revealed fractures of the right distal tibia and fibula. He testified that he cannot stand on his right leg alone and he also cannot walk long distances. He has to constantly take medication to control the pain.

[19] Dr Bongobi, the Orthopaedic Surgeon assessed the plaintiff and his report indicated the following:

19.1 Injuries sustained

- Right ankle – distal tibia and fibula fractures

Outcome diagnosis

- Healed previous right ankle distal and fibula fractures
- Post fracture chronic mechanical pain right lower leg and ankle

19.2 Treatment received

The medical records from GJ Crookes Hospital show that plaintiff was brought to the hospital by an ambulance fully conscious with a right ankle injury;

- X-Rays revealed fractures of the right distal tibia and fibula;
- A below knee back slab POP was applied on the left lower leg for 5 days;
- He was then taken to theatre for open reduction and internal fixation (ORIF) and a circular below knee POP for 6 weeks;
- He was put on analgesics and anti-inflammatories;
- He developed cellulitis around the ankle and he was re-admitted;
- The internal fixation implants were removed later;
- He attended several physiotherapy sessions.

#### 19.3 Summary of Serious Injury Assessment report by Dr Vusi Mnguni

Injuries: Pedestrian hit by a car that reversed onto him.

Diagnosis: Healed previous distal tibia and fibula fractures (right ankle);

Chronic mechanical pain and swelling in the right ankle.

Assessment : 5% WPI

Narrative report

**Serious long-term impairment: Post fracture right ankle mechanical pain and swelling.**

#### 19.4 Current complaints

- Pain and swelling in the ankle and lower leg;
- Pain is exacerbated by inclement weather;

- Pain is worse with physical exertion like walking long distances, standing for extended periods of time or walking on uneven surfaces;
- Difficulty in ascending and descending stairs;
- Unable to stand on right leg alone;
- He uses analgesics three times a week to relieve the pain and for a pain-free sleep.

#### 19.5 Radiology studies

##### RIGHT ANKLE AND FOOT X-RAYS

- Old fractures of the distal tibia and fibula are noted with acceptable alignment and angulation;
- The ankle mortise is well aligned;
- The small joints of the foot are normal;
- There is maintenance of normal bone density and
- No foreign bodies in the overlying soft tissue.

##### COMMENT

- Findings in keeping with old fractures of the distal tibia and fibula.

#### 19.6 Loss of income and Employability

His level of education is grade 7 and he is unskilled.

He is unemployed. He was unemployed at the time of the accident.

His injuries do not preclude him from acquiring gainful employment but **he will be best suited for a sedentary type of work where he will not have to stand for a long period or lift heavy objects.**

#### 19.7 Prognosis



The prognosis in his right ankle is fair as the fractures have healed. He however continues to suffer pain and swelling in the right ankle. He is likely to continue suffering mechanical pain and swelling especially in inclement weather.

His condition will require continuous medical attention with their inherent cost implications. Conservative treatment in the form of Analgesics and NSAIDs, and physiotherapy is the likely treatment in this case for the time being.

#### 19.8 Summary

The claimant sustained injuries as a result of a motor vehicle accident. He sustained right distal tibia and fibula fractures that were treated surgically with ORIF. He later developed cellulitis in the right ankle and was treated conservatively with antibiotics and analgesics. The internal fixation implants were later removed. The fractures have since healed but he still suffers pain and swelling in his right leg and ankle. The medical opinion of the orthopaedic surgeon is that the claimant should be compensated for general damages and medical expenses.

[20] Dr JM Matsepe, the Occupational Therapist assessed the claimant and gave the following report :

#### 20.1 Educational Background

Mr Nyawose stated that his highest grade passed was grade 7 at Tanganya Primary School.

### Tertiary Education

Mr Nyawose has no further skills or academic advancement.

### 20.2 Work History

Mr Nyawose has never been formally employed.

### 20.3 Current Complaints

Mr Nyawose mentioned the following complaints during the assessment on the on 3<sup>rd</sup> October 2019:

### 20.4 Physical

- He experiences difficulty to stand or walk for a prolonged period due to reduced physical endurance and pain;
- He cannot run due to pain and weakness of the right ankle;
- Difficulty wearing closed shoes due to swelling of the right ankle.

### 20.5 Home management

- He experiences difficulty to participate on other house hold activities due to pain of the right ankle

### 20.6 Psychosocial

- He feels sad most of the time due to his injuries;
- He experiences short temperedness and sometimes becomes verbally aggressive.

### 20.7 Work ability

- Mr Nyawose is currently unemployed and at the time of the accident he was unemployed. According to test results, his work ability can be viewed as follows:
- Mr Nyawose has pain on his right ankle. He experiences difficulty in picking up heavy objects from the floor. Subsequently, he gives poor effort during testing.
- Balance is poor due to posture and decreased musculoskeletal integrity of the right ankle.
- Work rate for physical tasks are below standard for employment in the open labour market.
- Work habits are poor. Mr Nyawose will not impress as a presentable employee on the open labour market.
- He is not motivated about work due to complicating factors of his reaction towards pain on the right ankle and his perception of his inabilities.
- Mr Nyawose will not be able to fulfil work tasks that require him to repeatedly assume a squatting or stooping posture. He will also not be able to lift up and carry objects of moderate to heavy weight on a frequent basis. It is also advised that he is not required to walk for prolonged periods of time.
- He must therefore perform tasks that allow intermittent periods of rest, and the requirements of the work must also be of such a nature that he is not required to handle, i.e. lift, pull and carry moderate to high loads.
- Taking into account his findings during consultation, experts reports regarding Mr Nyawose's physical and psychological condition,

difficulties to stand for a prolonged period or walk long distances, reduced physical endurance and personality changes, the Occupational Therapist formed an opinion that Mr Nyawose has limited employment prospects.

- Mr Nyawose's test results reveal that, he has the lifting capacity of occupations that lie in sedentary to light parameters with decreased capacity for medium work. Due to his lack of exposure to manual work, his ability to undertake medium manual occupations can only be determined with exposure to such occupation.
- He suffers residual pain that is exacerbated by prolonged postures and will impact his competitiveness against his uninjured peers and it is evident that due to the lack of acquired skills he will rely on his strength, mobility and agility skills to secure employment. Thus, the injuries sustained have impacted negatively on him being a favourable and competitive employee in the open labour market. He will benefit from reasonable accommodations where he is exempted from carrying heavy items.

[21] The Industrial Psychologist, Moipone Kheswa also assessed Mr Nyawose and the following were her findings:

#### 21.1 Employment History

He was self-employed as a trolley man between the years 2011-2012. He would assist people to carry their groceries at Spar to wherever they needed to be taken. He worked mostly during weekends. His income



was about R200.00 per weekend. This work ended because the Spar owner chased him away.

During 2015 he was employed at Mr Lemmy (Pawn shop) as a general worker. His basic wage was R70.00 per day.

## 21.2 Summary

Mr Nyawose's pre-accident history reflects employment as a general worker. However he was unemployed at the time of the accident. Taking note of his employment history, he would have in all probability secured employment in the open labour market and he would probably have been able to work until he reached normal retirement age of 65 years depending on his health and his circumstances as well as his employer's.

It is a reality that people without a matric qualification tend to work in fields of physical nature, which demands less administrative functions. They therefore rely on their physical strength for obtaining and maintaining employment. This was also the case with Mr Nyawose.

Based on the experts' reports, Mr Nyawose's employability is compromised by the injuries he sustained in the accident. He currently presents with the **physical challenges that are not going to make him eligible to secure and sustain employment in the open labour market**, especially occupations which requires mobility and medium to heavy physical exertion.

Given his reduced residual capacity, level of education and work experience, Mr Nyawose is likely to struggle to secure and sustain

gainful employment in the open labour market. It is therefore unlikely that future employers will be willing to accommodate his medical difficulties. The injuries he sustained in the accident have rendered him vulnerable for employment in the open labour market. **He is likely to continue suffering extended periods of unemployment and the probability that he will remain unemployed for most parts of his work life is quite high due to reduced job options in the open labour market.** In the most unlikely event the he finds an employer who will accommodate his challenges, he will probably earn at the lower quartile of unskilled non-corporate workers (Koch 2020) with applicable inflammatory increase. According to Koch, unskilled employees earn between R21 600 – R37 900 – R86 000 per year.

- [22] Due to the sequelae of the accident, Mr Nyawose's competitiveness, efficacy and productivity have been limited and currently being unemployed, he is likely to struggle to re-enter and secure stable employment into the labour market. He is likely to continue suffering extended periods of unemployment and the probability that he will remain unemployed for most parts of his work life is quite high. In the most likely event that he manages to find an employer who will accommodate his reported challenges, he will probably earn lower than the quartile of unskilled non-corporate workers with applicable inflationary increase.
- [23] The Occupational Therapist advises that the above mentioned financial risk cannot be accurately predicted in real monetary terms and she recommends

that this be dealt with by means of a **higher than normal post-accident contingencies** to be negotiated by the legal teams or determined by the court.

[24] Mr Win Loots, an Auctorial scientist quantified the matter after considering the Industrial Psychologist's report and compiled the following report:

Actuarial calculations

Date	age	Earnings(R)	Terms	Increases	Description/Source
04/06/2017	19,58	-	-	-	No earnings, an additional 3 years Following last employment in 2015
01/05/2023		25.54	21 600 pa	07/2020	Inflation Unskilled LQ QYB2020
01/07/2018		21.58	21 600 pa	07/2020	Linear Unskilled LQ QYB2020
01/11/2042		45.00	86 000 pa	07/2020	Inflation Unskilled LQ QYB2020
20/10/2062		65.00			Retirement

Earning potential having regard to the accident

Date	age	Earnings(R)	Terms	Increases	Description/Source
04/06/2017	19.58	-	-	-	No earnings to date assuming an additional year of unemployment for illustrative purposes
01/05/2023		25.54	21 600 pa	07/2020	Inflation Unskilled LQ QYB2020
20/10/2062					Retirement (assumed)

**Results**

	Past	Future
Pre accident	R65 180	R1 615 659
Less Contingency	5% (3259)	20% (323 131.8)
Total	R61 921	R1 292 527.2
	PAST	FUTURE
Post-accident		R1 615 659
Less Contingency	R	60% (969 395.4)
Total	R	R646 263.6
Total loss	R61 921	R646 263.6

**Total loss of earnings R 708 184.6**

[25] In the matter of *Mohlaba v Road Accident Fund* (12010/2014) [2016] ZAGPPHC 12 (21 January 2016)

- The plaintiff sustained a right proximal radius and ulna.
- He can only be considered for sedentary and very light work. He cannot lift heavy objects ruling out various types of work in future.
- He is suffering from mild depression as a result of the accident
- He can no longer become a motorcycle mechanic.
- The court awarded him R 540 000.00 general damages.



- [26] In the matter of *Litseo v Road Accident Fund (5637/2016)* [2019] ZAFSHC 52, the plaintiff suffered the following injuries as a result of a motor vehicle accident: right upper leg and knee injury, right lower leg and ankle, left knee and lower leg injury. The court awarded the plaintiff R700 000 in respect of general damages.
- [27] In the matter of *Mahlangu v Road Accident Fund (2013/46374)* [2015] ZAGPJHC 342, the plaintiff had sustained the following injuries: left ankle fracture which constituted fractured ankle bones, torn ligament and soft tissue. The court awarded the plaintiff R 300 000.00 in respect of general damages.
- [28] In the matter of *Countries v Road Accident Fund (A828/2016)* [2019] ZAGPHC 1062, the plaintiff had sustained the following injuries: minor head injury, closed fracture of the left tibia and fibula, open fracture of the right tibia and fibula, closed bimalleolar fracture of the left ankle, fracture of the medial malleolus of the right ankle, fracture of the head of the second metatarsal bone of the left foot and fracture of the right ankle. The court awarded the plaintiff R400 000.00 in respect of general damages.
- [29] Counsel for the plaintiff submits that in light of the above cited case law and expert reports the court should grant the following order:
- 100% in favour of the plaintiff
- General damages of R500 000.00

Loss of earnings of R708 000.00

Future medical expenses: Section 17(4) undertaking

Total R1 208 184. 60 in full and final settlement of the claim.

- [30] Turning to the matter before me, having listened to the testimony of the plaintiff and the submissions of his counsel and having considered the medical and expert reports I am satisfied that there is more than adequate evidence before me that the plaintiff would require future medical treatment as a result of the injuries he sustained in the accident.
- [31] I intend to grant an order that plaintiff's future medical treatment should be dealt with on the basis of a statutory undertaking to be provided by the fund to the plaintiff in terms of section 17(4) of the Road Accident Fund Act, 56 of 1996.
- [32] The plaintiff's future loss of income has been actuarially calculated and the actuary has substantiated his report adequately. The above cited cases also are assisting the court as they indicate how the courts ruled in cases with similar facts to the matter before me. I am of the view that the fact that plaintiff's prospects of finding future employment are very minimal according to the expert reports, is a compelling factor that must be considered by the court. The plaintiff was not employed at the time of the accident and he was unskilled. Therefore he would rely on his good health and physical strength to get employment as general labourer. To come to a just and equitable quantification of the plaintiff's

loss, his counsel argued that a higher than normal contingency reduction of 60 % should be applied. I agree with the plaintiff's counsel and the recommendations in the auctorial report and I intend to grant the loss of earnings in the amount the amount R708 184.60.

- [33] In regard to the general damages suffered by the plaintiff, the injuries have been classified as **Serious long-term impairment: Post fracture right ankle mechanical pain and swelling** by the orthopaedic surgeon. The medical opinion of the orthopaedic surgeon is that the claimant should be compensated for general damages and medical expenses. Counsel for the plaintiff suggested a sum of R500 000.00 should be awarded. For comparative purposes, he referred me to a number of cases above where the court dealt with injuries similar to those of the plaintiff before me. I am of the view that plaintiff suffered serious injuries that have greatly impaired on his livelihood as a young person and on his future developments. He continues to suffer pain and swelling in the right ankle. He is likely to continue suffering mechanical pain and swelling especially in inclement weather.

- [34] I therefore consider an amount of R500 000.00 to be fair and adequate compensation to the plaintiff in respect of his general damages.

In the premises, the following order is made:

Judgment by default is granted in favour of the plaintiff against the defendant for:

- a. A concession of merits is made 100 % in favour of the plaintiff.
- b. General damages in the amount R500 000.00.
- c. Loss of earnings R708 184.60.
- d. Total R1 208 184.60 in full and final settlement of the claim.
- e. The defendant shall furnish the plaintiff with a 100 % undertaking in terms of section 17(4) of the Road Accident Fund, Act 56 of 1996.
- f. Payment of plaintiff's costs, including the reasonable costs of all medico-legal reports.



**M.M.D. LENYAI**

**ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**



CASE NUMBER: 14546/2018

HEARD ON: 04 May 2021

FOR THE PLAINTIFF: ADV. K. MONGWE

INSTRUCTED BY: Kotlolo Attorneys, Arcadia, Pretoria

FOR THE DEFENDANT: NO APPEARANCE

DATE OF JUDGMENT: 10 August 2021