

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case number: 58762/2017

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED: YES  
17 JUNE 2022

JUSTIN MYBURGH

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

**JUDGMENT**

LESO AJ

**INTRODUCTION**

[1] Plaintiff claims damages against the defendant following a motor vehicle accident that occurred between a motorcycle with the unidentified registration

number and letters being driven by an unknown driver and the motor-cycle bearing registration numbers and letters [...] driven by the plaintiff on 04 December 2016 at R566 Onderstepoort at Rosslyn, Pretoria North

## BACKGROUND

[2] On 27 August 2019, before DJP Ledwaba the parties reached an agreement to settle the merits on the basis that the defendant shall pay 70% of the plaintiff's proven or agreed damages. The plaintiff's counsel moved a motion that the respective experts' evidence and other documentary evidence be admitted as evidence in support of the plaintiff's case and elected to proceed with the stated case. Having admitted the reports as evidence and having heard the counsel's submissions I reserved judgment to properly analyse the reports and consider the counsel's submissions.

[3] On 17 September 2021 the defendant's defense was struck out and during the trial, the defendant was not represented consequently, the plaintiff proceeded without opposition.

## ISSUES IN DISPUTE

[4] The matter was before the court to determine the following claims:

- 4.1 An amount of R 500 000.00 in respect of general damages;
- 4.2 Loss of income and/or earnings in the amount of R 2 843 292.00
- 4.4 An undertaking in terms of section 17(4)(a) of Act 56 of 1996 limited to 70% for future medical expenses and/or medical supplies and medical care for the necessary medical treatment and care as a result of the accident which occurred on 4 December 2016.

## EVIDENCE ON A CLAIM FOR GENERAL DAMAGES

[5] The plaintiff has furnished RAF4 forms which were completed by the orthopedic Surgeon, Clinical Psychologist, and Plastic and Reconstructive Surgeon who all

confirm that the plaintiff qualifies for general damages in terms of the narrative test. The plaintiff's counsel argued that the plaintiff is entitled to be awarded general damages in the absence of defence. The plaintiff's counsel argued that the implication of the aforementioned is that the defendant cannot raise any defence including non-compliance which is premised on the striking of the defence.

#### EVIDENCE ON LOSS OF INCOME AND EARNING CAPACITY

[6] For the purpose of this damages, the reports which are relevant to assist in determining the plaintiff's claim are as follows:

- 6.1 Clinical Psychologist, Dr Pauw
- 6.2 Orthopedic Surgeon, Dr. Engelbrecht;(22 September 2019)
- 6.3 Occupational Therapist, Ms Conradie
- 6.4 Industrial Psychologist, Dr Prinsloo;
- 6.5 Actuarial report,

[7] The collateral information gathered from Clinical Psychologist, Dr a Pauw indicates that the plaintiff was Twenty-three (23) years old at the time of the accident. The plaintiff had matric and he obtained various certificates in 2012 including an alignment certificate and he was employed by Monster Jeep as a mechanic from 2015 to 2018. At the time of the accident and assessment plaintiff was still employed in that capacity.

[8] The Orthopaedic Surgeon confirmed the plaintiff's injuries as follows:

- 8.1 Close fracture of the left femur and dislocation of the left elbow
- 8.2 Scarring to the left elbow and left hip.

[9] The expert reports that the plaintiff had surgery on his left elbow and left femur and after he was discharged from the hospital on 13 December he used a walking frame for six weeks while formal treatment was concluded in 2017 and he obtained medication over the counter for residual symptoms of the left hip and elbow. The experts reported that in 2018 the plaintiff was employed by Tyre Mart, Montana as

an alignment technician and he experiences pain on the left thigh, left hip and left elbow movement is impaired and sensitive to touch and he tires easily and he cannot walk a long distance or cannot carry heavy objects.

[10] The Orthopaedic Surgeon reported that the plaintiff's X-rays show that the left elbow fracture is united and the left femur has healed, abrasion scars of the distal left thigh and left knee have healed however he has a surgical scar on the left elbow. The expert reports that the plaintiff has reached maximum medical improvement however he opines that the plaintiff's capacity is limited to sedentary work. The expert opines that there is a likelihood that the plaintiff even with adaptations to his work station, the plaintiff will be able to work as a mechanic beyond the age of 60 years but only perform sedentary duties until the age of 65. The experts opine that per-accident early retirement will probably become inevitable.

[11] The expert indicates that the plaintiff suffered pre-accident injuries in 2003 where he was treated for ligaments of the left knee and left medial malleolus of the ankle and he was treated conservatively and has recovered from those injuries. In 2014 he had rib fractures.

[12] The Occupational Therapist reported that the plaintiff indicated to him that he now struggles with the physical work and he experiences pain in the left hip after 10 minutes he presented challenges with his left shoulder and right knee as well as neck and lower back. The expert reports that the plaintiff's level of work falls within the medium physical range and his post-accident work in a diminished state may be classified as light to medium work and he is unable to cope with his work or secure alternative employment after the accident. The expert reported that from the assessment result the plaintiff did not meet the dynamic strength requirements of both levels of work because he is permanently unsuited to medium and heavy.

[13] The Occupational Therapist reported that the plaintiff currently continues with his work as a mechanic because his son assists him however it is anticipated that he will probably not be able to run his business for as long as he wanted if the accident had not occurred. The expert opines that the plaintiff will not be able to reach his pre-accident work potential due to the right knee and left shoulder challenges and should

the business for any reason close down, he will struggle to secure and retain employment in a formal open labour market as he has always been a manual labourer. The expert opines that the plaintiff will be limited to some extent even in a managerial /administrative role and he postulates that the plaintiff is most likely to grow his business until such time the company was ready to appoint more employees to spread the workload. The expert concludes that the plaintiff's problems will harm his earning potential.

[14] The Industrial Psychologist, Wessel Van Jaarsveld conducted an assessment on the plaintiff on 01 June 2020 and completed an addendum report on 30 April 2021. The expert indicates that the plaintiff reported that he was earning an annual salary between R167 455.92 and R360 000.00 as a Diesel Mechanic. The Psychologist reports that the plaintiff has managed to retain his employment status since the accident occurred and his salary has since increased because his son is conducting the physical work and he earns an average income of R 271,020.00 per annum. The plaintiff's earnings are tabled as follows:

<b>June - November 2016</b>	<b>Dec 2016 to May 2017</b>	<b>July 2017</b>
R 11 477.13 per month	R11 447.13 per month	R10 000.00 per month
R 137 725.56 per annum		
<b>August 2018 to Dec 2018</b>	<b>Jan 2019-October 2019</b>	<b>March2020-Jan 2020</b>
R16 967.82 per month	R21 557.71 per month	R25763.42 per month
R203 493.89 per annum	R258 692.47 per annum	R309 161.06 per annum

[15] The experts conclude that the plaintiff's physical and cognitive capabilities are negatively affected by the injuries the plaintiff sustained and the plaintiff will likely continue in his pre-morbid role however he might need to scale down from his work and appoint additional employees sooner than expected. The experts postulate that the plaintiff might experience further future lack of productivity and motivation and future treatments will impact his earning capacity as he will need to close business or appoint another person during recuperation periods. The plaintiff has his son who is assisting him and the evidence indicates that his business is improving so is his income. The experts indicate that on post- Morbid earnings capacity, for the period of

December 2016 to May 2017 plaintiff's earnings were R11 477.13 and he opines that the plaintiff suffered the past loss of earnings in the amount of R11 477.13 while the plaintiff's counsel claims that the plaintiff lost income of R19 637.00.

[16] The Actuary calculated the plaintiff's Future loss of earnings at the total loss of **R 9 415 456** with no contingency application on the above amounts.

### ANALYSIS

[17] On the plaintiff's claim of general damages, Regulation 3(3)(c) provides that the Fund is only liable to compensate the third party for general damages in the event that the Fund is satisfied that the injury has been correctly assessed as prescribed by the Regulations in general. When the Fund is not satisfied that the third party's injuries were correctly assessed, the Fund can reject the third party's RAF 4 form and give reasons for its rejection [Regulation 3(3)(d)(i)] or direct the third party to a further assessment to establish if the injury is serious [Regulation 3(3)(d)(ii)]. In the event of the latter, Regulation 3(3)(e) allows the Fund to either accept the further assessment or to dispute it.

[18] There is no evidence before me as to when the RAF4 forms were submitted to RAF for consideration of general damages in terms of Regulations 3(3)(c) of 2008 and the plaintiff counsel did not make submissions in this regard. The plaintiff ought to first comply with the necessary legislative prescripts before he can approach the court.

[19] On the claim for past loss of income, the report of the Occupational Therapist and the Industrial Psychologist differs in as far as the report on the period the evidence. An income of R11 477.13 was recorded for the period of December 2016 to May 2017. In paragraph 14 of the judgment the plaintiff did not record any income in December except in 2016. While the plaintiff bears the onus to prove that he suffered past loss of income, the evidence before me does not support his claim.

[20] On the claim of future loss of income, the plaintiff continues with his work as a mechanic and his income has increased because his son assists him however it is

anticipated that he will probably not be able to run his business for as long as he wanted if the accident had not occurred. The expert opines that the plaintiff will not be able to reach his pre-accident work potential due to the right knee and left shoulder challenges and should the business for any reason close down, he will struggle to secure and retain employment in a formal open labour market as he has always been a manual labourer. From the evidence before me, the plaintiff's income has increased with the help of his son. The Industrial Psychologist postulates that the plaintiff will probably suffer a loss of income because he must take time off to undergo medical treatments and he will retire before 65 years.

[21] Having considered carefully and cumulatively all the relevant circumstances of this matter, as sketched above, I have concluded that a contingency of 25% spread on future loss of income will address the uncertainties of the plaintiff's prospects in life.

### CONCLUSION

[22] The plaintiff failed to prove that he is entitled to claim past loss of earnings and therefore he is not entitled to such award.

[23] Plaintiff is entitled to claim loss of future earnings calculated as follows :

23.1 Future loss( 25% spread)

**= R 2 353 864 less 70%**

24] HAVING RESERVED JUDGMENT ON THE BALANCE OF THE CLAIM AS PER PARAGRAPH 2 AN ORDER IS NOW MADE AS OUTLINED IN THE PARAGRAPHS BELOW.

1. The plaintiff's claim for past loss of earnings is dismissed.
2. The defendant shall pay the Plaintiff an amount of R 706 159( SEVEN HUNDRED AND SIX THOUSAND ONE HUNDRED AND FIFTY NINE RAND)

3. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him resulting the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on 4 December 2016, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof, limited to 70%.
4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, subject thereto that in the event that the costs are not agreed:
  - i. The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;
  - ii. The Plaintiff shall allow the Defendant 180 (ONE HUNDRED AND EIGHTY) Court days from date of allocatur to make payment of the taxed costs.
  - iii. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 7% per annum on the taxed or agreed costs from the date of *allocatur* to the date of final payment.
5. Such costs shall include but not be limited to:
  - i. The costs incurred in obtaining payment of the amount mentioned above;
  - ii. The costs of and consequent to the employment of Counsel, , including counsel's charges in respect of his full-day fee for 12 October 2021, as well as reasonable preparation, drafting of heads of argument, settlement proposals and joint memorandum of settlement;
  - iii. The costs of all medico-legal, radiological, actuarial, accident reconstruction, pathologist, joint minutes, affidavits compiled, and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles. including, but not limited to the following:
  - iv. The reasonable costs and time spent traveling incurred by and on behalf of Plaintiff in, as well as the costs consequent to attending the



medico- legal examinations of both parties.

v. The cost of holding all pre-trial conferences, as well as round table meetings and judicial case management conferences at court between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;

vi. The cost of and consequent to compiling all minutes in respect of pre- trial conferences;

6. The amounts referred to above will be paid to the Plaintiff's attorneys, Spruyt Incorporated, by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number: [...]

Branch code: Hatfield (01 15 45)

REF: SD2886

JT LESO

Acting Judge of the High Court

Date of Hearing: 12 October 2021

Judgment Delivered: 17 June 2022

For the Plaintiff: Pruyt Inc

Plaintiff's representative: Adv Venter

Contact No: 082-412 0939

Email Address: [pieterventer@lawcircle.co.za](mailto:pieterventer@lawcircle.co.za)

For the Defendant: Unrepresented