

SOUTH AFRICA / JUDGMENT

Masoga v Road Accident Fund (1386/2024) [2025] ZAMPMHC 16 (25 March 2025) [2025] ZAMPMHC 16

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

1386/2024

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION (MIDDELBURG LOCAL SEAT)****CASE NO: 1386/2024****(1)****REPORTABLE: NO****(2) OF****INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE 25/03/2025****SIGNATURE****In the matter between:****KEBIESHI PETRUS MASOGA****PLAINTIFF****And****ROAD****ACCIDENT FUND****DEFENDANT**

JUDGMENT

Coram: Langa J

Introduction and Facts

- [1] This is an action for damages brought in terms of the Road Accident Fund Act 56 of 1996 (“the Act”) against the Defendant as a result of the injuries sustained by the Plaintiff Petrus Kebiesh Masoga in a motor vehicle accident which occurred on the 19 September 2021 at or near Elandspruit West-Coal, Mpumalanga Province.
- [2] The Plaintiff is an adult male born on 24 June 1984 and currently residing at Number 7[...] T[...] Street, Mhluzi Township, Middelburg, Mpumalanga Province. He sues in his own personal capacity. The Defendant is The Road Accident Fund, (“the RAF”) is a juristic person created in terms of the Provisions of Section 2(1) of the Act with its principal place of business situated at 3[...] I[...] Street, Menlo park, Pretoria, Gauteng Province.
- [3] The Plaintiff instituted the action against the Road Accident Fund for bodily injuries he allegedly sustained in a motor vehicle collision which occurred on 19 September 2021 on the old Witbank and Middelburg road. It is alleged that at the time of collision the Plaintiff was the driver of a motor vehicle bearing registration letters and numbers B[...] which collided with a motor vehicle bearing registration letters and numbers B[...] (“the insured vehicle”).
- [4] The Plaintiff alleges that the two motor vehicles were driving in opposite directions. He was driving towards the Middelburg direction from Witbank while the insured vehicle was driving towards the Witbank direction from Middelburg. He alleges that the insured vehicle veered into his path of travel and he (the Plaintiff) attempted to avoid it by darting to the extreme right hand side of the road apparently in order to drive into a side road on the right hand side. However, a head on collision occurred between the two vehicles before he could finish this manoeuvre.
- [5] Both the merits and quantum are in dispute. The quantum involves the determination of general damages, past and future loss of earnings/income as well as section 17(4)(a) undertaking for future hospital/medical expenses.

Evidence

- [6] Only the Plaintiff and his witness testified on the merits. The Defendant did not call any witness. The Plaintiff’s version is that he was driving on the left hand side of the road in his lane of travel when the insured vehicle veered into his path of travel and caused the collision between the two vehicles. The Plaintiff alleges that as the insured vehicle veered into his path of travel, he attempted to avoid it by darting to the extreme right hand side of the road in order to drive into a side road on the right hand side. However, a head on collision occurred between the two vehicles before he could finish his manoeuvre. As a result of the collision, he sustained injuries on his left shoulder. The injury is referred to by Dr Kumbirai

as a left rotator cuff pathology. He said that he does not know what happened after the accident as he became unconscious. He was evacuated to and treated at Life Midmed Private Hospital.

- [7] The Plaintiff called one witness, Mr. Madonsela, who stated that he was a passenger in the Plaintiff's motor vehicle at the time of the accident. He confirmed that the insured vehicle was oncoming facing their lane from the Witbank direction to Middleburg direction. He stated that at some point the oncoming vehicle veered to their side and that in order to avoid a head on collision, the Plaintiff tried to turn to the right across the road where there is a small side road going to the plots. The insured vehicle however veered back to its correct lane and this led to the collision with the Plaintiffs motor vehicle on its left side.
- [8] The Plaintiff and his witness further alleged that the Plaintiff could not go to the left hand side as there is a trench dug by the mine on the side of the road. They however confirmed that there is a gate about 60 meters to 100 meters away from the road which if the Plaintiff had proceeded to, a head on collision could have still occurred.
- [9] In a nutshell both witnesses' version is that the insured vehicle veered to their lane of travel and was the sole cause of the collision. They say the Plaintiff could not have done anything other than swerving to the right side of the road to avoid a head on collision. They further say that he could not swerve to the left side as there mine trench hole on the side of the road.
- [10] The Plaintiff's counsel contends that it is the "insured driver" who drove into the Plaintiffs lane when it was not safe to do so and that he was the sole cause of the collision as he failed to adhere to the rules of the road. She argues further that as it was at night, the insured driver as a reasonable driver ought to have kept a proper lookout and also drive with the necessary attentiveness. He had to ensure that he was able stop in time or to reduce the vehicle's speed sufficiently to avoid a collision occurring if confronted with other cars on the road.
- [11] The Plaintiff's counsel argues further that an inference can be drawn that the insured driver was driving at excessive speed as a result of which he was unable to stop or brake in time to avoid the collision. Counsel for the Plaintiff further submits that the Plaintiff was a credible witness in the circumstances and that nothing suggests that he was negligent in any way, and that it is the insured driver who drove towards him in his correct lane of travel. The Plaintiff tried to avoid the collision by swerving out of the road.
- [12] The Defendant's counsel criticizes the Plaintiff's testimony as being riddled with discrepancies and suggests that the cautionary rules of evidence must be applied when dealing therewith. He argues that one of the discrepancies is that on the sketch plan there is no existence of the side road on the right to which the Plaintiff alleges to have attempted to drive into.

- [13] Secondly, he argues that on the sketch plan both motor vehicles appear to be facing the same direction after the collision and that this suggests that both vehicles might have been travelling in the same direction and that while they tried to overtake each other, they collided. The third criticism is that although the Plaintiff stated that there was a trench on the left-hand side of the road which prevented him from escaping to the left, his witness, Mr Madonsela admitted that there was space on the left-hand side between the road and the trench which was sufficient to accommodate at least two motor vehicles.
- [14] The Defendant's counsel further submits that the fact that the damage to the Plaintiff's motor vehicle was on the front left side suggest that the motor vehicle he collided with was on the left hand side sand that both motor vehicles were driving in the same direction and collided when the Plaintiff was overtaking the insured driver, or the Plaintiff was executing a right turn when it was not safe and opportune to do so. He however also said it is unlikely that he could be turning right in the light of the fact that there is no exit road on the right at the scene of the collision. A third assumption could be that the Plaintiff executing a U-turn on the road.
- [15] Lastly, the Defendant submits that, the fact that the collision occurred in the middle or centre line of the road, suggest that both drivers should take responsibility of the negligence that caused the collision. He contends that the sketch of the accident does not corroborate the Plaintiff's version, instead it reflects the point of impact in the middle of the road or centre therefore suggesting that both parties contributed negligence to the occurrence of the collision.

Discussion and

analysis

- [16] It is trite that the onus the rests on the Plaintiff to prove the Defendant's negligence causing injuries or damage on a balance of probabilities. Although civil cases are decided on a balance of probabilities, the probabilities and credibility are often intertwined. See *Stellenbosch Farmers' Winery Group Ltd And Another V Martell Et Cie and Others* 2013 (I)SA 204 (SCA) at 21 OA-C.
- [17] On the other hand, In order to avoid liability, the Defendant must produce evidence to disprove the inference of negligence on his part. Should he fail to disprove the inference of negligence on his part, the Defendant may be found to be liable for damages suffered by the Plaintiff. See *Fox v RAF (A548/16)* [2018] ZAGPPHC (26 April 2016). It is further trite that the Plaintiff is required to prove only 1% negligence against the insured driver in order to succeed with his claim.

- [18] Concerning driving under general and the facts of this matter, it is common cause that in terms of our rules of the road, a driver must drive to the left or on the left of the centre of the road and keep left. While so doing he is entitled to assume that the approaching oncoming traffic will do likewise. The purpose of this rule is to ensure that motor vehicles do not collide with oncoming traffic.
- [19] However, when another vehicle encroaches onto the incorrect side of the road, the driver on the correct side must exercise the greatest care and take every precaution to avoid it. He is not entitled to remain passive in the face of threatening danger and should as soon as the danger of a collision becomes evident, take all reasonable steps to avert one.
- [20] The evasive action which the driver on the correct side of the road takes to prevent a collision with the encroaching vehicle depends upon what is reasonable in the circumstances. For instance, it may be necessary for the driver on the correct side of the road to deviate to his extreme left or even the right hand side depending on the circumstances. *Noqude v Union and South West Africa Insurance Co. Ltd* 1975 (3) SA 685 (A) at 685A-C.
- [21] It is important to note that in this case the accident report shows that both vehicles are found right in the middle of the road after the collision. The Plaintiff's vehicle is facing the right-hand side as if it was moving back to its correct lane, while the insured vehicle is facing the right hand side, while in its correct lane. The significance of the vehicle's positions is that the collision took place in the middle of the road.
- [22] On the Plaintiff's own evidence the evasive action that he took when the on-coming vehicle allegedly came towards his direction was to go to the right across the road. In other words, he moved from his lane (left lane), crossed over to the right lane (on-coming lane). His explanation is that he wanted to dart into a side ride that is on the far right hand side of the road in order to avoid the on-coming vehicle. This manoeuvre would have entailed driving across the face of oncoming vehicle in the hope that he will make it before the other vehicle reaches him. The evidence and positioning of the two vehicles show that he did not go any far as the collision took place right in the middle of the road.
- [23] From this explanation the Plaintiff appears to have taken a wrong option to evade the collision. Although he had the option moving to his left in order to avoid this motor vehicle he did not. The explanation that he could not move to the left because of the trench in the vicinity created the impression that there was no room at all to manoeuvre. This explanation was destroyed by his witness who testified that there was space to move on the left hand side as well. He said the space could accommodate at least two vehicles. That being the case the Plaintiff could and should have taken that safer option than to drive across the road in the face of an oncoming vehicle.
- [24] Author HB Klopper, *Law of Collisions in SA*, 7 th Edition, page 73 states the following:

"If there is irrefutable proof of a collision on the incorrect side of the road, such collision constitutes prima facie negligence on the part of the driver who was found to be on his incorrect side of the road at the time of the collision."

- [25] In *Burger v Santam Versekeringsmaatskappy* 1981 (2) SA 703 (A) the court held that "where a reasonable driver of the motor vehicle approaches a motor vehicle which has over a considerable distance been veering to the right or to its wrong side of the road, he would have to take at least three steps, namely he would have to reduce his speed by braking or moving slowly, he would have to turn left or right as far as possible or would have to hoot continuously to alert the driver of his presence".
- [26] In this case there is no evidence that the Plaintiff took any of these steps except to drive across to the extreme right and wrong lane of the road. As stated in the Santam case, supra, he could have avoided the collision had he reduced speed and escaped to the left. He did not reduce speed, or hoot. He did not veer to the left as he should have. If he had the collision could most probably have been avoided as his witness confirmed that there was enough space on the left side of the road which he could have used as an escape route.
- [27] The Plaintiff's action of going across the road instead of keeping left and moving to the left does not constitute a reasonable decision in the circumstances. Instead of veering away from the impending danger he went towards it. The fact that the insured vehicle was found in its lane after the accident does not support the Plaintiff's version or explanation. If the insured vehicle encroached to his side the collision in all likelihood would have taken place on his lane of travel and not in the middle of the road. I find that the Plaintiff explanation does not absolve him of wrongdoing in the incident.
- [28] His credibility as a witness is also not above board as projected. For instance, although he said that he does not know what happened after the accident as he became unconscious, however when asked by the Court how he reported the accident to the police and called the ambulance as it is indicated on paragraph 4 of his section 19(f) affidavit, he testified that he was confused not unconscious. This contradiction casts doubt of the credibility of the Plaintiff as a witness.
- [29] Considering all the facts of the matter I am not satisfied that the Plaintiff has proved on a balance of probabilities that the insured vehicle/driver was the sole cause of the collision and resultant injuries. Although the Defendant argues that on the merits the Plaintiff should be held 100% liable for the collision, the Defendant has not adduced any evidence based on which such a conclusion can be reached. It cannot therefore be said that the Defendant did not contribute to the collision. I find that the contribution of the Plaintiff in the collision was equal if not more than that of the insured driver.
- [30] I accordingly find that the Defendant is liable to compensate the Plaintiff for 50% of the Plaintiff's proven damages and the Plaintiff's claim should therefore be adjusted accordingly in terms of the provisions of the Apportionment of Damages Act 34 of 1956.

Quantum

General Damages

- [31] As stated above the Defendant has rejected the seriousness of the Plaintiff's injuries and the claim for general damages is accordingly to be referred to the Health Professions Council of South Africa for determination. This court will consequently not deal with this aspect at this stage. The claim for general damages is consequently postponed for further case management pending the decision of the Health Professions Council of South Africa tribunal.

Past and Future Medical Expenses

- [32] Concerning the quantum in respect of past medical/hospital expenses the Plaintiff's case is that he was admitted at Life Midmed Private Hospital and incurred medical bills during his stay there. He avers that all medical expenses were necessary and that the exact costs can be obtained from the treating Doctors and/or Hospitals. However, as the medical bills have not yet been submitted to the Defendant, this aspect will be postponed sine die. Regarding the Plaintiff's future medical/hospital expenses, the Plaintiff seeks an undertaking in terms of section 17(4)(a) of the Act as indicated by the experts in their medico-legal reports.

Past and Future Loss of Earnings/Income

- [33] Concerning the past and future loss of income, the Plaintiff relies on the reports by experts to assess the impact of the injuries on his past and future loss of earnings/income. The Defendant on the other hand has not presented any expert reports or evidence on this head. After the parties submitted to the court that they that they agree that the evidence of experts be admitted in terms of Rule 38(2), the reports of the Industrial Psychologist Dr. B Selepe, the Occupational Therapist Ms M Sekele and the actuary Nilen Kumbaran of Arch Actuarial were admitted as evidence in terms of Rule 38(2).

Dr B Selepe

- [34] In her report Dr Selepe notes that during her interview the Plaintiff the latter complained that after the accident he inter alia had limited strength, experienced pains on the left arm and could carry not heavy items. He confirmed that at the time of the collision, he was 37 years of age and employed by the South African Police Service ("the SAPS") from 2010 as a constable. He is still employed by SAPS and has approximately 17 years overall working experience of which 12 years was as Constable on a permanent basis. In 2022, not long after the accident, he was promoted to the rank of sergeant which he still holds.
- [35] Concerning pre-accident earning potential Dr Selepe stated that according to his payslip dated 30/11/2021 the Plaintiff's gross monthly salary was about R20367.32. He would have been expected to continue working as a Police constable without any limitations with his earnings expected to increase per annum with progression from one notch to another and possibly securing a promotion to sergeant in 1-2 years depending on the availability of posts.

- [36] She opined further that considering his drive and motivation, with more experience the Plaintiff could have progressed after 7 to 10 years, to the rank of Warrant Officer B1 Lower Band with a salary of approximately R309,354 per annum (April 2022-rand value) according to salary structure of SAPS. She postulated further that he could have probably reached career ceiling at a position graded in terms of accountability, complexity and responsibility at Warrant Officer B2 Upper (WOO earning approximately R 489 297 (1 April 2022) per annum Notch, level 15 or Captain, B and C earning approximately R 456 768 Notch level 7 in line with the SAPS basic salary within the government sector around the age of 50 years. At this stage his career would have stabilized and annual inflationary increases would apply until retirement.
- [37] Dr Selepe suggested further that an actuarial calculation which applies a straight line increase from career entry point until the earnings ceiling is reached be adopted, as this results in a decreasing pattern of real increases in earnings, with inflationary increases thereafter. The annual inflationary increases would have applied until normal retirement age of 65 years or even beyond depending on health and the policy/agreement with the employer.
- [38] She stated that given the above-mentioned scenarios, in the absence of serious health impairment and with his willingness to study further, personal work capacity and strength intact, the Plaintiff would have been able to exercise his career choice moving from one job to the next, depending on the availability of jobs, academic background and work experience within his field. This means his career options would not have been impacted upon, suggesting that he would not have been able to exercise career choice the same way as his peers.
- [39] Concerning the post-accident earning potential, Dr Selepe stated that the Plaintiff reported that he resumed his duties seven months after the accident and was promoted to Sergeant from 2022. According to his payslip dated 29/12/2023 his gross salary amounted to R25403.00. On his employability she referred to Orthopaedic Surgeon Dr P. T. Kumbirai's report in which the latter note that the Plaintiff sustained a painful shoulder-traumatic left rotator cuff pathology which was treated with rotator cuff repair. Dr P. T. Kumbirai however also noted that the left upper limbs x-rays showed no bony pathology. He noted further that he reportedly suffered severe acute pain for about 2 weeks which subsided over a period of 4 weeks. The Plaintiff reported that he continues to suffer the inconvenience and discomfort of chronic pain from the left shoulder.
- [40] Dr Kumbirai further noted that the pain in the left shoulder will limit the Plaintiff's choice of occupations such as occupations which require lifting of heavy weights and he will therefore not be able to compete fairly for a job on the open labour market. He noted further that the injuries sustained in this accident are not likely to influence the Plaintiff's natural survival although he will need to consult his general practitioner, orthopaedic surgeon and physiotherapist from time to time. He stated further that no future surgery is foreseen and that the Plaintiff has reached maximum medical improvement. He however noted that he

qualifies under the narrative test for serious long-term impairment.

- [41] Dr Selepe further stated that she obtained collateral information from one Colonel Nkosi of the SAPS who reported the following in respect of the Plaintiff condition and status on 06/06/2024:

“I knew of the Plaintiff’s involvement in the accident. He was injured on his arm but can still perform his duties. I do not have any complaints and he can still do relevant duties. He was not accommodated in any way. The injuries did not hamper his entire

career as he can still go to the next rank of Warrant Officer.”

- [42] Dr Selepe concluded that given his medical prognosis and outcomes, the Plaintiff may not, in all probabilities, progress, as postulated in his pre-morbid career path and thus would likely suffer the loss of potential earnings as a result of the accident in question. She states further that although upon successful recommended treatment and rehabilitation his symptoms can be expected to subside, complete healing seems to be unforeseeable and he may not return to his pre-accident level of functioning to engage a wide spectrum of occupations or positions he would have prior to the accident due to his orthopaedic impairments. She

concludes that this means that his prospects of venturing into other fields are negatively affected and render him a vulnerable and unequal competitor in the open labour market where physical strength is of great importance. (my emphasis).

Ms Sekele (Occupational Therapist)

- [43] The Occupational Therapist Ms Sekele notes that the Plaintiff performed well on aspects of evaluation which required reading, writing and arithmetic. His pre-accident job duties are classified as medium work as per the physical demands of the job. He therefore demonstrated the ability to meet the physical demand characteristics of aspects of work at a lower range medium level. She opines that he has residual physical ability to perform up to lower range medium work with reasonable accommodation for prolonged carrying and lifting of heavy objects. (my emphasis).
- [44] The Occupational Therapist noted further that the Plaintiff’s residual physical capacity does not fully match the physical demands of his post-accident duties as a police officer. She states that he is limited in aspects of his post-accident job duties that require prolonged lifting and carrying of heavy weights objects. She notes that physically, he is not competitive for full medium, heavy and very heavy work. He is also not suited for work that requires weight handling above 15kg and that he is more suited for work within the sedentary, light and up to the medium range medium category and with the above reasonable accommodations.

[45] She is therefore of the view that considering the above, he is not a fair competitor in the open labour market. She concluded that, although upon successful recommended treatment and rehabilitation the Plaintiff's performance is expected to improve, complete healing seems to be unforeseeable. She thus concluded that he may, in all probability struggle to cope with job demands of his occupation as a Constable. She states further that given his current prognosis and outcome by the relevant experts, the Plaintiff may not, in all probability, progress, as postulated in his pre-morbid career path and thus, he would likely suffer the loss of potential earnings as a result of the accident in question. As such, the Occupational Therapist opines that the Plaintiff's should be compensated for the difference between his pre-morbid and post morbid earnings potential which was caused by the accident in question. (my emphasis).

Nilen Kambaran

[46] The actuary's report is based mainly on Dr Selepe's report. It is based on inter alia Dr Selepe's report opinion that were it not for the accident the Plaintiff would not have progressed either to the rank of Warrant Officer B2 or Captain by age 50. Based on the information and estimation of his career ceiling the following calculations were made in respect of future earnings:

Pre morbid

R9 196 998

Less 15% contingencies:

R1 379 550

Net future earnings: R7 817 448

Post morbid

R8 032 368

Less 35% contingencies:

R2 811 325

Net future earnings:

R5 221 033

Loss of earnings after contingencies:

(R9 196 998 - R8 032 358)

R1 164 640

(R1 379 550 – R2 811 325)

R1 431 775

Net future loss (R7 817 448 - R5 221 033)

R 2 596 415

[47] The Plaintiff however presented the following calculations of the future loss of income which seems to be at variance with that of the actuaries:

Post-Morbid Earnings

(Having regard to the Accident)

Past Loss of Earnings:

R9 196 99.00

R9 196 998.00

Less Contingency:

15%

(R1 379 549.70)

Subtotal

R7 817 448.30

Future Loss of Earnings:

R9 196 998.00

R9 196 998.00

Less Contingency:

35%

(R3 218 949.30)

Subtotal:

R5 978 048.70

Total Post-morbid Earnings:

R1 839 399.69

TOTAL LOSS OF EARNINGS:

R1 839 399.69

- [48] The Plaintiff's counsel stated that the Plaintiff is relying on the actuarial calculations in which the contingencies of 15% and 35% were applied in respect of pre morbid and post morbid future loss of earnings respectively. Based on these calculations the Plaintiff contends that an amount of R1 839 399.69 is a fair and reasonable total loss of earnings.
- [49] The Plaintiff's counsel further submits that given the above, although upon successful recommended treatment and rehabilitation the Plaintiff's symptoms can be expected to subside, complete healing seems to be unforeseeable, and he may therefore not return to his pre-accident level of functioning to engage in wide spectrum of occupations or positions he would have had prior to the accident due to his orthopaedic impairments. This means his prospects of venturing into other fields are negatively affected and thus rendering him a vulnerable and unequal candidate when competing with his non-injured peers with similar skills, knowledge and experience in the open labour market, specifically in job where physical strength is of great importance. (my emphasis).
- [50] On the loss of past earnings counsel for the Plaintiff concedes that no loss was incurred by the Plaintiff as a result of the accident in question. However, concerning the future loss of earnings counsel submits that provision should be made for the expected loss of income for time taken off duty to undergo treatment and rehabilitation as recommended by the relevant experts. She further referred to Plaintiff's actuarial report and calculations therein on past and future loss of earnings.
- [51] The Plaintiff's counsel submits in conclusion that there are incapacitating factors present that will limit the Plaintiffs employability, future career choices and income potential and he has sustained injuries that had compromised his health and therefore affecting his physiological and occupational abilities. She further states that it is postulated that the Plaintiff is an unequal competitor at the open labour market compared with his healthier peers and that he will not be able to perform functions efficiently and effectively as compared to his counterparts. Thus, the injuries sustained from this accident would hinder his career and future employability in that regard.
- [52] Counsel submits further that his progression through his career is considered restricted and compromised as a result of the impact of the accident-related injuries, resulting in a loss of earnings. She submits further that in the light of the above an order be made in favour of the Plaintiff. In the following terms with costs.
1. 100% award on the merits in favour of the Plaintiff;
 2. Section 17(4)(a) Undertakings for Future Medical/Hospital Expenses; and
 3. An amount of R1 839 399.69 for Past & Future Loss of Earnings.
- [53] It is settled law that in order to successfully claim loss of earnings or earning capacity, a claimant must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss. *Rudman v Road Accident Fund* 2003 SCA 234. In her report, the Industrial Psychologist, Dr Selepe in essence concluded that the collision and

resultant injuries have impacted the Plaintiff's earning capacity. She basically relied on the information received from the Plaintiff, the Occupational Therapist and the Orthopaedic Surgeon as to the nature of the injuries sustained and impact thereof on the Plaintiff's earning capacity. In turn the actuary calculated the potential loss of earnings based on the Industrial Psychologist's report.

- [54] Although the Industrial Psychologist opined that the Plaintiff may, in all probability struggle to cope with job demands of his occupation as a police officer and that he may not, in all probability, progress, as postulated in his pre-morbid career path and would likely suffer the loss of potential earnings, Dr Selepe does not deal at all with the fact that the Plaintiff has already been promoted to a higher rank after the accident. Furthermore, she fails to address the important collateral information received from the Plaintiff's supervisor or "employer" save for only mentioning it. This information, which was at Dr Selepe's disposal when she made her report, is obviously very relevant and important to consider in determining the impact of the injuries on the capacities.
- [55] Dr Selepe clearly deliberately ignored Colonel Nkosi's report which in essence contradicts the conclusion in her report. Colonel Nkosi states clearly that despite the arm injury, the Plaintiff can still perform his duties as normal and was not accommodated in any way. He specifically says that the Plaintiff has not complained about his ability to work. But most importantly concerning career progression Colonel Nkosi categorically states that the injuries did not hamper his entire career and that in his view there is no reason he cannot still progress to the next rank of Warrant Officer. This vital information was given by Nkosi to Dr Selepe on 06/06/2024, more than two and half years after the accident. Furthermore, despite stating that were it not for the accident the Plaintiff would not have progressed to higher ranks than that of constable, which he occupied at the time of the accident, Dr Selepe does not deal at all with the fact that despite the accident the Plaintiff was elevated to a higher rank of sergeant in 2022, after the accident.
- [56] It is clear that the Industrial Psychologist's report failed to deal with very crucial information which should have been considered. This undermines the reliability and credibility of the report. Despite the fact that this evidence is revealed in her own report, she has not factored it in making her conclusion. Other than Dr Selepe's conclusion that the Plaintiff may, in all probability struggle to cope with job demands of his occupation as a Constable that he may in all probability not progress, as postulated in his pre-morbid career path, there is no evidence that the Plaintiff is at a risk of being dismissed or losing his current position and that the prospects of him obtaining progressing have been negatively impacted by the injuries. On the contrary the evidence by the employer in no uncertain terms suggest that the Plaintiff's injury has not affected his employability as a police officer, his work performance and career progression. (my emphasis).
- [57] As opposed to Colonel Nkosi's factual assertions, the nature of the conclusions reached by the Industrial Psychologist are speculative on very important aspects. When considering the above, there is clearly no sufficient evidence to establish that the Plaintiff's earning capacity

has been adversely affected by the injury nor is there evidence that that he may not progress to higher ranks. On the contrary there is evidence that he has already progressed a rank up since the accident happened. The Industrial psychologist has not commented on this aspect or stated what the import thereof is in the greater scheme of things.

- [58] It is trite for a claim to succeed, the injured person or Plaintiff to prove that they suffered a reduction in the earning capacity which will result in the actual loss of income. As stated in *Prinsloo v Road Accident Fund* 2009 5 SA 406 (SECLD), earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven, the loss may be compensated if it is quantifiable as a diminution in the value of the estate. However, physical disability or injury which impacts on the ability to earn an income does not automatically reduce the patrimony of the injured. The onus is on the injured person or Plaintiff to prove the loss.
- [59] Likewise, in *Rudman v Road Accident Fund* 2003 SCA 234, it was stated that a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. The Plaintiff must prove that the reduction of the income earning capacity will result in actual loss of income. He must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss.
- [60] In this case I am not persuaded that the evidence supports the claim that the Plaintiff has suffered any loss of earnings or earning capacity as a result of the injuries sustained in the collision. As stated above, his injury has not affected his functioning, the ability to do his work and his chances of progressing up the ranks.
- [61] In my judgment the injuries he sustained have not affected his earning capacity or career progression. His pre-and-post-morbid earnings remain the same. I consequently find that the Plaintiff has not proven that he is entitled to any compensation for loss of earning capacity. Consequently, the claim for loss of earnings stands to be dismissed.
- [62] Concerning the future medical treatment there appears to be no contentious issues there. Even though no operations are envisaged, the reports show that the Plaintiff may need some pain medication and consultations from time to time for the management of pain. It has not been contested that the Plaintiff is entitled to a section 17(4)(a) undertaking, and I am accordingly satisfied that the claim on this head should succeed.

Order

[63] I accordingly make the following order:

1. The Plaintiff's claim on the merits succeeds and the Defendant is ordered to pay 50% of the Plaintiff's proven damages;
2. The claim for future loss of earnings is dismissed;
3. The claims in respect of general damages and past medical expenses is postponed sine die;

4. The Defendant is ordered to furnish the Plaintiff with an undertaking for future medical and hospital expenses in terms of section 17(4)(a) of the Act;
5. The Defendant is ordered to pay the costs of the litigation on scale B which costs are accordingly apportioned on a 50/50 basis.

MBG LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG

Appearances

For the Plaintiff: Advocate NT Mthombeni For the Defendant: Mr N Mhlanga Date of hearing: 05 November 2024 Date of judgment: 25 March 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 25 March 2025 at 14h00.

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