

SOUTH AFRICA / JUDGMENT

Phala v Road Accident Fund (7712/2020)

[2024] ZALMPPHC 56 (23 May 2024)

[2024] ZALMPPHC 56**COURT**

Limpopo High Court, Polokwane

BEFORE

Mashamba

CASE / FILE NUMBER

7712/2020

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Policy**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****LIMPOPO DIVISION,****POLOKWANE****CASE NO:7712/2020****(1)****REPORTABLE: NO****(2)****OF INTEREST TO THE JUDGES: YES/NO****(3)****REVISED****DATE:**

23 – 05 – 2024

SIGNATURE

In the matter between: JOSHUA LEKGOWA
PHALA
PLAINTIFF
And
ROAD ACCIDENT
FUND
DEFENDANT

JUDGEMENT

MASHAMBA AJ:

- [1] The Plaintiff has instituted an action against the Road Accident Fund ("Defendant") for damages resulting from personal injuries he has sustained as a passenger in a motor vehicle accident Isuzu KB with registration numbers [...] there and then driven by one Sello Samuel Rasehlo which vehicle collided with another motor vehicle with registration number [...] there and then driven by the insured driver Disego Reuben Modiba at Ga-Chuene along the R37 public road to Polokwane on or about the 28th November 2017.
- [2] The Plaintiff was 22 years old when the accident occurred and currently 29 years old, unemployed.
- [3] On the 11th October 2021, the Madam Justice Semanya DJP granted an order in terms of which the Defendant was found liable for the plaintiffs proven damages to the extent of 100%, whilst the issue of quantum of damages suffered was postponed sine die.

ISSUE BEFORE THIS COURT

- [3] The Court is called to determine the Plaintiff's claim for general damages, past, future medical expenses and past, future loss of earning.
- [4] The Plaintiff claimed an estimated amount of R 10 431 250.00 calculated as follows;

4.1 Past medical Expenses

R 250 000,00

4.2 Future Medical Expenses

R 300 000,00

4.3 Past Loss of Income

R 92 175,00

4.4 Future Loss of Income

R 8 789 075,00

4.5 Non-pecuniary Loss

R 1 000 000.00

[5] The Future Medical Expenses claim will be substituted with an undertaking certificate in terms of section 17

(4) (a)-(b) of the Road Accident Fund Act 56 of 1996, as amended.

[6] The summons against the Defendant was issued on the 09th December 2020, and served by sheriff on the 21 January 2021, at the Defendant principal place of business. The Defendant did not enter his appearance to defend as required.

[8] The Plaintiff proceeded with their submissions on the absence of the Defendant, The Plaintiff used the experts' medical reports to substantiate his claim. The Plaintiff relied on the following expert reports;

8.1 Dr PT Kumberai (Orthopaedic Surgeon)

8.2 Dr KA Tseka (Neurosurgeon)

8.3 Dr RK MARINGA (ENT Specialist)

8.4 VP CLOETE (Educational Psychologist)

8.5 A Swanepoel (Psychotherapy & Counselling)

8.6 NJ Mabote (Occupational Therapist)

8.7 S Mkabile (Industrial Psychologist)

8.8. Robert J Koch (Actuaries)

[9] The Defendant did not defend the matter and the Plaintiff proceeded with his submissions based on the conclusions of the medical experts reports duly filed before the Court. The Court evaluated the probabilities of all experts' evidence. In Prince v Road Accident Fund[1], the Court held at paragraphs 55, 56 and 59 in the evaluation of the probabilities in respect of expert evidence.

"[55] Sufficient proof is established when an inference can be drawn about the fact in issue, providing that the inference is consistent with all the proven facts. In civil matters, it suffices if the inference is the most probable inference.

[56] Further, once prima facie proof or evidence has been provided, that is proof calling for an answer. This becomes conclusive proof on the point in issue usually if no evidence is produced to rebut it. The fact of the matter is, however, that the Court must at the end of the case review all the evidence and evaluate this according to the applicable primary criterion.

[59] It must be accepted, of course, that where, for example, a Defendant fails to produce evidence, this does not mean necessarily that the opponent's version in the case, falls to be accepted. The acceptance of Plaintiff's case depends on the probative strength of Plaintiff's case, being whether it is sufficient to cast, an evidential burden on the Defendant to present evidence. "

PLAINTIFF'S INJURIES AND EVIDENCE

- [10] The medical records from Polokwane Provincial Hospital show that the Plaintiff had the following injuries; laceration on the base of the nose and abrasion of the fore head. The Plaintiff was admitted on the 28 November 2017 at 08h55 and discharged the same date, at 10h55.[2]
- [11] The Plaintiff gave viva voce evidence, and confirmed that he was a passenger at the motor vehicle referred above which occurred on the 28 November 2017. The Plaintiff proceeded to say that as a result of the unbearable chest pain, he cannot do any type of work to earn a living.
- [12] Dr PT Kumberai (Orthopaedic surgeon), examined the Plaintiff on the 21 July 2020, and recorded injuries sustained as laceration to forehead and nose. The Plaintiff reported painful Knee to the Orthopaedic surgeon. The knee was examined and it was found that there is no deformity noted, and that the knee had a full range of motion without a pain and neurovascularly was intact. The Orthopaedic surgeon opined that it is difficult to ascertain internal derangement of the left knee. The Plaintiff was referred to Ors Mkhabele and Indunah Radiologist on the 21 July 2020, and the result show no bone pathology. These clinical and radiologist findings =0 LEI (Class 0) = 0 WPI. No significant negative orthopaedic effect foreseen.
- [13] Dr KA Tseka, (Neurologist) examined the Plaintiff on the 03 April 2021, the Plaintiff sustained a head injury. The Plaintiff reported that he has headache which is throbbing in character and graded 6/10. The Neurologist associated with photophobia and phonophobia. The neurologist opined that the Plaintiff injuries' sequelae is mild concussion and 4% WPI. [3]
- [14] Dr RK Maringa, (ENT specialist) has examined the Plaintiff on the 9th June 2021, He assessed the Cranial nerves and found left Vestibulocochlear, nerve fallout. The ENT concluded that the Plaintiff sustained head injuries with loss of hearing. The ENT concluded that the Plaintiff needs hearing aids[4].
- [15] VP Cloete, (Educational Psychologist) has examined the Plaintiff on the 6 April 2022. The Plaintiff reported that pre -accident, he repeated grade 3,7 and 10. The Plaintiff failed grade 11 in 2017, and dropped out in 2018, as a result of memory loss, painful left knee and that he was demotivated. When considering the pre-cognitive functioning of the Plaintiff, there were no indicators of ill health or development delay. The Educational Psychologist opined that pre accident repeated grades could be an indicator that the Plaintiff might had undiagnosed learning difficulties. The Educational Psychologist further opined that based

on the information on hand the Plaintiff would most probably a child of at least average intelligence with the ability to pass grade 12 and probably ability to pursue tertiary studies if he had received the necessary support and interventions

for his undiagnosed learning difficulties.[5] The Educational Psychologist further opined that the Plaintiffs cognitive functioning post-accident is compromised as he dropped out of school in 2018.

[16] Swanepoel (Psychotherapy), examined the Plaintiff on the 18 May 2022, and opined that based on the Plaintiff performance on certain task, still trying to use his left leg for abilities which will suit his condition. The Plaintiff short term memory conditions are making his abilities much lower as compared to others. Swanepoel opined that the Plaintiff supposed to go for X RAY of his chest, head and left knee. Swanepoel further opined that the Plaintiff must see another neurologist for second opinion. Swanepoel opine that the Plaintiff display no self-esteem or maladaptive behaviours and that his behaviours do affect his functioning in the society environment or very negatively impacted on his normal living.

17] NJ Mabote (Occupational Therapist), examined the Plaintiff on the 04th August 2021, who opined that the Plaintiff sustained soft tissue injuries to the left knee and left chest wall. Knee pain is triggered by joint flexion, standing on the left leg. Climbing and squatting triggers left knee stability which affect static balance on the left leg. The Plaintiff could not lift more than 13.6 kg with the left hand due to reported left knee and chest pain. The Plaintiff has poor standing endurance and functional sitting endurance, his performance with regards to problem solving was below average, especially with concrete functional planning skill.[6] The Plaintiff physical and cognitive impairments render him incapacitated to perform most occupations.[7]

THE PLAINTIFF LOSS OF EARNING

[18] S Mkabile (Industrial Psychologist), examined the Plaintiff on the 17 November 2021, noted that the Plaintiff obtained C1 driving license in 2016. The accident occurred on the 28 November 2017(after completing his grade 11 final examinations). The Plaintiff reported that in 2018 he returned back to school, however, dropped out due to accident injuries. The Plaintiff reported that he worked as a taxi driver for a week, thereafter, resigned due to not coping with his work demand due to accident-related challenges. He remained unemployed.

[19] Mkabile (Industrial Psychologist), postulated the Plaintiff earnings on pre accident Scenario 1, certificate (NQF level 5). The Industrial Psychologist opined that after the completion of matric probably in 2019/2020, the Plaintiff could have enrolled for a certificate of his choice and that upon the completion probably in 2021/2022 it could have taken him twelve (12) months to do learnership in which the Plaintiff could earn R 99 938 per year. Then after completing his learnership, it could have taken the Plaintiff at least 0-12 months to secure employment which is in line with his qualification. In this regard, the Plaintiff is likely to have started earning between lower and upper quartile Paterson level B3.[8] With experience, better employment opportunities and promotional prospects, the Plaintiff is likely to have progressed and reached his ultimate earning level at the upper quartile

Paterson Level C2 (total package) when he reached 45 years with applicable inflationary increase.

- [20] The Industrial Psychologist, Scenario 2, National Diploma (NQF Level 6), It was opined that after completion of matric, probably in 2019/2020, the Plaintiff could have enrolled for a Diploma of his choice. Upon completion of his Diploma probably in 2022/23, it could have taken him about 12 months to do learnership in which he could have earned R 99 938 per year. Then after completing his learnership, it could have taken him at least 0-06 months to secure employment which is in line with his qualification. In this regard, it is likely to have started earning between lower and upper quartile of Paterson B4, with experience, better employment opportunities and promotional prospects, the Plaintiff is likely to have progressed and reached his ultimate earning level at the upper quartile of Paterson Level C4 (total package) when he reached 45 years with applicable inflationary increases.[9]
- [21] The Industrial Psychologist, opined that the accident, rendered that Plaintiff an unequal competitor for the gainful employment as well as much more vulnerable employee having to compete with well-bodied individuals for employment. The Industrial Psychologist, further opined that, the Plaintiff is currently unemployed, and it is beyond reasonable doubt that this accident in question has rendered the Plaintiff practical unemployable in the open labour market and this will constitute total loss of future earnings.
- [22] This leads me to the issues of the award for the future loss of earning capacity and contingencies to be applied. In this regard I am also guided by *Mngomezulu v RAF*[10], where Kgomo J argued that:
- "[84] For the Plaintiff to succeed in a claim for loss of earnings, he is required to provide a factual basis for an actuarial calculation. This is a process designed to assess actuarial/mathematical calculations on the basis of the evidence as well as over-all assumptions vesting or depending on such evidence. This approach is known as the actuarial approach.
- [85] The actuarial approach seeks to determine the loss of earnings as realistically as possible to what may be the Plaintiff's actual losses. The approach comprises of (a) providing a factual basis upon which the loss of earning is to be calculated and only then (b) by applying appropriate contingency deductions."
- [23] The Plaintiff submitted that 35% contingency deductions will be reasonable considering the Plaintiff's age, qualifications and that the discretion of the Court should be accepted.
- [24] The Court finds that injuries in the medical records are not identical with the injuries reported in various medical reports. The Plaintiff reported knee injury to the orthopaedic surgeon, but such was not recorded in the medical records. The Plaintiff reported chest pain with the Occupational Therapist but the same was not on the records. The Plaintiff reported that he became unconscious when the accident occurred but such information was not documented in the medical records. A Swanepoel, a Psychotherapy opined that the Plaintiff should be reexamined by neurologist and the findings of the Psychotherapist was not

conclusive and such evidence did not help the court.

- [25] The nexus between the injuries recorded in the medical records and other injuries reported by the Plaintiff in various experts were not succinct. The extent of neurological impairment was not precise from the reports. The Court noted that it has taken approximately, two (2) years nine (9) month before the Plaintiff was assessed by the orthopaedic surgeon. The Court further noted that other medical experts assessed the Plaintiff after three
- (3) years post-accident. So, the Court is not satisfied that all injuries reported are motor vehicle accident related.
- [26] I deliberately highlighted the above inconsistencies in para 24 and 25 supra in order to demonstrate issues I have taken in to account when deciding a reasonable compensation for the Plaintiff damages as a result of the motor vehicle accident in question.
- [27] The Court find that pre accident the Plaintiff had some learning challenges and that it will not be reasonable to suggest that the Plaintiffs' drop out from school was entirely due to the motor vehicle accident-related injuries. The Plaintiff repeated four (4) Grades before the accident so this indicates that pre-accident the Plaintiff had challenges as opined by the Educational Psychologist. In my view, the accident might have contributed slightly to the dropout from school but the Plaintiff had a serious learning challenges pre-accident. The accident happened after the 2017 final examinations but the Plaintiff yet failed grade 11 and thus was not as a result of the accident.
- [28] When dealing with the issues of future loss of earning and General damages I took note of all discrepancies I found from the medical experts reports. I find that the Plaintiff pre morbid and post morbid future earnings capacity are equal. The Court shall compensate the Plaintiffs future loss of earnings by applying a spread contingency method of 10 %. In Southern Insurance Association Ltd v Bailey NO 1984
- (1) SA 98 (A) Nicholas JA stated as follows at 116 G - 117 A:
- "Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the Plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case."
- [29] The Plaintiff appointed Robert J Koch Actuaries to calculate the Plaintiff's loss of income based on the Industrial Psychologist report. The Court is going to concentrate on the scenario 1 of the actuarial calculations.
- [30] I therefore find that the following contingencies should apply:

SCENARIO 1:

Pre-morbid Earnings (had the accident not occurred)

Future loss of earnings

R 9 606 430,00

Less contingency

15 %

R - 1 440 964,50

Total Pre-morbid Earnings

R 8 165 465,50

Post-morbid Earnings (having regard to the accident)

Less contingency

25%

R -2 401 607,50

Total Post-morbid Earnings

R 7 204 822,50

Pre-morbid earnings minus post-morbid earnings

$R\ 8\ 165\ 465,50 - R\ 7\ 204\ 822,50 = R\ 960\ 643,00$

TOTAL LOSS OF EARNINGS

R 960 643,00

[31] In the circumstances, I find that the appropriate amount to be awarded to the Plaintiff in respect of the future loss of earnings capacity is in the sum of R 960 643,00

GENERAL DAMAGES:

[32] In dealing with general damages, I considered the order granted on the 28th July 2023 by the learned brother Judge Kganyago, and in brief the order compelled the Defendant to within 10 (ten) days from the date of service of the Court Order to indicate that the Plaintiff injuries had been correctly assessed as serious as per the RAF 4 form by Dr Tseka. The Court Order required the Defendant to exercise his rights in terms of regulation 3(3)(d) to reject or direct the Plaintiff for assessment by designated medical practitioner of his choice. The Court Order further indicates that if the Defendant fails within 10 (ten) days from the date the Defendant received the Court Order the Plaintiff will be deemed to have qualified for general damages. The above Court Order was served to the Defendant Menlyn office on the 08 September 2023. The Defendant did not comply with the Court Order, instead Defendant is

mute. The Court Order was not varied nor rescinded in terms of Rule 42, of the Uniform Rules of the High Courts. This Court proceeded to adjudicate on the issues of the general damages.

- [33] Moseneke DCJ in *Van der Merwe v Road Accident Fund and Another*[11] stated that, non-patrimonial damages, which also bear the name of general damages, are utilized to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include "pain and suffering", "disfigurement",

and "loss of amenities of life." [12]

- [34] The Plaintiff submitted that the amount of R 1 000 000.00 (ONE MILLION) is fair and reasonable to compensate the Plaintiff. The Plaintiff referred the Court in the unreported case of *Mguni v Road Accident fund* (810/2005 North Gauteng) a 39-year-old suffered a brain injury and experienced headache, pain in the neck, shoulder, knee and ankle. He suffered memory, concentration and attention difficulties but was taken back at his employment. The court awarded him R 700 000,00 19 years ago. The current value is n bbbbbbbover R 2 500 000,00.
- [35] In another case the *Megaline v Road Accident Fund* [2007] 3 ALL SA 531 (W) an 11-year-old boy suffered a head injury and experienced profound neurological impairments and disfigurement. The court held that his loss of amenities was profound and awarded R 1 000 000,00 for general damages.
- [36] In the case of *Nkosi v RAF* 2009 6 QOD J2-16 (GSJ) the plaintiff had lacerations on the head, a concussion, and chest injury and hand fractures. In current values, the amount awarded to the plaintiff was R449 000-00.
- [37] The Plaintiff's Counsel referred me to several case laws. It is so that one cannot find a case that is exactly the same as that of the Plaintiff, however there are injuries and sequelae that informs me in determining the general damages. I have considered the injuries and I am inclined to agree with the Plaintiffs counsel that the plaintiff must be compensated. I however, considered that in some of the matters I have been referred to, the injuries might have been worse, therefore, I am of the view that the amount that is fair and appropriate in this matter is the sum of R 500 000.00 for general damages.

ORDER

- [38] In the circumstances, the following is the Order of this Court:

1. The Defendant shall pay the Plaintiff the sum of R 960 643 (Nine hundred and sixty thousand, six forty-three Rand) in respect of loss of Earnings.
2. The Defendant shall pay the amount of R 500 000,00 (Five Hundred Thousand Rands) in respect of the general damages. TOTAL: 1 460 643,00
3. The Defendant shall furnish the Plaintiff with an undertaking in terms of section 17 (4) (a) of Act 56 of 1996 within 180 days from the date of delivery of the Court Order.
4. The Amount in paragraph 1 and 2 above shall be paid into following Bank Accounts;

NAME OF BANK: [...]

ACCOUNT HOLDER: I[...] P[...] A[...]

ACCOUNT NO: [...]

BRANCH CODE: [...]

ACCOUNT TYPE:C[...]A[...]

1. The Defendant shall be liable to pay interest on the aforesaid amounts tempore morae at the rate of 7% per annum from 180 days after the date of this order to date of the payment.
2. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs until the date of this order including costs of a counsel scale C.
3. The costs consequently in the preparation of and obtaining the medico legal and actuary reports that were served on or provided to the Defendant.
4. The reasonable taxable preparation, qualifying and reservation fees, if any of the Plaintiffs experts for trial of whom notice was given to the Defendant.
5. The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the Plaintiff for attending the medico legal examination, subject to the discretion of the taxing master.
6. The reasonable taxable costs of traveling, subsistence, accommodation costs of the Plaintiff for attending court.
7. The Defendant shall be liable to pay interest on the amount of the Plaintiff's costs of suit, as taxed or agreed, at 7 % per annum from 14 (fourteen days) of the allocatur of the taxing master or the date of the agreement, whichever applies, to date of payment.

MASHAMBA AJ

JUDGE OF THE HIGH COURT, POLOKWANE;

LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : PROF/ADV JLH LETSOALO INSTRUCTED BY : ISHMAEL PHALA
ATTORNEYS FOR THE DEFENDANT : NO APPEARANCE INSTRUCTED BY DATE OF HEARING : 08
MAY 2024 DATE OF JUDGEMENT : 23 MAY 2024

- [1] (CA 143/2017) [2018] ZAECGHC 20 (20 March 2018)
- [2] Medical records bundle, page 1-2
- [3] Medical reports bundle, page 30
- [4] Medical reports bundle, page 35
- [5] Medical experts bundle, page 54
- [6] Medical experts reports bundle page 68-67
- [7] Medical experts reports bundle page 70
- [8] Medical experts report bundle page 79-80
- [9] Corporate Survey Earnings(Robert J Koch, Quantum Yearbook, 2022)
- [10] (Case No. 04643/2010) [2011] ZAGPJHC 107 (8 September 2011)
- [11] (CCT48/05)
- [2006] ZACC 4
- [12] Cf: Sandler v Wholesale Coal Supplies Ltd 1941 AD 194 at 199 where the court held: "The amount to be awarded as compensation can only be determined by The broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case".

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