



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MAIN SEAT)**

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
<u>01/02/2024</u> DATE	<div style="background-color: black; width: 100px; height: 40px; margin: 0 auto;"></div> SIGNATURE

Case no.2046/17

In the matter of:

SIYENGA MAXWELL MLUNGISI

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT

PICK, AJ

This Judgement was handed down electronically by circulation to the parties and/or the parties' representatives by e-mail. The date and time for hand-down is deemed to be 01 February 2024 at 10h00.

INTRODUCTION:

- 1 This is a claim against the Road Accident Fund. The merits in this matter were settled 90/10 in favour of the Plaintiff on 24 July 2023. The Defendant provided the Plaintiff with an undertaking for future medical, hospital and related expenses in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996 (as amended). The Plaintiff conceded that there were no past medical expenses. The only question to be determined by this Court was that of general damages and loss of earning capacity.
- 2 The Court granted a Rule 38(2) Application on the day of trial, enabling the Plaintiff to lead his Evidence on Affidavit. The Court was requested to decide on the papers.

FACTS OF THE MATTER:

- 3 The Plaintiff was a 19 year old scholar attending grade 12 when he was run over by an unidentified motor vehicle. The accident occurred on 01 January 2016 at 01h30 on the main road by Powerhouse Tavern. The Plaintiff sustained the following injuries: Fracture of mandible (jawbone), lacerations on both cheeks, abrasions on the right knee and right arm, and forehead hematoma (swelling) and painful teeth. (P73, P108 of the Bundle)
- 4 The Plaintiff was transported to Kanyamanzane Clinic where he was stabilised and then transferred to Rob Ferreira Hospital. (P228, P282 of the Bundle) On admission his GCS was 15/15. (P210 of the Bundle) The lacerations and abrasions were treated on the 01st of January 2016 and the fracture was treated by open reduction and internal fixation of the mandible on 12 January 2016 when two teeth were extracted as well. The Plaintiff was admitted to hospital on the 01st and discharged on the 13th of January 2016. (P108 of the Bundle). The matter was reported to the Pienaar branch of the SAPS CAS No. 202/01/2016 on 18 January 2016. (P70-P79 of the Bundle).
- 5 The Plaintiff went on to finish grade 12 in 2016. In 2017 he studied at the Agricultural College but did not write the final exam due to strikes at the college and financial constraints. In 2018 he worked as a gardener for 4 months. In 2019 he was unemployed. In 2020 he worked as a general worker at Leanne-Ann and in 2021 at PAR Electrical Engineering Company. (P209 of the Bundle) In May 2022 the Plaintiff started working at Monday Tavern. (P285 of the Bundle)

- 6 The matter was referred to the Defendant by submission of a RAF1 form and the Plaintiff's accompanying Section 19F Affidavit on 24 May 2017. (P100-P111; P91 of the Bundle). In its Summons dated 27 September 2017, the Plaintiff claims R30 000, 00 for past medical expenditure, R 170 000 for past loss of earnings, R 200 000 for future loss of earnings and R350 000 for general damages, costs of the suit and interest. The Plaintiff also claims an Undertaking in terms of Section 17(4) (a) for future medical expenses. (P6 of the Bundle). The Summons was never amended to make provision for the higher claim amount as reflected in the Actuarial Reports.
- 7 The Defendant seeks either Absolution of the Instance, or a lesser award as provided for in the Actuarial Reports.

RULE 38(2) EVIDENCE ADDUCED TO COURT:

- 8 In substantiation of its case, the Plaintiff relies on no less than 9 Experts. (P138 – P301 of the Court Bundle). I sorted the Experts in accordance with the dates of their assessing the Plaintiff.
- 8.1 The Occupational Therapist, Mr. Dlamini practices in Nelspruit. He assessed the Plaintiff on 10 September 2018 and brought out his first Report on 08 March 2020. (P226 – P 247 of the Bundle)
- 8.2 Dr Tiholoe, the Maxillofacial & Oral Surgeon, who practices in Pretoria. The date of assessment and Report coincides as 16 May 2019. (P56 – P62 of the Bundle)
- 8.3 The Educational Psychologist, Mr Mthimkulu assessed the Plaintiff on 18 June 2021, her Report followed on 25 June 2021. She practices in Pretoria. (P204 – P223 of the Bundle)
- 8.4 Dr Ajay Maharaj, a Specialist Neurosurgeon, who has his address in Midrand. The consultation took place in Arcadia, Pretoria on 07 April 2022. (P158-P183 of the Bundle)
- 8.5 A neuropsychological assessment by Clinical Psychologist, Ms Mlungisi who has her practicing address in Pretoria and assesses the Plaintiff on 07 April

2022. The place of the interview is not disclosed. Dr Mlungisi brought out a Report on 10 April 2022. (P140-P155 of the Bundle)

- 8.6 An Addendum to the original Report dated 08 March 2020 was brought out by the Occupational Therapist, Mr Dlamini. The date of assessment on the Report still reads 10 September 2018. The Report is dated 28 April 2022. (P 250 – P274 of the Bundle). The Occupational therapist in this Report simply added the other Experts' Reports to her collateral and amended her Report accordingly.
- 8.7 An Addendum to the original Industrial Psychologist's Report was brought out by Dr Kheswa on 20 May 2022. The date of Assessment on the Report reads 10 September 2018. (P277 – P293 of the Bundle) The original Report was not made available to Court.
- 8.8 Two Actuarial Reports by Munro Actuaries from Cape Town was filed on 25 May 2022 and 17 October 2023 respectively. (P296 – P301 of the Bundle; Annexure "A" to "BM 13" of the Plaintiff's Practice Note dated 17 October 2023.)
- 9 Rule 38(2) reads as follows: *"The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit..."* It is trite that an Expert Witness Report may not be accepted into evidence without an accompanying Affidavit, verifying at least the identity and qualifications of the Expert, the identity of the Plaintiff and the purpose of the Report.
- 10 The Affidavits to all the Plaintiff's Expert Reports were added as Annexures to his Counsel's Practice Note, filed on 18 October 2023.
- 11 The Affidavit of the Orthopaedic Surgeon, Dr Kumbirai forms Annexure "BM6" to the Practice Notes. The Affidavit is a copy. It does not state where or the date it was signed by Dr Kumbirai. The commissioning clause reads that the Affidavit was signed before the Commissioner of oath in Mbombela and notwithstanding the Affidavit being a copy, an original signature and stamp appears on the Affidavit dated 18 October 2023.

The same trend follows with the Affidavits by the Clinical Psychologist, Ms Muvhangu (Annexure "BM7"); the Specialist Neurosurgeon from Midrand (Annexure "BM8"); the Maxillofacial and Oral Surgeon (Annexure "BM9"); the

Educational Psychologist (Annexure "BM10") and the Industrial Psychologist (Annexure "BM12").

Annexures "BM11" and "BM13" being the Affidavits of the Occupational Therapist and the Actuary are copies signed in Mbombela and Cape Town respectively, before different Commissioners of Oath.

- 12 The Orthopaedic Surgeon Dr Kumbirai who practices in Pretoria completed the RAF 4 form on 16 May 2019. Although no further and/or complete Report was made available to Court, the Affidavit discredits his evidence as well. (P56-P62)
- 13 The Experts' evidence is not before Court if the Affidavits of the Experts are not proper. The Court is left with the RAF1 and Section 19F Affidavit, Content of the Police Docket, and the Reports of the Occupational Therapist and the Actuary for consideration in adjudicating on general damages and loss of earnings and/or earning capacity.
- 14 The Occupational Therapist's Report cannot be considered in isolation. The Industrial Psychologist's Reports, at least, are needed to establish the prospects of employability of the Plaintiff going forward. The impact of the Plaintiff's injuries cannot be established without proper evidence. The Actuarial Report is of no use in the absence of proper motivation.

CONCLUSION

- 15 In the absence of substantiating evidence, it follows that the Court is not in a position to adjudicate upon general damages and/or future employability of the Plaintiff. This Court is however of the view that dismissing this case on the basis of the Section 38(2) Affidavits not being proper, would not be in the interest of justice. It is evident that the Plaintiff sustained injuries and should at the least be afforded an opportunity to make out his case for compensation as stated in Section 3 of the Road Accident Fund Act, Act 56 of 1996, as amended.
- 16 *In Osman Tyres and Spares CC and Another v ADT Security (Pty) Ltd (1174/2018) [2020] ZASCA 33; [2020] 3 All SA 73 (SCA) (3 April 2020), Judge Koen, AJA held:*

[23] A court must not evaluate a plaintiff's evidence at the absolution stage, but must accept the evidence as true. (Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 at 527C-E.) Nor should a Court weigh up different inferences, it must rather determine whether any one inference, from a range

of possible reasonable inferences, might favour the plaintiff. (Gandy v Makhanya 1974 (4) SA 853 (N) at 856B-C; Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 39."

- 17 As stated by Harms JA in the matter of Gordon Lloyd Page & Associates v Rivera and Another (384/98) [2000] ZASCA 33; 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A) (31 August 2000)

"[2] The test for absolution to be applied by a trial court at the end of the plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

".... when absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes that would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonable to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T))."

..... Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interest of justice." (my emphasis)

- 18 The Court is satisfied that the Plaintiff at least made out a prima facie case.

ORDER:

- 1 Absolution from the instance is granted.
- 2 No Order as to costs.



PICK, AJ

Acting Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

Appearance for the Plaintiff:

Ms Banyele Mphokane

Instructed by Mphokane Attorneys

Mbombela, Mpumalanga

Ref no. Not provided

E-mail: mphokaneattorneys@telkomsa.net

Mmavuso@mphokane.co.za

Ngomanenokulunga12@gmail.com

Appearance for the Respondent:

TB Mlope

The Office of The State Advocate

Instructed by The Road Accident Fund

Mbombela, Mpumalanga

Link no. 4145766