

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO:8672/2019

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| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO THE JUDGES: YES / NO</u> |
| (3) | <u>REVISED.</u> |

Signature

Date.....

In the matter between:

THABANG MORABA

PLAINTIFF

And

ROAD ACCIDENT FUND.

DEFENDANT

JUDGMENT

MONENE AJ

[1] The plaintiff instituted action proceedings against the defendant for damages arising from a motor vehicle accident which occurred on 03 June 2018. The plaintiff was a pedestrian when he was hit by the motor vehicle and according to his uncontested version the driver who hit him was solely responsible for the accident owing that driver's failure to keep a proper lookout and/or failure to apply brakes and/or travelling at an excessive speed and/or generally failing to exercise the care of a reasonable driver.

[2] Although the defendant initially filed a plea, it did not follow through with defending the matter leading to the plaintiff approaching this court on default and seeking to be heard per cover of affidavit in terms of uniform rule 38(2).

[3] It being so that the jurisdiction of this court is unfortunately as per precedence hampered by the defendant's failure to make an election on the seriousness of the injuries in casu, what stands to be determined before this court is liability and the plaintiff's loss of earnings with general damages having to be postponed sine die. The plaintiff put up a spirited but futile fight with additional or supplementary heads of argument to show why, despite the defendant's failure to make an undertaking and absent a court order to put the defendant on terms in that regard pursuant to the regulations, this court should still entertain general damages but the law is clear on this score and this court is subject to stare decisis and hierarchy of courts.

[4] Under cover of affidavit the plaintiff adduced the following uncontested evidence in brief:

[4.1] Regarding the merits the plaintiff tendered a damages affidavit, his affidavit from the police docket and an accident report all of which spoke to the supra-mentioned version of what happened which cannot, in the absence of evidence from the defendant, be gainsaid.

[4.2] Accordingly I must, without unnecessarily belaboring the point, find that the defendant is 100 percent liable for the plaintiff's proven damages.

[4.3] Regarding the extent of the injuries suffered by the plaintiff resulting from motor vehicle accident, an Orthopaedic surgeon, Dr Bongobi' evidence was in sum that the plaintiff had suffered a head injury with a skull fracture and deep head lacerations, multiple facial lacerations, multiple left distal tibia fabula fractures, fracture of the left platella, odontoid fracture C2 and compression fractures of C4 and C5. The sequelae from this injuries are witnessed to be pain in the neck, left knee and leg and difficulty ambulating.

[4.4] Dr Mazwi, a neurosurgeon's evidence was that the plaintiff had whole person impairment of 34 percent, has significant mental or cognitive deficiencies arising from the head injury and has reached maximum medical improvement meaning that nothing more can be done for him medically.

[4.5] Gillian Sibiya, the clinical psychologist, testified that the plaintiff demonstrated an undesirable cognitive and emotional orientation. It was emphasized that the plaintiff had neurocognitive deficiencies which arose from the accident and further that the plaintiff was post the accident psycho socially and psychologically vulnerable. Compounding the plaintiff's problems, this court understood, was increased irritability and anxiety which exacerbated the plaintiff's emotional and cognitive vulnerabilities.

[4.6] Ntwanano Mabasa, an occupational therapist's evidence was to the effect that the plaintiff's post-morbid physical capacity was such that it did not meet the physical demands of his pre-accident occupation as a mine Plant Cleaner. It was this witness's further evidence that the diminished functionality of the plaintiff compromised him in the open labour market and made him vulnerable therein. It was this expert's further evidence that given the plaintiff's limited skills and education, he is going to struggle further in competing for physically demanding jobs with able bodied persons in a shrinking job market. The cognitive fallouts from the head injury, it was opined by this witness, compound the plaintiff's problems such that even the theoretical possibility of sympathetic employment is very remote.

[4.7] Observing that at the time of the accident the then 22-year-old plaintiff earned a salary of R3500.00 per month which could with overtime sometimes go up to R7000.00 monthly, the industrial psychologist, Muchiney Chimbetete-Dzamatira, noted as follows:

"...Given his age, work experience and the collateral information provided by the pre-accident manager, the writer is of the opinion that the claimant's earnings would have likely reached around 60% to 70% of the maximum

earnings of the semi-skilled worker's scale, depending on his employment opportunities as his ceiling around ages 45 to 50. Thereafter, his earnings would experience annual inflationary related increases until retirement. But for the accident, the writer is of the opinion that the claimant had the physical, cognitive and behavioral ability necessary for him to enjoy a working life which would have most probably ended in age-related retirement at age of 65 years."

[4.8] Johan Sauer, an Actuarial scientist, informed in the main by the industrial psychologist's report, postulated a net future loss of earnings at R2 404 214.00 having factored contingencies at pre-morbid 5 % past and 15% to 47%20 percent future loss.

[5] The approach in computation of loss of earnings was stated in ***Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F***("Bailie") where the following was stated:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augururs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment by y way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative."

[6] In ***Prince v Road Accident Fund***(ca143/2017) [2018] ZAECHC 20(20 March 2018) the full court cautioned courts never to ignore loss of earnings computations so long as those computations are having an evidential basis.

[7] In ***Hersman v Shapiro and Co*** 1926 TPD at 379 it was held as follows:

“Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages.”

[8] In my view the expert evidence which was led before me is solid and informed. These experts represent for this court, present day soothsayers and oracles providing a very useful service to the court in its determination of loss of earnings. To needlessly compute outside their evidence where their evidence has not been gainsaid by any opposing view and where it cannot be faulted would, in my view, be a misdirection.

[9] The summary of expert evidence led before me above, which evidence I have no reason nor inclination to deviate from is, in my view, sufficient determinant of the quantum opined on loss of earnings. Given the well-documented sequelae of the injuries suffered by the plaintiff, particularly the physical deficiencies, difficulty in ambulation, cognitive fallouts of a very young person without any skills set and expected to compete unequally in a hostile employment milieu, and bar contingencies of life the expected long life expectancy, I find the computations arrived at by the actuary and the empirical data and expert opinions those computations were premised on unassailable.

[10] Accordingly, I am persuaded to award the plaintiff loss of earnings in accordance with the computation of the actuarial scientist and on the contingencies suggested by counsel for the plaintiff.

[11] In the same vein I am persuaded that the contingency percentages for past and future loss of earnings factored in by the actuaries as already alluded to above are fair and reasonable. Indeed, I find those contingencies to accord with ***Van der Plaats v Southern African Mutual Fire and General Insurance Co 1980(3) SA 105(A) 114-115*** which a long time ago spelt out that contingency deductions must allow for the possibility that the plaintiff may have less than normal expectations of life and may experience periods of unemployment flowing from accident sequelae and is seen within the prism of prevailing economic conditions.

[12] Furthermore, the evidence of the experts in casu being replete with indications that the plaintiff who has reached maximum medical improvement will need constant pain management and may need plastic surgery for his unsightly scarring, I find that there is a need for the plaintiff to be catered for regarding future medical care. Doubtful as this court is about the efficacy and perhaps the legal accuracy of an order directing an undertaking, I find no real harm in making the undertaking order prayed.

[13] In the result, I make the following order:

[13.1] The defendant is 100 percent liable for damages suffered by the plaintiff arising from the motor vehicle accident of 3 June 2018.

[13.2] The defendant shall pay an amount R 2 404 214.00(**TWO MILLION FOUR HUNDRED AND FOUR THOUSAND TWO HUNDRED AND FOURTEEN RANDS ONLY**) in respect of loss of earnings.

[13.3] The said amount shall, within 180 days of this order, be paid by direct transfer into a trust account nominated by the plaintiff's attorneys of record which nomination shall be made within 14 days of this order.

[13.4] The defendant shall pay the plaintiff's taxed or agreed to party and party costs on a high court scale which costs shall include the costs attendant to obtaining expert reports and the costs of counsel on scale B

[13.5] Should the defendant fail to pay the amount in 13.2 above within the 180 days and/or the agreed to or taxed costs within 30 days of agreement or taxation; the plaintiff shall be entitled to recover interest thereon on the prescribed rate of interest from the date of mora to date of final payment.

[13.6] The defendant shall furnish the plaintiff with an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 within 60 days of this order.

[13.7] The issue of general damages is postponed sine die.

MALOSE S MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 26 June 2024

Judgment delivered on : 04 November 2024

For the Plaintiff : Adv. B Phahlela
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For the Defendant : No appearance