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

CASE NO: 89983/19

(1) REPORTABLE: YES / **NO**

(2) OF INTEREST TO OTHER JUDGES: YES/**NO**

(3) REVISED.

SIGNATURE

DATE: 05/08/2024

In the matter between:

BARNARD MOENG MOLOKO

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 05 August 2024.

JUDGMENT

Mali J

[1] The plaintiff claims damages for the injuries he sustained due to the negligence of the insured driver who caused the accident whilst the plaintiff was driving a motor bike with registration number C[...] 5[...] [...]. The insured driver was driving a motor vehicle with registration number B[...] 3[...] [...]. The plaintiff was travelling towards Jane Furse in the province of Limpopo. Both motors were travelling towards the same direction. The accident occurred on 29 January 2016 at about 5 am on R 519 Road in Lebowakgomo.

[2] As a result of the collision the plaintiff sustained serious injuries; namely open fracture right tibia and fibula; Lumbar spine soft tissue injury; Right wrist Laceration; and jaw injury. He was admitted in hospital for a period of two weeks.

[3] The defendant denies liability. The court is called upon to determine both issues of merits and loss of earnings.

[4] The legal principles are set out briefly as follows. The provisions of section 17(1) of the Road Accident Fund Act 56 of 1996 ('RAF Act') stipulates that the defendant is obliged to compensate a person for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle.

[5] The defendant's liability is conditional upon the injury having resulted from the negligence or wrongful act of the driver. An evidentiary onus rests on the plaintiff to prove such negligence.

[6] Contributory negligence on the part of the plaintiff can reduce such loss or damage in accordance with the provisions of section 1 of the Apportionment of Damages Act 34 of 1956 ('the Apportionment Act'), which states as follows:

"1(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage."

[7] The plaintiff bears the onus of discharging the burden of proof regarding the allegation that the insured driver was negligent. The plaintiff was the only witness who testified regarding the merits.

[8] The plaintiff's evidence is that he was driving at a speed of 80 km per hour on a 120 km per hour zone. At a distance of about 10 metres, he noticed a stationary motor vehicle driven by the insured driver dropping off passengers towards the stop on the right-hand side of the road. When the plaintiff's motor bike was at about 3 metres from the motor vehicle the motor vehicle suddenly made a U-turn towards the plaintiff's direction. The plaintiff tried to overtake it towards the right-hand side and collided with the motor vehicle on its rear as it had not yet made a complete U-turn. It was too late to do anything to avoid the accident.

[9] The defendant did not call any witnesses. The defendant's closing argument is that the plaintiff contributed to the negligence, by failing to stop when he saw the insured driver making a U-turn. Therefore, the court must decide on the basis of 80/20 split in favour of the plaintiff.

[10] In *Harwood v Road Accident Fund*¹, it is held as follows:

'It is trite that in trial proceedings parties must formulate their cases and the issues on which evidence must be led, in their pleadings. A defendant cannot, at the trial, rely on a defence, in casu sudden emergency, which is not pleaded. Neither can a plea of apportionment of damages be considered in the absence of specific allegations concerning the plaintiff's negligence.'

[11] The defendant's argument is made notwithstanding that there is no evidence supporting same and of significance that the defendant did not plead contributory negligence. Furthermore, this argument ignores the application of 1(b) of the Apportionment Act stating as follows:

¹ (56226/17) [2019] ZAGPPHC 448 (19 August 2019)

“(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person’s fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.”

[12] Having regard to the above this court cannot decide based on contributory negligence as it was not pleaded. The plaintiff testified in a satisfactory manner; the court is satisfied that the accident was solely caused by the negligence of the insured driver. In the result that the defendant is liable for 100% damages.

QUANTUM

[13] The plaintiff claims the total amount of R 3 481 250.00 under the following headings.

13.1 Past Medical Expenses	R 100 000.00
13.2 Future Medical Expenses	Section 17(4)(a) undertaking
13.3 Past loss of Earnings	R479 500.00
13.4 Future loss of Earnings	R 2 383 685.00
General Damages	R 800 000.00

[14] Pertaining to loss of income the plaintiff must adduce evidence of his income in order to enable the court to assess the loss of past and future earnings. In addition, the plaintiff must prove the amount of income he will reasonably lose in the future as a result of the injury. In *Mvundle vs RAF*² it is held:

“It is trite that the damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff’s performance can also influence his

² (63500/2009)[2012]ZAGPPHC(17 April 2012).

or her current job and /or be limited in a number and quality of his or her choices should he or she decides to find other employment”.

[15] It is common cause that at the time of the accident the plaintiff who was 25 years old was employed as a cash in transit security guard by Fidelity Security Company for a period of approximately 8 years. The plaintiff 's highest standard of education is grade 11. He further possesses Grade C Security Certificate. He earned an amount of R5000 per month for the whole period before accident. On post morbid the plaintiff earns an amount of R6000.00 per month, though he no longer performs the same duties due to injuries. He testified that he performs lesser duties as he could no longer carry heavy firearms and was therefore accommodated by the employer.

EXPERTS EVIDENCE

[16] In quantification of the plaintiff's claim for loss of earnings, reports of experts were admitted as evidence. The defendant did not call any witnesses and neither submitted any expert reports.

[17] The orthopaedic Dr NC Hadebe opines that the plaintiff suffered severe acute pain for about 5 weeks. He continues to suffer discomfort of standing prolonged periods. In the result his injuries resulted in a serious long-term impairment or loss of body function. The plaintiff can be managed with pain medication and surgical treatment.

[18] Regarding the plaintiff's occupation and future employability, the orthopaedic considered opinion is that since the plaintiff has pain in his right leg his choices of occupation requiring prolonged standing and walking will be limited. His ability to compete in an open labour market has been affected. In conclusion the orthopaedic deferred to various experts, whose evidence will be dealt with below.

[19] The occupational therapist, Mr SM Baloyi opines that the functional capacity evaluation strength testing placed the plaintiff in the light category of work with increased pain on his right leg and lower back. Right leg has increased pain with

mobilization and when pressure is applied to the leg. He further opines that his residual functional capacity indicates that he is suitable for light work. The accident has a significant impact on his pre-morbid job. He is no longer competitive for working as a cash in transit security guard and any work involving: (i) lifting and carrying of medium heavy stuff (ii) elevated work heights where he needs to work overhead. (iii) job requiring too long and walking (iv) job requiring climbing of ladder or stairs on a regular basis (v) working outdoors on cold temperatures (vi) driving long distances (vii) jobs that require sitting in one position for a long period of time.

[20] The plaintiff 's working speed productivity, work endurance, physical endurance and work habits have declined due to his physical pains. In the result the plaintiff is compromised in meeting the physical demands of his former occupation as a cash in transit guard as a result of his injury. The plaintiff will always have problems in fulfilling his duties as an employee because of chronic lower back pain and right leg. In conclusion the Occupational Therapist concurs with the Orthopaedics' findings that the plaintiff's injuries have resulted in long-impairment or loss of a body function.

[21] The Industrial psychologist, Ms ME Mokhethi concurs with the Occupational Therapist that the accident in question has rendered the plaintiff vulnerable and unequal competitor in an open labour market; he will not be able to work until his retirement age at 65. The Industrial Psychologist in making a determination on the post-morbid situation concludes that the plaintiff may continue employment as Security Officer receiving inflationary/ industry-linked increase until retirement of age 60 and 65 (depending on his employer policy and health status).

[22] It is further opined that the plaintiff will not reach the pre-accident postulated position of a Custodian, indicating his financial loss due to the accident. According to the National Bargaining Council for Road Freight Logistics Industry a Custodian is defined as an employee who drives a motor vehicle and is engaged in the guarding and handling of cash, valuables, securities and negotiable documents in transit and who may be required to carry firearms, in addition the employee will be required to replenish Automated Teller Machines.

[23] From the evidence above it is apparent that the plaintiff's working capacity is compromised. The diminished physical capacity has been proven to have negative impact on the plaintiff's future earnings. In the result the plaintiff has succeeded in proving that he will suffer a true patrimonial loss in that his employment situation has patently changed.

[24] In determining future losses, it is expected that the Court make use of contingency deductions to provide for any future circumstances which may occur but cannot be predicted with precision. The actuarial calculations are not binding to this Court as the court has a wide discretion to award what it considers to be fair and reasonable compensation.

[25] "Contingencies have been described as the normal consequences and circumstances of life, which beset every human being, and which directly affect the amount that a plaintiff would have earned."³ In his book *The Quantum Yearbook*, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation... The deduction is in the prerogative of the Court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of employment, promotion prospect, divorce etc.

[26] Koch refers to the following as some of the guidelines as regards contingencies:

- "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.
- Sliding scale: 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on *Goodall v President Insurance*.⁴

³ *AA Mutual Insurance v Van Jaarsveld* 1974(4) SA 729 (A).

⁴ 1978 (1) SA 389.

- Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[27] When a Court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[28] The actuarial calculations as they stand are based on a scenario that the plaintiff's earnings would have progressed fairly. The calculations are based on the information provided by the plaintiff's attorney and the Industrial Psychologist's report dated 14 June 2021 and the figures are calculated on 01 March 2023. The calculations are based on what the plaintiff would have earned as a Custodian based on the basic salary of R4013-00 per week and employer pension contribution of 7.5% and an annual bonus equal to one month's basic salary. The actuary allowed for earnings until retirement age of 62.5.

[29] The Actuary has applied 5% and 15% on past and future earnings when uninjured and at 25% on future earnings when injured. Having considered all of the above 10% contingency had the accident not occurred and 30% contingency for future loss of earnings is applicable.

[30] The use of the plaintiff's actuarial calculations has been accepted to be the viable approach. Having regard to the above it is concluded that deductions of 10% contingency but for the accident presents a fair value and 30% having regard to the

accident will fairly compensate the plaintiff for the loss suffered as a result of the accident.

ORDER

1. The defendant is ordered to pay the plaintiff the amount of R1 677 040 .00 (One Million Six Hundred and Seventy-Seven Thousand and Forty Rand), for loss of earnings.
2. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17 (4) (a) of RAF Act.
3. General damages are postponed sine die.
4. The defendant is ordered to pay the plaintiff's costs on party and party scale B including the costs of the reports of the experts.

N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff: ADV L MAPHELELA
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