

SOUTH AFRICA / JUDGMENT

Komane v Road Accident Fund (24809/2022) [2022] ZAGPPHC 1007 (30 November 2022)

[2022] ZAGPPHC 1007

COURT

North Gauteng High Court, Pretoria

BEFORE

Khashane Manamela

CASE / FILE NUMBER

24809/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 24809/2022

REPORTABLE:

NO
OF
INTEREST TO
OTHER JUDGES:NO
REVISED.:
NO
30
November 2022
In

the matter between:

TUMELO
GODWILL
KOMANE Plaintiff
and
ROAD
ACCIDENT
FUND Defendant
DATE
OF JUDGMENT: This judgment was
handed down electronically by circulation to the parties'
representatives by email. The date and time of
hand-down is deemed to
be 10h00 on 30 November 2022.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

- [1] The plaintiff, born on 21 October 1990, was involved in an accident, when he was about 31 years old, on 21 June 2021 at or around 10h30 in the morning at or near Hensneck Road (next Bundu Inn), Rosslyn, Pretoria, Gauteng Province. The plaintiff was a pedestrian or by the side of the road at the time of the accident. He, consequently, blames the negligent driving of the driver of the motor vehicle which hit him ('insured driver') for the accident. It is alleged, among others, that the insured driver drove the vehicle haphazardly and veered to the plaintiff's side of the road to cause the accident. The plaintiff sustained injuries to his head and neck, as well as what is described as orthopaedic injuries.
- [2] The plaintiff caused summons to be issued against the Road Accident Fund, the defendant, on 6 May 2022. The summons was served on the defendant on 10 May 2022. The plaintiff seeks compensation from the defendant for the damages suffered due to the injuries sustained from the accident and/or their sequelae. The compensation sought was initially in the amount of R6.3 million for the plaintiff's past and future medical expenses; past and future loss of earnings, and general damages. The defendant did not deliver a notice of intention to defend the action and, therefore, the matter proceeded towards obtaining of a default

judgment.

- [3] The matter came before me for a hearing on 3 October 2022 - through the mode of video link - and Mr F Matika appeared for the plaintiff. And, expectedly, there was no appearance on behalf of the defendant, due to default in the delivery of notice of intention to defend. It is submitted though that a notice of set down was properly served on the defendant on 11 August 2022. This judgment was reserved after hearing counsel for the plaintiff. Also, it

benefited from the written submissions by counsel. I am also grateful that counsel acceded to the request of the Court to file supplementary or further submissions, which I will say more about later, below.

- [4] The matter proceeded on trial for the determination of both issues relating to merits or liability and those relating to the quantum of the general damages and loss of income suffered by the plaintiff, as well as future medical and hospital expenses which the plaintiff may incur to deal with the injuries from the accident and/or their sequelae.

Evidence and submissions on behalf of the plaintiff

General

- [5] The plaintiff has grade 12 level of education and N4-N5 Civil Engineering Certificate.

Following the accident, the plaintiff was taken to hospital. Reportedly, his Glasgow Comma Scale or GCS was recorded at 5/15 upon arrival at the hospital. He was in the intensive care unit or ICU of the hospital for more than a week and, thereafter, was rehabilitated in the ward. At the time of the accident, he was employed at Hirsch Home Appliances as a sales consultant earning an average R23 930.75 total earnings per month. But following the accident the plaintiff decided not to return to work.

- [6] Medico-legal reports compiled by experts who had assessed the plaintiff's injuries and their sequelae were filed on behalf of the plaintiff. The experts also deposed to affidavits which were subsequently filed in order to confirm their opinions and other contents of their reports in terms of the prevailing practice directives of this Division. This, also was intended to satisfy the provisions of Rule 38(2)[1] of the Uniform Rules of this Court in order for this Court to allow the evidence in the trial to be adduced or given on the basis of the filed affidavits. This was allowed, including the affidavit deposed to by the plaintiff in respect of the merits of the matter explaining how the accident occurred.

Merits or liability

- [7] The defendant's liability in this matter derives from the defendant's obligation under section 17(1) of the Act to compensate persons, such as the plaintiff, for loss or damages suffered as a result of bodily injuries or death of or any bodily injury to another person caused by or arising out of the driving of a motor vehicle by any person in this country, for example, due to the negligence or the wrongful act of the driver of a motor vehicle.
- [8] With regard to the merits of the matter, the plaintiff explained under oath that – in his recollection – the accident occurred along the following lines. He was a pedestrian walking or standing by the side of the road at all material times. As already hinted above, the plaintiff alleges that the insured driver drove his vehicle haphazardly and in the process veered or drove the

vehicle to his side of the road. The plaintiff, further, states that he was driving back from work when he parked his vehicle on the side of the road in order to attend to or fix a burst or punctured tyre. He was hit by the insured vehicle which had lost control and collided with him outside of the road. He sustained injuries and was taken to hospital for medical assistance.

- [9] The accident report filed on behalf of the plaintiff does not indicate how the accident occurred. I took this issue up with counsel when he made submissions, but he had nothing more to add. The report also appears to have some of the pages missing of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.”
- [10] Counsel for the plaintiff referred the Court to case law which is to the effect that as a pedestrian walking on a sidewalk the plaintiff will not foresee a vehicle without warning coming from behind to strike him.
- [11] With only the plaintiff’s version before the Court, I accept this version on how the accident occurred and, therefore, found negligence to have been established on the part of the insured driver. Consequently, I find that the liability of the defendant has accordingly been established. The evidence contained in the plaintiff’s affidavit, although somewhat sketchy and missing facts in some places, suffices for the making of the necessary ruling. Therefore, I will hold the defendant fully (i.e. 100%) liable for any damages proven on behalf of the plaintiff arising from the injuries sustained by the plaintiff and/or their sequelae caused by the negligence of the insured driver whose vehicle hit the plaintiff on 21 June 2021.

Plaintiff’s injuries and/or sequelae /expert medico-legal reports and opinion

- [12] The experts state that some of the deficits borne by the plaintiff are indicative of severe traumatic brain injury with intracerebral bleeds. Further, that the plaintiff had suffered vertical shear ‘pelvic fracture’ with retroperitoneal haematoma and bladder contusion; fracture of the right acetabulum; blunt abdominal trauma with a ruptured bladder, head injury and scalp laceration. He received various type of treatment relating to the injuries or their effects.
- [13] The plaintiff had the following complaints when he was examined by the medical experts: painful right joint (exacerbated by prolonged standing, walking, lifting of heavyweights and cold weather); sequelae of head injury; poor self-esteem due to discharging of sinus in the suprapubic area; headaches; right shoulder pains; right ankle pains and memory problems. Psychological complaints include becoming short tempered and easily irritable. The plaintiff also gets anxious when crossing a road or travelling in a speeding motor-vehicle.

The plaintiff’s loss of income

- [14] As stated above, the plaintiff has a matric or grade 12 qualification and N4-N5 Civil Engineering Certificate. He worked as a sales consultant at Hirsch Home Appliances is the time of the accident with a monthly income of R23 930.75. It is submitted that the plaintiff relied on his cognitive and physical attributes to maintain this gainful employment. His earnings are said to have ranged within Paterson B3 level in the corporate sector.
- [15] The plaintiff did not go back to his employment following the accident. This is not explained. It is the occupational therapist's opinion that the plaintiff's compromised physical capacity compounded by compromised cognitive and psychological or emotional functioning render him functionally compromised and unsuited for any open labour market employment. Further, that this turn of events on the plaintiff's part is consistent with the fact that the plaintiff has not been able to find work since the accident.

Actuarial calculations

- [16] The actuaries calculated the plaintiff's loss of income on the basis of the opinions contained in the report by the industrial psychologist. It is further submitted that it ought to be accepted that the plaintiff is unemployable.
- [17] The calculations did not contain any contingency deductions with regard to the amount of R8 291 190 and, consequently, counsel for the plaintiff submitted that a 5% contingency deduction be applied to the plaintiff's past loss and a 15% contingency deduction be applied to plaintiff's future income in the absence of accident. The application of contingency deductions as suggested by counsel would have the following result:

[17.1] the plaintiff's past loss of earnings in the amount of R251 856,40 concluded as follows:

Past loss of income

Uninjured

Injured

R300 724.00

R35 612.00

Contingencies

-5%

-5%

Subtotals

R285 687. 80

R33 831. 40

Total Past loss

R251 856.40

[17.2] the plaintiff's future loss of earnings in the amount of R 6 822 166. 30 concluded as follows:

Future loss of income

Uninjured

Injured

R8 026 078.00

Contingencies

-15%

Total Future loss of income

R6 822 166.30

[18] The above-mentioned actuarial calculation and the contingencies suggested by counsel for the plaintiff yielded the total amount of R7 074 022.70 (i.e. R251 856.40 in respect of past loss plus R 6 822 166.30 for future loss of earnings).

Revised actuarial calculation and further submissions

[19] On 21 October 2022, I caused the following request to be made, through my erstwhile registrar, to the plaintiff's legal representatives:

[19.1] that, the actuary be instructed to apply a 5% contingency deduction to the past loss and a 25% contingency deduction be applied to the future income in the absence of accident. I explained that the basis for the suggested contingency as being, mainly, due to the following:

[19.1.1] that, for some unexplained reason, the plaintiff decided not to return to work after the accident;

[19.1.2] that, there is no proof that he would have not coped, although one is mindful of expert opinion in this regard;

[19.1.3] that, the possibility of re-employment using N4-N5 Civil Engineering Certificate, given his relatively youngish age, cannot be completely excluded.

[19.2] that, the plaintiff's legal representatives furnish further written submissions commenting on the calculations furnished in terms of the request, should they be so minded.

[20] On 21 October 2022, the plaintiff's legal representatives furnished a revised calculation by the actuary. It was explained that the actuary applied a 5% contingency deduction on the past loss and a 25% contingency deduction applied on the future income in the absence of accident, as requested by the Court. The result of the revised actuarial calculation is that the plaintiff past loss of income or earnings is in the amount of R251 857.00 and future loss of income or earnings is in the amount of R6 019 559. Therefore, the total loss of income or

earnings to be awarded to the plaintiff in this matter will be in the amount of R6 271 416.00.

General damages

[21] It submitted, on the basis of the report by the neurosurgeon contained in the Form RAF 4 completed after assessment of the plaintiff that the plaintiff suffered severe long-term mental and severe long-term behavioural deficits and disorders, and permanent serious disfigurement. Plaintiff's injuries were noted to have a combined whole person impairment or WPI of 54%. The orthopaedic surgeon is also of the view that the plaintiff had suffered serious long-term impairment or loss of body function.

[22] It is further submitted that the defendant did not reject the above-mentioned assessment of plaintiff's injuries. I will accept

- for purposes of general damages - that the injuries sustained by the plaintiff in the accident constitute serious injuries. The plaintiff had claimed an amount of R2.5 million in respect of general damages.

[23] The plaintiff's counsel referred the Court to the following comparable cases for purposes of an award for general damages suffered by the plaintiff:

[23.1] *Megalane NO v The Road Accident Fund*. [2] This case concerned an 11 year-old schoolboy at the time of the accident and who was 14 years old at the time of the trial. He had sustained a severe brain injury with diffuse and focal brain damage in the form of a subdural haematoma. This injury resulted in cognitive impairments characterised by poor verbal and visual memory; poor concentration and distractibility; impaired executive function characterised by frontal lobe disinhibition causing inappropriate behaviour; speech difficulties characterised by dysarthria and word retrieval difficulties; bilateral hemiparesis with severe spasticity of all four limbs and left facial paralysis..

This claimant is or was confined to a wheelchair and his intelligence level is or was that of a young child, but he still has/had insight into his predicament. Before the accident he had been an above average scholar, but would probably have acquired tertiary-level

education. Post-accident he is/was left with severe permanent physical and mental disabilities rendering him unemployable. The

court awarded him the amount of R1 000 000 as general damages which is equivalent to R2 399 000 in current value.

[23.2] *Zarrabi v The Road Accident Fund*. [3] This matter concerned a claimant who was 30 years old. She was a trainee medical specialist, ostensibly when the accident occurred.

She sustained the following injuries: severe diffuse axonal brain injury (with severe neuro-physical, neuro-cognitive and neuro-psychiatric consequences); multiple facial lacerations; fractured nose; contusions of the chest (with bilateral contusions of the lungs); rupture of the liver; contusion of the kidneys with haematuria; closed fracture of the right humerus; open

fracture of the right radius and ulna; deep laceration of right elbow; open fracture of the right radius; fracture of left patella; lacerations of left knee; injuries to ligaments of the right knee; and multiple contusions and abrasions to both legs. As a result of the injuries and sequelae she had intellectual impairment; personality change; dysarthria; spasticity on the right side; loss of depth perception; loss of

vision of the right visual field, and lack of drive; subtle speech; language and communication problems. Further, the claimant

experienced difficulties with executive functions; sustained concentration; memory; psychomotor speed, and emotional control. Before the accident this claimant was a high achieving scholar; medical graduate and practising doctor. The cognitive and physical

sequelae of this claimant's injuries resulted in her inability to secure employment as a medical doctor or specialist. The claimant, at best, was expected would manage some form of employment in a sympathetic environment on a flexible or part time voluntary basis. The court awarded her general damages in the amount R800 000 equating to R1 919 000 in current terms.

[24] Given the age at which the plaintiff in this matter under determination sustained her injuries, which it is submitted by his counsel had robbed 'him of all personal independence and rendering him subject to multiple medical and surgical procedures in future, apart from profound intermittent psychological and psychiatric consequences', it is submitted that the amount of R2 000 000 be awarded as general damages.

[25] At the end of the hearing, I requested that plaintiff's counsel furnish the Court by 5 October 2022 with additional case law in respect of general damages and also address the issue of protection of the funds to be awarded to the plaintiff. This was duly complied with.

[26] Plaintiff's counsel gratefully added the following cases to the two mentioned above, for purposes of comparison with the case under determination by the Court:

[26.1] SC McKay v Road Accident Fund .[4] In this case the claimant was a 27 year-old qualified beautician. She had sustained a severe brain injury, but continued to work for some time after the accident. She was awarded the amount of R1 500 000, which is equivalent to R1 934 790 in current terms.

[26.2] M E v Road Accident Fund.[5] The claimant in this matter had sustained severe head injuries leading to neurocognitive and neurobehavioral changes, which also

manifested in poor memory and concentration, aggressive behaviour and various other injuries which left him disabled and disfigured. He was awarded R1 900 000 in 2012 which equates to R2,344,600 in 2022 terms.

[27] It is submitted by plaintiff's counsel that the injuries sustained by the claimant in the abovementioned comparable case of M E v Road Accident Fund are similar to those of the plaintiff before the Court.

Conclusion

- [28] I have had regard to the injuries sustained by the plaintiff and sequelae. I have also considered the comparable cases I was referred to by counsel. I agree with counsel that the case most similar to the one before the Court is that of *M E v Road Accident Fund*, but obviously no two cases can ever be the same in very respect. For example, (a) the claimant in *M E v Road Accident Fund* ('ME') was 27 years at the time of the accident, whereas in this matter the plaintiff ('Komane') was nearly 31 years old when he was injured; (b) ME had GCS of 4/15, whereas Komane had GCS of 5/15; (c) ME had suffered severe head injury, whereas Komane has sustained severe traumatic brain injury, and (d) ME was unable to speak for two months and had severe restrictions with mobility, which deficits are present in respect of Komane but not seemingly to the same degree. There will be more similarities and/or differences between the two matters, but significantly there is an alignment. Plaintiff's counsel has submitted that an amount of R2 million should be awarded as damages, but considering what is stated above I will award an amount of R1,8 million as general damages.
- [29] The abovementioned amount awarded for damages suffered by the plaintiff will be added to the amount awarded for loss of income in the amount of R7 074 022.70. This means that the total amount awarded to the plaintiff in this matter is R8 874 022.70. And costs will also follow this result. Details of the costs would appear in the order made below, essentially, in terms of the order contained in the draft order submitted by counsel in this matter.
- [30] I also raised with counsel for the plaintiff the issue of possibly protecting the funds to be paid to the plaintiff given the nature of plaintiff's injuries and the comments by the some of the experts in this matter. I also requested counsel to make submissions in this regard. Counsel's submissions are to the effect that 'protection of funds will be in the best interest of the plaintiff, to this end Standard Bank Trust has agreed to set up a trust on behalf of the plaintiff'. Accompanying the further submissions by counsel is a letter by Standard Bank Trust regarding the establishment of a trust for the benefit of the plaintiff. I do not think that with what is available before the Court in the matter one could order the creation of trust, especially given that the plaintiff is still acting without any legal assistance and, therefore, capable of managing his own affairs. But because the issue is very important I will include in permissive terms something to the effect that a trust may be created should the plaintiff and his legal representatives be so minded. In the event that what is included does not suffice, the Court, differently constituted of course, can be approached for whatever order deemed necessary.

Order

- [31] In the premises, I make the order, that:
- 1) the defendant is fully (i.e. 100%) liable for the plaintiff's proven or agreed damages;

- 2) the defendant shall pay to the plaintiff the amount of R8 874 022.70 (eight million eight hundred and seventy four thousand and twenty two rand and seventy cents) in full and final settlement of the plaintiff claim in respect of general damages and loss of earnings arising from the injuries sustained in the motor vehicle accident which occurred on 21 June 2021 and/or sequelae. The aforesaid amount is made up as follows:

2.1 loss of earnings =

R7 074 022.70, and

2.2 general damages = R1 800 000.00

- 3) the defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996, for the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to the plaintiff, arising out of the injuries and the sequelae thereof sustained in a motor vehicle accident which occurred on 21 June 2021 after such costs have been incurred and upon proof thereof;
- 4) the defendant shall pay the plaintiff's taxed or agreed costs on the High Court Scale as between party and party pertaining to merits and quantum, which costs shall include the costs of the plaintiff's attorney and correspondent attorneys and the following: costs of trial bundles; all costs of pre-trial conferences held between the parties including judicial case management if any; costs relating to the further submissions and other activities at the instance of the Court between 5 and 21 October 2022, but not limited thereto, and further:

4.1 the full costs of all plaintiff's experts report, medico-legal reports including addendum medico legal reports if any, RAF4 serious injury assessment reports and radiologist report including the following experts reports:

4.1.1

Dr Kumbirai (Orthopaedic Surgeon);

4.1.2

Dr Sello Solly Selahle (Plastic & Reconstructive Surgeon);

4.1.3

Prof M S Mokgokong (Neurosurgeon);

4.1.4

Dr Thembelani F Lephoto (Clinical psychologist);

4.1.5

Ms Sabatha Mogane (Occupation Therapist);

4.1.6 Mr/Ms Ntseni Talifhani (Industrial Psychologist), and

4.1.7

Tsebo Actuaries (Actuary)

4.2 the full costs of travelling, transportation, subsistence and accommodation incurred by and on behalf of the injured for attending medico-legal examinations arranged by plaintiff and defendant;

4.3 the costs of counsel, including the costs of drafting heads of argument, as well as costs relating to the further submissions and other activities at the instance of the Court between 5 and 21 October 2022.

5) the capital amount in 2) hereof and the costs in 4) hereof are to be paid into the trust account of GWATULE ATTORNEYS as set –out below and within 180 days of this order:

BANK:

FIRST NATIONAL BANK

BRANCH:

PRETORIUS STREET

ACCOUNT NUMBER: [...]

REF NUMBER: MG/RAF/KOMANE

- 6) the plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record, if any or the defendant;
- 7) the plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs;
- 8) the defendant will not be liable for any interest on this payment on condition that payment made timeously;
- 9) In the event of the defendant not making payment timeously the defendant will pay interest at the prescribed rate of interest per annum on the amount then outstanding to date of final payment;
- 10) subject to 11) hereof, the plaintiff may instruct his attorneys to invest the amount in 2) hereof, either in part or as a whole, on his behalf following receipt thereof in an interest bearing account as envisaged in section 78(2)(A) of the Attorneys Act until a trust as set out hereinafter is established and registered;
- 11) the plaintiff and plaintiff's attorneys are urged to consider paying the capital amount in

- 2) hereof less provision for reasonable attorneys' fees in terms of the contingency fee agreement, expenses incurred and accounts rendered by experts and counsel employed to the Trustee of a Trust to be established of which the plaintiff is to be the sole capital- and income beneficiary following the registration of the said Trust with the Master of the High Court and following the furnishing of security by the Trustee to the satisfaction of the Master of the High Court as stipulated hereinafter: provided, that the plaintiff may approach the Court for an alternative or supplementary order(s) in this regard.
- 12) subject to 11) hereof, the plaintiff's attorneys may make any reasonable and necessary payments, until such time as the trustee is able to take control of the capital sum and to deal with same in terms of the Trust Deed, to satisfy the needs of the plaintiff that may arise and that are required in order to satisfy any reasonable need for treatment care and/or equipment as may be necessary in the interim period;
- 13) subject to 11) hereof, the plaintiff's attorney shall take all necessary steps to attend to the formation and registration of a trust for the benefit of the plaintiff, and to approach this Court with regard to the person to be appointed as trustee; fees payable to such person and other provisions of the deed of trust or matters regarding the administration of the trust, and
- 14) it is noted that there is what appears to be a valid contingency fee agreement between the plaintiff and the plaintiff's attorneys of record.

Khashane La M. Manamela

Acting Judge of the High Court

Date of Hearing: 3

October 2022

Dates of Further Submissions: 6 and 21 October 2022

Date of Judgment: 30

November 2022

Appearances:

For the Plaintiff: Mr

F Matika

Instructed by: Gwatule Attorneys, Pretoria

For the Defendant: No appearance

- [1] Uniform 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 or that the affidavit of any witness be

read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.”

- [2] Megalane NO v The Road Accident Fund 2006 (5A4) QOD 10 (W)
- [3] Zarrabi v The Road Accident Fund 2006 (5B4) QOD 231 (T).
- [4] SC McKay v Road Accident Fund 1963 (1) QOD 101 (E).
- [5] M E v Road Accident Fund (12601/2017) [2018] ZAGPJHC 438 (18 June 2018).

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