REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2283/22

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

_____ _____

DATE SIGNATURE

In the matter between:

HERBERT TSHUKUDU PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

NEMUTANDANI AJ:

INTRODUCTION

[1] Mr Herbert Tshukudu "the plaintiff" instituted an action against the Road

Accident Fund “the defendant” in terms of section 17 of the Road Accident Fund Act[1] (the Act”. The plaintiff was involved in a motor vehicle accident on the 16 June 2018 and sustained injuries as a result thereof.

[2] The matter served before me for trial on both merits and quantum. The plaintiff had appointed and filed expert reports with the defendant having not appointed any experts.

[3] At the commencement of trial, Ms Moore for the defendant informed this court that what is most contentious between the parties is the aspect of merits and contingencies to be applied in the actuarial calculations. Adv Nemukula for the plaintiff made a request in terms of Rule 38(2) of the Uniform Rules of Court that this court accepts evidence on oath. Having regard to the nature of the claim and the proceedings, together with the fact that the affidavits of various experts and their reports are filed on record, I exercised my discretion to accept the evidence on oath.

THE PARTICULARS CLAIM

[4] The plaintiff pleaded that on the 16 June 2018 at approximately 21h45 pm at or near M2 Cleveland, Germiston, Gauteng, a collision occurred between a motor vehicle of which both the registration letters and numbers of the vehicle, and the identity of the driver are to the plaintiff unknown (the first insured vehicle” and a motor vehicle bearing registration letters and numbers R[…] there and then being driven by Mr Aaron Ralefe (“second insured vehicle”), in which the plaintiff was a passenger.

[5] The plaintiff alleges that the sole cause of the collision was due to the negligent driving of the first insured driver who inter alia failed to pay due regard to the rights of other road users. In the alternative, plaintiff alleges that the collision was caused by the negligence of the second insured driver who failed to keep a

[1] 56 of 1996, as amended by Act 19 of 2005

proper look out and to keep his vehicle under proper control. In the further alternative, plaintiff pleaded that the sole cause of the collision was due to the negligent driving of both insured drivers.

[6] As a result of the accident, plaintiff sustained bodily injuries which included a chest injury and an injury to the left hip “the injuries”.

[7] The plaintiff seeks an order that the defendant should be held liable 100% for his proven or agreed damages and costs.

THE DEFENDANT’S PLEA

[8] In its plea, the defendant denied the collision, the negligence, alleged injuries, damages suffered and placed the plaintiff to the proof thereof.

ISSUES FOR DETERMINATION

[9] Ms Moore for the defendant conceded that the plaintiff was involved in an accident on the 16 June 2018 and was taken to Bertha Gxowa Hospital by ER24 Medics. This court is called upon to determine the following:

a) Whether or not the plaintiff a passenger, pedestrian or a driver at the time of the collision;

b) Whether or not the plaintiff discharged the onus that rests on him;

c) Whether or not the plaintiffs’ failure to have an Officer’s Accident Report bar him from claiming from the Road Accident Fund; and

d) Appropriate damages.

THE EVIDENCE

The evidence of the plaintiff

[10] The plaintiff testified that on the 16 June 2018 he was a front seat passenger in a Nissan 1400 motor vehicle driven by Mr Ralefa. Along the M2 Cleveland road

he noticed a trailer which was stationery on their lane of travel. When he enquired from Mr Ralefa whether he saw the trailer in front, it was too late. Mr Ralefa tried to swerve and he did not succeed and collided into the rear end of that stationery trailer which was on the road. After the collision he was unconscious, taken to Hospital by ambulance and regained his conscious in hospital. He was admitted thereat and followed up at Baragwanath Hospital where a total left hip replacement was performed.

[11] In his s*ection 19(f) Affidavit*, the plaintiff alleges that on the 16 June 2018 at 21:54 He was a passenger travelling along the M2 in Cleveland towards Elandfontein when the driver of his motor vehicle noticed a stationery vehicle with a trailer in the middle of the road. He tried to swerve to avoid the collision but unfortunately it was too late and they rear ended the trailer. He sustained serious injuries and was taken to Bertha Gxowa Hospital where he received treatment.

[12] Before me, there were also discovered photographs of the vehicle in which the plaintiff was a passenger. The damages to the vehicle were on the passenger's side and the left front side of the said vehicle is completely ripped off[2].

[13] I was also referred to discovered hospital reports from Bertha Gxowa Hospital dated the 17 June 2018. The said records indicate that the plaintiff was brought in by ER24 medics around 00:33 am with the history of being involved in a motor vehicle accident.

The evidence of Mr Ralefa

[14] He testified that on the day in question he was driving his father's motor vehicle. When he approached where the accident occurred, he suddenly saw a stationery trailer in the middle of the road. He tried to swerve to the right and it was too late. He then collided into the rear of the said trailer.

[2] Caselines item 4-100

[15] The trailer was being pulled by a Toyota quantum which had parked on the left emergency lane of the road with the trailer remaining on the left lane. He testified further that the quantum insured driver had not placed any emergency warning signs behind the trailer.

[16] After the collision, the quantum driver came to his motor vehicle and they pulled out the plaintiff who was trapped, severely injured, and placed him on the ground. They feared that his motor vehicle would burn following the impact. The ER24 medics and towing people arrived at the scene. The plaintiff was then taken to Hospital by ER24 Medics. Mr Ralefa then exchanged details with the quantum driver and he told him that he will report the case at the police station.

[17] During cross examination, he testified that he assumed that the quantum driver had reported the accident as he undertook to do so.

[18] Mr Ralefa did not sustain any injuries and his father's motor vehicle was not insured. Mr Ralefa believed that he was also negligent in rear ending the stationery trailer and he did not deem it necessary to follow up on the accident report as he did not intend to use it. He went to Cleveland Police Station and Germiston Police station to enquire about the accident report and he learned that the accident was not reported. This was at the request of the plaintiff some months after the accident.

[19] The defendant did not call any witnesses and closed its case without leading any evidence.

THE SUBMISSIONS

[20] Adv Nemukula submitted that the court should not lose sight of the fact that it is common cause that a collision occurred on the date in question and the plaintiff was taken to hospital by ER24 Medics and he sustained injuries. It was submitted that the plaintiff has discharged the onus that rests with him and has proven causation and the injuries.

[21] Ms Moore submitted that it has not been clearly established whether the plaintiff was a driver, passenger or pedestrian at the time of the collision. A determination of the plaintiff's capacity at the time of the accident is crucial for possible risk deductions.

THE LAW

[22] In terms of Section 17(1) of the Act, and regulations as promulgated thereunder, the defendant is liable to compensate victims of motor vehicle accidents arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established and/or subject to any regulation made under Section 26 of the Act where the identity of the neither the driver thereof has been established.

[23] It is settled law that in order for the plaintiff to succeed with his claim against the defendant, he must establish 1% negligence against the insured driver. The onus rests on the plaintiff to prove negligence on the part of the insured driver. Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the insured driver, the latter must produce evidence to the contrary. The defendant must then tell the remainder of the story, or take a risk that judgment is given against him.

DISCUSSION ON MERITS

[24] This court is called upon to make a fact finding on whether the plaintiff was a driver, passenger or pedestrian at the time of the accident. This exercise entails examination of the evidence and documents filed on record.

[25] The plaintiff in this matter is at pains of having merits conceded by the defendant by virtue of the fact that both insured drivers and most importantly his own driver at the time of the collision failed to report the accident with the police.

[26] The defendant does not dispute that the collision took place. It is not

disputed that the plaintiff was taken to hospital by paramedics. What the defendant contends is that the plaintiff could have been a driver and/or a pedestrian at the time of the collision. In considering the defendants suppositions I must also consider the defendant's contention that upon his admission, the plaintiff did not tell the nurses whether he was a passenger or a driver.

[27] Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. If there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.[3]

[28] Mr Ralefa, testified that he was the driver on the date in question and he was driving his father's motor vehicle. Considering the severity of the damages on the passenger's side, this confirms that the injured person could only be a person who was on the passenger seat. It is improbable that the plaintiff was driving as he wouldn't have sustained the injuries he did since there were minimal damages on the driver's side. To that end, the proposition by the defendant that the plaintiff was a driver lacks merit and is accordingly rejected.

[29] Furthermore, the supposition that he could have been a pedestrian contrary Mr Ralefa's evidence is baseless, lacks merit and is accordingly rejected.

[30] It is undisputed that Mr Ralefa went to Cleveland and Germiston Police Stations and it is there that he learned that the accident was not reported. Considering his explanations on why he did not report the accident, can it be said that failure to report a case by the insured driver like it is in this matter should prejudice the victim. The answer is a resounding no.

[31] At any rate, the Act and the Regulations obliges the driver or owner of the vehicle to report the accident and not a passenger. Furthermore, Officer's Accident

[3] Caswell v Powell Duffryn Associated Colliers Ltd (1939) (3) All ER 722 at 733,

Report is in itself hearsay evidence. The presence of collaborative evidence to the fact that the plaintiff was a passenger when he was involved in an accident is sufficient.

[32] Having regard to the totality of evidence, I am satisfied that at the time of the collision, the plaintiff was a passenger. I am further satisfied that both Mr Ralefa and the unidentified insured driver were negligent. The plaintiff has thus succeeded in proving the required 1% negligence.

[33] I further find that there is *nexus* between the collision and the injuries sustained by the plaintiff. Resultantly, the defendant is held 100% liable for the plaintiff's damages.

QUANTUM

[34] The plaintiff proceeded with their submissions on quantum. The plaintiff relied on the following expert reports;

34.1 Dr AF Pienaar (Orthopaedic Surgeon);

34.2 N Doorsamy (Occupational Therapist);

34.3 Dr AC Strydom (Industrial Psychologist);

34.4 S Van Den Heever (Clinical Psychologist);

34.5 Ivan Kramer (Actuaries).

PLAINTIFF'S INJURIES AND MEDICAL EVIDENCE

[35] The general principle in evaluating medical evidence and the opinions of expert witnesses is to determine whether and to what extent their opinions advanced are founded on logical reasoning. The court must be satisfied that such

opinions has a logical basis and determine whether the judicial standard has been met.

[36] The medical records from Bertha Gxowa and Baragwanath Hospitals[4] show that the plaintiff had the following injuries; fracture of the left acetabulum and injuries to the chest. The plaintiff was admitted in the early hours of the 17 June 2018 and was discharged some six days later. He went for follow up treatment at Baragwanath Hospital on 11 June 2019 were a total left hip replacement was performed.

[37] Dr Pienaar (Orthopaedic surgeon)[5], examined the Plaintiff on the 6 June 2019. On examination, left hip movements were restricted. Dr Pienaar diagnosed fracture of the left acetabulum. The plaintiff was referred to Dr T Wetgarth Taylor Radiologist on the 16 July 2020, and the radiological studies revealed a left total hip replacement with normal alignment with signs of mechanical failure and minor ectopic bone formation in the region of the greater trochanter. His life expectancy has not been affected by his injuries.

[38] S Van Den Heever (Clinical Psychologist)[6] - Opined that the plaintiff is suffering from symptoms of Post-Traumatic Stress Disorder, severe symptoms of anxiety associated with depressive ideation which will undoubtedly have a negative effect on his overall functioning , all as a result of the accident. She found that the plaintiff lacks emotional resilience and has not managed to adapt to the changes post-accident and as a result has been rendered more vulnerable on a personal, psychological, social, occupational and physical plane. The plaintiff's emotional dysfunctions resulting in the breakdown of relationships as well as psychological obstacles translate into his inability to deal with stressors in his life because of his Post Traumatic Stress Disorder, depression and anxiety symptomology.

[4] Caselines 04-15
[5] Caselines 03-1
[6] Caselines 03-18

[39] N Doorasamy[7] (Occupational Therapist), In the assessment, plaintiff was noted to have physical limitations of movement, weakness and pain in the left lower limb/hip. As a result, he presented with some limitation in his ability to cope with walking, forward bending, squatting, crouching and left unilateral balance. Although he presents as coping with light physical demand level work from a weight handling perspective, it is likely that he will have difficulty in coping with the postural demands of light work, such as prolonged walking or prolonged sitting with negotiating leg controls. He is thus compromised in meeting the demands of any work which requires intact mobility and agility, frequent assumption of low level posture or prolonged weight bearing postures. She is of the view that the plaintiff is unable to meet the demands of his pre accident position without accommodations.

THE PLAINTIFF'S LOSS OF EARNING

[40] Dr A C Strydom[8](Industrial Psychologist), noted that the plaintiff obtained code 10 driving license in 2006. The Industrial Psychologist accepted that at the time of the accident the plaintiff was employed as a taxi driver earning R 900.00 per week. Although no collateral information was obtained, considering his work history as a driver, it is accepted that he was a taxi driver at the time of the collision.

> Pre morbid, it is postulated that he would have continued working in his pre morbid capacity as a taxi driver or had the capacity to work in any other unskilled position until normal retirement age. It is assumed that his salary would have increased in line with inflations. He would have retired at age 65 years or as long as his health permitted.
>
> Post- morbid – The plaintiff never returned to his pre- morbid employment as a taxi driver. He was paid for two months. He is not seen to ever return to his pre-morbid position as a full time Taxi Driver or other physical type of work.

[7] Caselines 03-46
[8] Caselines 03-71

He is seen to perform as an ad hoc Taxi Driver i.e two days a week at a lower earnings of an Uber Driver (automatic gearbox). Appropriate post morbid contingency deduction is suggested to accommodate period of unemployment and unavailability of work.

Ivan Kramer – Actuary

[41] The Actuarial calculations[9] are based on both past and future pre and post morbid. Contingency of 5% on past pre-morbid and 15% on past post-morbid was applied. As to future post morbid 35% contingency was applied resulting in loss of earnings of totalling R 531 911.00

[42] I have considered the filed reports. I am satisfied that the plaintiff has on a balance of probability demonstrated that the opinions of experts are founded on logical reasoning considering the available information.

[43] This leads me to the issue of the award for loss of earning and the contingencies to be applied. The discretion to determine a reasonable amount for compensation as well as reasonable contingencies must be exercised judicially having regard to the facts before court. To this end, I find guidance in **Southern Insurance Association Ltd v Bailey NO[10] and M.I v Road Accident Fund**[11]**.**

[44] In the defendant's view, a 50% contingency should be applied on both past and future loss of earnings. The plaintiff was dependent on his body physique for employment purposes pre morbid. A 50% contingency will be unrealistic and unreasonable in the circumstances. I accept that post-morbid, he has been compromised. Having considered the experts reports and applicable legal principles, I am of the view that the proposed contingencies by the actuary are reasonable under the circumstances. I find that an amount of **R 531 911.00** stands to be awarded to the plaintiff for loss of earnings.

[9] Caselines 03-108
[10] 1984 (1) SA 98
[11] (16384/2013 [2023] ZAGPPHC 585

[45] It is evident from the expert reports that the plaintiff will require future medical treatment. The defendant conceded that the plaintiff is entitled to an Undertaking for future medical expenses.

[46] The defendant has not accepted the plaintiff's claim for general damages. Accordingly, the determination of general damages is postponed *sine die.*

ORDER

[47] In the result the following order is made:

1. The Defendant is held 100% liable for the Plaintiff's damages.

2. The Defendant shall pay an amount of **R 531 911.00 (Five Hundred and Thirty One Thousand Nine Hundred and Eleven Rands Only)** to the Plaintiff in respect of past and future loss of earnings.

3. The aforesaid amount shall be paid into the trust account of the Plaintiff's Attorneys, **HOUGHTON HARPER INC** within 180 (one hundred and eighty) days in settlement of the Plaintiff's claim by direct transfer into their Trust Account, the details whereof are the following:

BANK: […….]
BRANCH CODE: […..]
ACCOUNT HOLDER: H[..] H INC
ACCOUNT NUMBER: […]

4. The Defendant is directed to furnish the Plaintiff, within 180 days from service of this order, with an undertaking in terms of Section 17(4)(a) of the **Road Accident Fund Act,** Act 56 of 1996,

5. The Defendant is ordered to pay costs of suit on High Court Scale applying scale B in terms of Rule 67A.

6. Should payment of the capital and interest not be affected in terms of this order the Plaintiff will be entitled to recover interest to be calculated in accordance with the **Prescribed Rate of Interest Act,** Act 55 of 1975 read with Section 17(3)(a) of the **Road Accident Fund Act**.

7. The determination of general damages is postponed *sine die.*

F.S NEMUTANDANI
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: *This judgment was handed down electronically by circulation to the parties' and/or parties' legal representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 15:00 on 23 August 2024*

APPEARANCES:

COUNSEL FOR PLAINTIFF:	ADV NEMUKULA
INSTRUCTED BY:	HOUTON HARPER INC JOHANNESBURG REF:M3811 setona@houghtonharper.co.za 011 648 1066/7
COUNSEL FOR DEFENDANT:	MS M MOORE
INSTRUCTED BY:	STATE ATTORNEY, JOHANNESBURG REF: 4913395 moiponebrendam@raf.co.za/ 011 233 3000
DATE HEARD:	22 MAY 2024

JUDGMENT DELIVERED: 23 AUGUST 2024