



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

Case number: **5066/2020**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/

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SIGNATURE

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DATE

In the matter between:

BEKITHEMBA MINENHLE MAZIBUKO

PLANTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

- [1] The plaintiff in this matter issued summons against the Road Accident Fund for damages suffered as a result of the injuries he sustained in a motor vehicle

accident that occurred on 10 August 2019. The matter came before me for trial on a default basis after the defendant's defence was struck out.

MERITS

- [3] According to the plaintiff, on 10 August 2019 at about 22h00 he was a pedestrian walking on the pavement when a motor vehicle with unknown registration numbers knocked him down. As the defence of the defendant was struck out there would be no evidence to gainsay the version of the plaintiff and as a result the version of the plaintiff will remain unchallenged.
- [4] I am satisfied that the plaintiff has discharged the onus of proving that the defendant through the insured driver negligently caused the accident which resulted in the plaintiff sustaining injuries.

QUANTUM

- [5] Counsel for the plaintiff informed me that the plaintiff is pursuing a claim for general damages and loss of earnings/earning capacity.

GENERAL DAMAGES

- [6] At the outset I asked counsel for the plaintiff whether the Road Accident Fund has accepted the plaintiff's injury as a serious injury in terms of section 17(1) of the Road Accident Fund Act 55 of 1996 read with Regulation 3. Counsel for the plaintiff submitted that because the Fund has not expressly rejected the plaintiff's RAF 4 form the court should deal with the issue of general damages as if the Fund has accepted.
- [7] It is trite that in terms of section 17(1) of the Act, the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury and shall be compensated by way of a lump sum. Regulation 3 provides that an injured person must be assessed by a medical practitioner registered as such with the Health Professional Council. After the assessment of the injuries, the medical practitioner will complete the prescribed form known as the RAF 4 Form. Regulation 3 further stipulates that if the Fund is not satisfied that the injury is not a serious injury as contemplated in the Act, the Fund may reject.
- [8] It is patently clear that the decision whether to accept or reject the injury as a serious injury is solely within the powers of the Fund. This is an administrative action and therefore the court may only interfere once the plaintiff has exhausted the remedies provided for by the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

- [9] The plaintiff had a remedy against the Fund's inaction, namely to approach the interlocutory court to compel but the plaintiff failed to pursue that remedy. The court cannot therefore usurp the powers of the Fund by accepting the plaintiff's injury as a serious injury.
- [10] Accordingly I am of the view that the issue of general damages was brought by the plaintiff before me prematurely and therefor stands to be postponed.

PAST AND FUTURE LOSS OF EARNINGS/EARNING CAPACITY

- [11] The legal position regarding the claim for loss of earning capacity is very clear, namely that the defendant must compensate the plaintiff for the difference between the value of the estate after the injury was sustained and what the plaintiff would have earned had the injury not occurred. This principle was well illustrated in the often quoted case of *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) where the following was said: *"In our law, under the Lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of the person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate"*
- [12] The plaintiff sustained a right lower leg injury as a result of the accident. At the time of the accident the plaintiff was 29 years of age and he was employed as a Forecourt Attendant at a petrol station. Post-accident the plaintiff was absent from work for a period of ten months. He reportedly earned his normal income for three months only. He reportedly lost out on income earned for working on Sundays and public holidays, his annual bonuses as well as performance bonus since he did not receive any income for seven months.
- [13] The evidence uncontested evidence presented by the plaintiff clearly demonstrates that the plaintiff suffered past loss of earnings which is an actual loss.
- [14] I now turn to the issue of future loss of earning capacity. According to Dr Reddy, the orthopaedic surgeon, the plaintiff sustained a Right lower leg injury and the following *sequelae* are recorded:
- 14.1 'the patient continues to experience pain in the lower leg and ankle;
 - 14.2 prolonged walking and standing intensify pain;
 - 14.3 lifting/carrying heavy objects, squatting and walking up/down stairs remain difficult.

- 14.4 according to the patient, his duties at work are difficult due to the pain and symptoms associated with his injury;
- 14.5 cold weather continues to intensify the pain;
- 14.6 the injury affects his daily activities and household chores.'

Regarding the plaintiff's future employment prospects Dr Reddy opines that the plaintiff must be accommodated in a permanent sedentary working environment.

- [15] Occupationally, the Occupational Therapist reported that the plaintiff presented with mild muscle wasting in his right leg, confirming altered functional usage in his right leg. He stands with a right asymmetrical posture with his pelvis oblique. The right iliac spine was lower than on the other. The occupational therapist further reports that the plaintiff's pre accident and current work a petrol attendant is classified as light work. He however has stand continuously. From the assessment results it is clear that he retains the physical capacity to cope with inherent job requirements of being a petrol attendant. There was however a mismatch with regard to constant standing, as well as frequent squatting. The occupational therapist is of the opinion that "he will only be able to sustainably comply with the inherent job requirements of being a petrol attendant, if he has an understanding employer who will allow for reasonable accommodations, including adequate rest breaks and sitting down when there are no vehicles to service."
- [17] The opinions of both the orthopaedic surgeon as well as the occupational therapist demonstrates that the plaintiff has lost capacity to earn, and therefore should he loose his current employment it would be difficult for him to secure another job.
- [18] Nicole Kotze, the industrial psychologist reported as follows: " it should, however, also be noted that although Mr Mazibuko's productivity might improve after receiving treatment, there is a possibility that he will develop degeneration in his right ankle joint and when this happens, his productivity will decrease again. Thus his work performance might reduce in future when the pain he experiences becomes worse and degeneration starts setting again. Therefore, it is acknowledged that his productivity might be negatively impacted on and he might experience a continued loss of productivity in this regard. The writer is of the opinion that the risks towards his future employment, should be addressed by means of o much higher post-accident contingency deduction"
- [19] It is clear that the plaintiff post morbidly is still employed by the same employer albeit on sympathetic basis.
- [20] It is trite that contingencies are within the discretion the court, however actuaries are used to assist with mathematical calculations because they are trained to do so. The plaintiff employed Johan Sauer actuaries and the actuary applied a 5%

contingency deduction on both the uninjured and the injured past loss. On the future loss, the actuary applied 20% contingencies on the but-for the accident scenario and 40% on the having regard to the accident scenario.

[21] I am satisfied that the contingencies applied by the actuary are fair and reasonable in the circumstances of this case.

FUTURE HOSPITAL, MEDICAL AND RELATED EXPENSES

[22] In respect of the future treatment of the plaintiff's injuries the orthopaedic surgeon reports as follows: *"in my opinion conservative treatment will not work. I recommend the following treatment:*

- i. osteotomy and open reduction and internal fixation of the right tibia-the cost of which amounts to R 100 000.00*
- ii. Provision must be made for the removal of instrumentation in 18(eighteen) months at a cost of R 40 000.00.*

Please note that all treatment is set put as across the patient's total lifespan."

Following the recommended future treatment by the expert it is unequivocal that the plaintiff must be given undertaking by the defendant for future medical expenses.

[23] In the result I make the following order:

- 23.1 The defendant shall pay 100% of the plaintiff's proven or agreed damages;
- 23.2 The defendant shall pay to the plaintiff an amount of R 956 759.00(nine hundred and fifty six thousand seven hundred and fifty nine rand) in respect of the plaintiff's claim for past and future loss of earnings;
- 23.3 The plaintiff's claim for general damages *is postponed sine die*.
- 23.4 The draft order attached hereto and marked "XKF" is made an order of court.

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

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 17 November 2021.

**HEARD ON : 06 August 2021
FOR THE PLAINTIFF : Adv Grobler SC
INSTRUCTED BY : Wehmeyer Attorneys
FOR THE DEFENDANT : No Appearance
DATE OF JUDGMENT : 17 November 2021**