



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

CASE NUMBER: 6756/21019

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

DATE: 26/7/21

In the matter between: -

MAKWAKWA, GIVEN JAPHTA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 26 July 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The plaintiff instituted a claim against the defendant for damages suffered as a result of injuries sustained by the plaintiff due to a single motor vehicle collision that occurred on 1 July 2016. At the time of the collision, the plaintiff was a passenger in the motor vehicle.
- [2] The defendant defended the action and pleadings were exchanged. The matter became trial ready and was enrolled for hearing on 8 March 2021.
- [3] In view of the dispute that arose between the defendant and certain firms of attorneys that served on the defendant's panel, the attorneys instructed by the defendant received no further instructions on trial and apparently withdrew as attorneys of record for the defendant.
- [4] The defendant consequently was directly involved in the finalisation of this action. When the matter was allocated to me for adjudication on 8 March 2021, there was no representation on behalf of the defendant. The matter stood down for the defendant to appear. At 11h30, Senior Claims Handler, Ms Portia Zungu, appeared for the Defendant. Ms Zungu informed that court the claims handler who had been dealing with the matter was off sick. Ms Zungu undertook to assess the matter and revert at 12h30. The matter stood down further for this purpose.
- [5] When the court resumed at 12h30, Ms Zungu was replaced by Ms Lesego Moruane who advised that an offer had been made. Counsel for the plaintiff,

Mr Luvuno advised that the offer was rejected and that that plaintiff wished to continue with the trial.

- [6] The court was informed that the issue of liability had been conceded by the defendant. In addition, a section 17(4)(a)¹ undertaking for future medical treatment had been furnished by the defendant. Therefore, the only issue for determination ad quantification was the plaintiff's loss of earnings. The matter was stood down to 9 March 2021 to enable the parties to make oral submissions in a virtual hearing held *via* the MS Teams platform.

PLAINTIFF'S SUBMISSIONS

- [7] The plaintiff is a 30-year old single male. He was employed as a waiter during the time of the collision. He did not resume his pre-morbid employment post-injury. His contract of employment was terminated in September 2016. The plaintiff's former employer paid over and above all his sick leave entitlement.
- [8] Thereafter, during January 2017, the plaintiff procured employment at Andiccio Pizza Restaurant in Grayston Road, Sandton, and was transferred to the Illovo branch during June 2019 because the restaurant was less busy.
- [9] The plaintiff completed matric and in 2014 enrolled at City Varsity College for a short certificate programme in television and video production, but discontinued his studies after the accident. The plaintiff's certificate of employment reveals that he earns R3,600.00 per month.

¹ Road Accident Fund Act 56 of 1996

[10] As a result of the accident, the plaintiff sustained the following injuries: -

[a] Fracture to the left humerus;

[b] Lacerations to the right wrist.

[11] Following the motor vehicle accident, the plaintiff was taken by ambulance to Chris Hani Baragwanath Hospital where he was admitted on the 2nd of July 2016 and discharged on the 13th of July 2016. On his arrival, the plaintiff was given pain medication and X-rays were conducted which revealed that he had sustained a left humerus fracture. A U-slab was applied to his left upper limb. Further treatment included an open reduction and internal fixation of his left humerus and glass shards lodged into his right wrist were removed. The plaintiff received specialist treatment from a physiotherapist and he was issued with a left arm sling to support his left arm. Pursuant to his discharge from hospital, the plaintiff was referred for outpatient consultations at Rob Ferreira Hospital, which he attended twice a month for the period of six months in consultation with a physiotherapist.

[12] According to the plaintiff, he had never suffered from any serious illness or sustained any serious injuries that warranted hospital admission prior to the accident.

[13] According to the medico-legal report compiled by orthopaedic surgeon, Dr R S Ngobeni, dated the 5th of August 2019: -

"[The plaintiff] reports left arm weakness; he is unable to carry 20 kg. He is very sensitive on the arm. He experiences pain in cold

weather on the left arm. Right wrist pain in certain positions.

Medical expenses: Future surgical treatment: Provision for surgical treatment in the form: removal of left proximal humerus plate. Left shoulder replacement at the later stage at R250,000.00.

Opinion: He was treated surgically with plate and screws. Currently complains of left shoulder weakness and pain with inclement weather. On clinical examination he has restricted abduction and forward flexion. The X-ray shows plate and screws with disruption of the neck shaft angle. The claimant is prone to develop avascular necrosis of the humerus head and/or shoulder posttraumatic degeneration. We currently recommend the removal of implant and continuous rehabilitation by physiotherapist. Provision should be made for left shoulder replacement at the later stage.

Prognosis: Fair.

Future work capacity: The claimant managed to return to his pre-injury occupation as a waiter. He will have challenges with hard manual labour work. He completed matric and has a certificate of produce. The injury sustained will force him to seek for lighter duty. He will be incapacitated for 2 weeks to recuperate after the removal of plate. Deferred to occupational therapist and industrial psychologist for opinion. Total whole person impairment = 8 %."

- [14] The plaintiff was examined by a neuropsychologist, Ms H Matlou and a written report was rendered on the 4th of April 2019. The following extract from the report is instructive: -

"Cognitive functioning: Mr Makwakwa's performance indicates a pattern of variability in his neurocognitive functioning, in that there were skills that were intact and adequately functional, while there were areas of impairment and poor functioning. His performance in visual spatial organisation, visual planning and visual perception was

average and his visual construction and his visual memory were intact. This suggests better functioning in visually presented and visually stimulating tasks. His verbal memory functioning showed variability in that his incidental memory was intact, while his contextual memory functioning was compromised. He displays poor functioning in his working memory and complex attention, while his functioning was intact in some areas of attention and concentration. His performance declined in his mental tracking as he showed an impaired functioning. His performance demonstrated a poor ability to keep track of more than one piece of information at the same time. Mr Makwakwa showed difficulty in abstract verbal concept formation. However, he displayed skilful functioning in social reasoning. Mr Makwakwa sustained injuries to his arm and wrist. Based on the information provided by Mr Makwakwa and the documents perused, there was no head injury sustained. The hospital records did not document any loss of consciousness and no report of GCS score. Although Mr Makwakwa presents with neurocognitive difficulties, this would be related to other factors in his case, as he did not sustain a direct head injury. Rather, his concentration, attention and memory are likely affected by his clinical depression and PTSD. This is due to depression and anxiety having an adverse impact on these cognitive functions, particularly if they are chronic and are untreated for a prolonged period of time. His current neurocognitive difficulties are likely due to the combined and overlapping effects of his emotional difficulties in the form of depression and PTSD and the impact of residual physical pain.

Emotional functioning: Mr Makwakwa's psychological assessment indicated that he has severe symptoms of depression. These include symptoms of crying, insomnia, lowered libido, self-blame, fatigue, worry over physical symptoms, helplessness, hopelessness, irritability and loss of enjoyment, amongst others. He also presents with moderate post-traumatic stress disorder, as he reported repeated and stressful memories from the past, avoidance of talking about past stressful events, being easily startled, being super alert

and watchful and feeling like the future might be cut short and physiological symptoms of anxiety. Additionally, the occurrence of ongoing pain and residual physical symptoms likely acts as an exacerbating factor to his emotional distress. This is due to pain having an adverse effect on mood and the correlation between chronic pain and depression... Traditionally, the occurrence of pain would serve as an emotional reminder for Mr Makwakwa, especially since he is somebody who is still showing distress with regard to the trauma of the accident. Collectively his symptoms are indicators that he has not adjusted on a psycho-emotional level to the consequence of the accident in his life and may not have accepted the occurrence of the accident.

Physical and occupational functioning: Mr Makwakwa is concerned about the impact of his physical residual symptoms on his ability to do jobs that need him to lift heavy objects and move them around, which points to worry about his viability and competitiveness in the open labour market. This is a reasonable concern from him as he has largely served unskilled to semiskilled jobs. Mr Makwakwa reported that he was completing his first year at the time of the accident. He had to drop out because he could no longer pay his fees due to being unemployed. Mr Makwakwa's lack of sufficient funds to pay for his education may result in him staying in the current job market longer than he had anticipated which will delay his completion of his tertiary education. It will furthermore limit his career prospects."

- [15] According to occupational therapist, Ms Mbhekiseni Dhlamini, in her report dated 6 September 2019, the plaintiff has suffered a significant decline in earning capacity, particularly in physically demanding occupations that require intact use of the upper extremities. The occupational therapist further opined that the plaintiff is likely to struggle securing new employment in the future, particularly in the manual category, should he

lose his current employment.

[16] Ms Dhlamini's opinion regarding the plaintiff's restrictive prospects in the job market, is shared by industrial psychologist, Ms Myra Tambwe.

Ms Tambwe drew the following conclusions: -

- [a] The plaintiff's employment prospects in the open labour market are limited due to his reduced competitiveness;
- [b] He has high risks of experiencing prolonged periods of unemployment. A higher than normal post-morbid unemployment contingency is therefore recommended;
- [c] The estimate on the total duration of the recommended treatment should be established in order to predict the likely financial impact;
- [d] The plaintiff has a higher risk of losing employment, more so due to his psychiatric symptoms;
- [e] His career ceiling is estimated at the mid-point between the lower and medium quartile for semi-skilled labourers (scenario 1) or at the median quartile for semi-skilled labourers (scenario 2), depending on the availability of future opportunities. This entails that the informal sector earnings for unskilled and semi-skilled labourers would currently be as follows: -
 - [i] Unskilled labourers: R20,700.00 – R36,300.00 – R82,000.00 per year;

[ii] Semi-skilled labourers: R36,300.00 – R82,000.00 – R178,000.00 per year.²

[17] The actuary, Mr G A Whittaker, stated in his report that the normal life expectancy for a 20-year old male according to the South African Life Tables 1984/1986 is 36.46 additional years. Mr Whittaker stated that the actuarially correct method is not to rely on the life expectancy, but rather to work directly with the life table. The life table determines a complex pattern of survival probabilities that are then used in the actuarial year-by-year method.

[18] Mr Whittaker stated that had the accident not occurred, the plaintiff would have reached his career ceiling at the upper quartile wage for a semi-skilled worker in the non-corporate sector, earning R178,000.00 per year at age 42½. Upon reaching his career plateau, the plaintiff's earnings would have increased in line with inflation only until his retirement age at age 65.

[19] Mr Whittaker provided for general contingency deductions such as loss of earnings due to illness, savings in relation to travel to and from work and risk of future retrenchment and resultant unemployment. He therefore made a 5 % deduction from the plaintiff's past loss of earnings. In respect of the plaintiff's future earnings Whittaker applied the following deductions: -

[a] Uninjured earnings at 18.5 %;

² Koch RJ: Quantum Yearbook 2019.

[b] Injured earnings at 33.5 %.

[20] In summary, Mr Whittaker concluded that on the average lower quartile and median wages for a semi-skilled worker in the non-corporate sector, and in applying the contingencies referred to above, the plaintiff's total net future loss of earnings would amount to R1,385,540.00, as opposed to R1,172,049.00 when the injured ceiling at the median wage for semi-skilled workers in the non-corporate sector is applied.

[21] In the circumstances the plaintiff submitted that an amount of R1,385,580.00 would be justified as an amount for loss of earning capacity.

[22] As far as the plaintiff's claim for general damages is concerned, the plaintiff submitted that an amount of R500,000.00 would be appropriate in the circumstances. In support hereof, Mr Luvuno for the plaintiff relied on Mohlaba v Road Accident Fund (12010/2014) [2014] ZAGPPHC 12 (21 January 2016).³ In this matter the plaintiff was a motor mechanic who experienced reduced function in his dominant hand resulting from injuries that he sustained in a motor vehicle accident. The plaintiff was 20 years old, could only be considered for sedentary and very light work and suffered from mild depression as a result of the accident. In Mohlaba the Court also referred to Adv J P van der Berg N.O. v Road Accident Fund (unreported on 17 February 2014 in GNP case number: 10528/2011) where the plaintiff sustained similar injuries to his arm and was awarded R500,000.00. The Court accordingly found that an award of R540,000.00 for general damages in that instance would be reasonable and fair. Mr Luvuno argued that in

³ 2016 JDR 0130 (GP).

present day value the award would amount to R600,000.00 which is a far higher amount than the amount claimed by the plaintiff in the present matter.

DEFENDANT'S SUBMISSIONS

[23] Ms Zungu appeared on behalf of the defendant and referred the Court to Lee v The Road Accident Fund.⁴ Ms Zungu argued that Lee was a more comparable authority to the facts in the present matter than Mohlaba referred to by Mr Luvuno. However, an immediate difference is the age of the plaintiff. In Lee the plaintiff was 40 years of age at the time of the collision and started his employment as workshop manager shortly before the accident. He had also reached his hierarchal career ceiling at the time. His upper quartile earnings on Patterson C3 was estimated at p 50, although a similarity is that the plaintiff in that matter would have continued working until the age of 65, were it not for the accident. Unfortunately, the Court did not indicate in its judgment the nature and extent of the injuries sustained by the plaintiff.

[24] Ms Zungu did not dispute the contingencies suggested by Mr Whittaker, the plaintiff's actuary. She did however submit that the hospitality industry has been severely impacted by the Covid-19 pandemic and the lockdown restrictions. Ms Zungu therefore submitted that there was a general reduction in salaries. She therefore suggested that a further deduction of 20 % as a contingency would be more than fair in the circumstances, which would reduce the plaintiff's claim for loss of earning capacity to an amount

⁴ 2017 JDR 1378 (GP).

of R1,099,312.00. She also submitted that in the case of general damages an award of R400,000.00 would be reasonable.

[25] In reply, Mr Luvuno argued persuasively that the Covid-19 pandemic was not a consideration. The plaintiff had always been employed in the hospitality industry and if anything, the Covid-19 pandemic and the negative impact that it had on the hospitality industry would count in the plaintiff's favour in that he would run the risk of retrenchment due to the reduction in employment opportunities within the hospitality industry. Moreover, so Mr Luvuno argued, the plaintiff's position would be regarded as sheltered employment because of his injuries and he would accordingly be first in line in the event that the employer elects to reduce the workforce.

[26] It bears mentioning that the defendant did not file any expert reports.

DELIBERATION

[27] The *locus classicus* with regard to contingencies is the judgment of Nichols JA in Southern Insurance Association Ltd v Bailey N.O.⁵ where the Court stated that: -

*"Where the method of actuarial calculation is adopted, it does not mean that the trial judge is tied down by inexorable actuarial calculations. He [she] has a large discretion to award what he [she] considers right."*⁶

[28] Zulman JA, with reference to various authorities, including Southern

⁵ 1984 (1) SA 98 (A).

⁶ At pp 116 and 117.

Insurance, stated the following in Road Accident Fund v Guedes:⁷ -

"The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. Such an enquiry is speculative and the court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example Southern Insurance Association). The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just."

[29] The plaintiff's highest form of qualification is a matric certificate and he continued to work after the accident. I am not persuaded by the defendant's argument that a further deduction of 20 % should be made to the loss of earning capacity, more especially, because the parties agreed that the contingency applied by the actuary, Mr Whittaker, is fair. I therefore find that an amount of R1,385,580.00 towards the plaintiff's loss of earning capacity is reasonable in the circumstances.

[30] From the expert reports it is clear that the plaintiff has suffered an injury which has a permanent effect on his life, in particular his future earning capacity. The plaintiff is vulnerable and compromised in his capacity for sustaining occupation while having to rely on his level of physical fitness to secure an income. In support of the respective arguments, I was referred

⁷ (611/04) [2006] ZASCA 18 (RSA) (20 March 2006).

to Mohlaba and to Lee and I have already indicated that I am not persuaded that Lee is an appropriate comparable in the circumstances.

[31] In arriving at a fair award, I have taken into consideration: -

[a] the age of the plaintiff;

[b] the fact that he has already reached his maximum medical improvement and that he will have to live with the scars and the restricted arm movement for life;

[c] he has suffered mild depression as a result of the accident.

[32] Although the plaintiff would be able to further his studies, he is restricted by his earning capacity in order to pay for these studies. I have therefore also taken this factor into consideration.

[33] When making an award the Court must take care that the award is fair to both parties and give just consideration to all aspects applicable.⁸

[34] I am therefore of the view that an award of R480,000.00 for general damages in this instance will be a reasonable and fair award. It must be remembered that the plaintiff is not totally incapacitated and that his depression will be managed more effectively and will improve should he receive appropriate medical treatment.

⁸ De Jongh v Du Pisanie N.O. 2005 (5) SA 457 (SCA) at 476D, paragraph [60].

ORDER

[35] Accordingly, judgment is granted in favour of the plaintiff and I make the following order: -

- "1. *The defendant shall make payment to the plaintiff of the amount of R1,385,540.00 (one million three hundred and eighty five thousand five hundred and forty Rand) in respect of the plaintiff's loss of earning capacity.*
2. *The defendant shall pay to the plaintiff the amount of R480,000.00 (four hundred and eighty thousand Rand) in respect of the plaintiff's claim for general damages.*
3. *The defendant shall make payment of the amount of R1,865,540.00 into the following bank account: -*

Name of account: N T Mdlalose Inc Trust Account

Bank: Nedbank

Branch code: 198 765

Account number: 1003372570.

4. *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 the date of payment.*
5. *The defendant shall pay the plaintiff's taxed party and party costs on the High Court scale, subject thereto that: -*

5.1 In the event that the costs are not agreed:

5.1.1 the plaintiff shall serve a notice of taxation on the defendant;

5.1.2 the plaintiff shall allow the defendant 14 (fourteen) court days from the date of allocatur

to make payment of the taxed costs;

5.1.3 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 the date of allocatur to date of final payment;

5.2 Such costs shall include: -

5.2.1 the costs incurred in obtaining payment of the amounts mentioned in paragraphs 1 and 2 above;

5.2.2 the costs of counsel, including counsel's charges in respect of his attendance on 8 and 9 March 2021, as well as reasonable preparation costs;

5.2.3 the costs to date of his order, which costs shall include but not be limited to preparation for trial and attendance at Court, which shall include all costs previously reserved;

5.2.4 the costs of the orthopaedic surgeon, the occupational therapist, the industrial psychologist, the clinical psychologist and actuary and/or affidavits obtained by the plaintiff, as well as such reports furnished to the defendant and/or its former attorneys, as well as all reports in their possession and all reports contained in the plaintiff's bundles, irrespective of the time elapsed between any reports by an expert;

5.3 The reasonable and taxable preparation of qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master of the experts as in paragraph 5.2

above;

- 5.4 *Costs and expenses incurred by and on behalf of the plaintiff in, as well as the costs consequent to attending the medico-legal examinations;*
- 5.5 *The costs of holding all pre-trial conferences and judicial management meetings, as well as roundtable meetings between the legal representatives for both the plaintiff and the defendant, including counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials, if any;*
- 5.6 *The costs of and consequent to compiling all minutes in respect of pre-trial conferences, including counsel's charges.*
6. *The defendant shall furnish to the plaintiff an undertaking limited to 100 % in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of service or supplying of goods to the plaintiff, arising out of the injuries sustained in the motor vehicle collision on 1 July 2016, and the sequelae thereof, after such costs have been incurred and upon proof thereof.*

[36] A written contingency fee agreement was concluded between the plaintiff and the plaintiff's attorneys and a copy thereof has been uploaded onto CaseLines, as requested by me. I considered the content of the contingency fee agreement and hold the view that the agreement complies with both the Contingency Fees Act, 66 of 1997 and with the judgment of this Court in Masango v Road Accident Fund.⁹

⁹ 2016 JDR 1586 (GJ).



F BEZUIDENHOUT
ACTING JUDGE OF
THE HIGH COURT

Date of hearing: 8 and 9 March 2021

Date of judgment: 26 July 2021

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