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

**CASE NO: 41033/21**

**(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.**

**DATE: 10 MAY 2023**

In the matter between:

**MOJALEFA MBOWENI**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

**JUDGMENT**

**PIENAAR AJ**

**INTRODUCTION:**

1. The Plaintiff herein instituted action against the Defendant herein, the Road Accident Fund as a result of the motor vehicle accident which occurred on 20 August 2020. On 30 March 2021 the claim was lodged at the Road Accident Fund. On 18 August 2021 the Road Accident Fund was served with the summons. The Defendant failed to enter an appearance to defend.

2. A Notice in terms of Rule 41A was served on the Defendant on 4 November 2022. On 24 March 2023 the matter came before me, Mr van den Berg appeared on behalf of the Plaintiff. There was no appearance on behalf of the RAF. The notice of set down was served electronically on 21 February 2023.

3. The merits of the matter were settled with the Defendant accepting liability for 100% of the Plaintiff's proven damages. Plaintiff Counsel, Mr van den Berg proceed to trial by way of default proceedings, the only issue for determination is the quantum of the Plaintiff's loss of earnings or earning capacity.

4. In terms of Section 17(1) of the Road Accident Fund Act 56, of 1996 the Defendant (RAF) is obliged to compensate the Plaintiff for damages sustained in this accident.

5. The Plaintiff amended the Particulars of Claim in terms of Rule 28 as follows:

Past Loss of Income	R200 000,00
Future Loss of Income	R12 000 000,00
General Damages	R1 000 000,00

6. The Plaintiff did not present any viva voce evidence, but relied on 4 (four) Expert Confirmatory affidavits, accompanied by reports, compiled by expert witnesses. In these affidavits the experts did not stated their qualifications.

## EVIDENCE

7. The Plaintiff has served and filed the medico legal reports of the following experts:

- 7.1 Dr R S Ngobeni Orthopaedic Surgeon
- 7.2 T Sibiya Occupational Therapist
- 7.3 M Kheswa Industrial Psychologist
- 7.4 N Waisberg Actuary Consulting

8. For sake of completeness the following documents are uploaded onto Caselines as exhibits for the trial, namely:

- 8.1 Plaintiff's merits settlement documents bundle as Exhibit 1
- 8.2 Plaintiff's Lodgment documents bundle as Exhibit 2
- 8.3 Plaintiff's quantum Expert reports bundle as Exhibit 3
- 8.4 Plaintiff's expert confirmatory affidavits as Exhibit 4
- 8.5 Plaintiff's updated actuary report as Exhibit 5
- 8.6 Plaintiff's notice in terms of Rule 28 as amended as Exhibit 6

9. To recap: the Plaintiff sustained the following injuries in the accident: Lower back injury and left foot injury. Mr Mboweni was a passenger in a car which unfortunately lost control and overturned. Following this accident he was taken by an ambulance to Lephalale hospital for treatment and was discharged the same day and was diagnosed with minor soft tissue injuries.

10. At the time of the accident the Plaintiff was 28 years old, with a Grade 12 level of education and obtain N2-N5 Mechanical Engineering Certificates and a Diploma in Information Technology. He also has a code 10 driving licence. The Plaintiff was employed as a fitter prior the accident and he is currently an artisan working for Eskom.

Dr R S Ngobeni (Orthopaedic Surgeon)

11 Dr Ngobeni examined the Plaintiff on 30 August 2022. He had also completed the RAF 4 form in which he found that the Plaintiff qualified for General Damages under 5.1 (i.e serious long term impairment or loss of a bodily function), after calculating his injuries to amount to 14% whole person impairment or WPI.

12. According to Dr Ngobeni the Plaintiff sustained chest contusion, lumbar spine injury and right ankle soft tissue injury and the outcome diagnosis is post-traumatic chronic back pain and post traumatic chronic left ankle pain. The Plaintiff was treated conservatively with analgesics and anti- inflammatories to manage the pain. X-rays were done on the 30/08/2022 by Meso's Medical Diagnostic Radiography (Pty) Ltd and reported by WonderRad Medical Imaging Inc. Diagnostic Radiology, Dr D C Thebe.

13. Findings are as follows: thoracic spine, lumbar spine, left foot and left calcaneus. Normal radiograph of the left foot and calcaneus, ligamentous injuries cannot be excluded. Previous L1 compression wedge fracture. Normal T-spine radiographs. Mr Mboweni is a 30 years old claimant. He was involved in a motor vehicle accident on 20/08/2020 and he was treated conservatively at Ellisras hospital. He is currently experiencing back pain. X-Rays were done two years later on 30/08/2022. According to the X-rays of the Ellisras hospital, Mr Mboweni sustained soft tissue injury. From the X-rays on 20/08/2020 it is apparent the Plaintiff sustained soft tissue injury and two years later the X-rays showed a L1 compression wedge fracture. There is no evidence before the Court of what happened between the first x-rays that was done done on 20/08/2020 and the second which was done on 30/08/2022.

14. Dr Ngobeni also noted that the Plaintiff was employed as a fitter prior to the accident. He is currently an artisan working for Eskom. The back pain will restrict him to light activities. Duties to that require him to stand for long or seat for long will be a challenge for him. His lumbar spine will reduce his endurance and will have difficulty to carry heavy objects.

Sibiya (Occupational Therapist Consultants)

15. Tsholofelo Sibiya had assessed the Plaintiff on 30 August 2022. She opined that the Plaintiff current complaints about headaches and back pain, left foot pain and cannot run and jog. He is unable to compete for work that requires heavy to very heavy physical strength demands category.

16. Ms Sibiya (OT) is of the opinion that Mr Mbeweni's requires a work visit to be conducted by an occupational therapist in order to assess his work environment and make further recommendations.

Gcina (Industrial Psychologist)

17. Dr Kheswa (Industrial Psychologist) assessed the Plaintiff on 30 August 2022. The Industrial psychologist postulates the scenarios should the collision not have happened. He has Grade 12 level of education and obtained N2-N5 Mechanical Engineering Certificates and a Diploma in Information Technology thereafter. He also has a Code 10 driving licence. He entered the open labour market as a Call Centre Agent. His pre-accident employment history also reflects working as a Mechanical Fitter in which capacity he worked at the time of the accident. He probably would have been able to work until his normal retirement age of 65 years depending on his health, personal circumstances as well as his employer's retirement policy.

18. As a Planner his duties will be arranging spares for the division (checking plants and workshops for missing equipment). Salary information about the position is unknown. Retirement age is dependent on the skill that a person has, the company still hires retired employees on private capacity to come and train the staff.

19. Dr Kheswa is of the opinion that considering Mr Mboweni's young age (28 years) at the time of this accident, level of education and work experience, he is likely to have

continued working as a Mechanical Fitter or doing similar jobs until he reached normal retirement age. Therefore, with experience and better employment opportunities and the fact that he already had N5 Mechanical Engineering Certificate, it is probable that he could have upgraded his Engineering qualification to N6 (Diploma equivalent, and already obtained

Trade Test in 2017) and is likely to have progressed and reached his earning ceiling at the upper quartile of Paterson Level D3 (total package) when he reached 45 years with applicable inflationary increases thereafter. Once again, I don't have evidence before me relating to Plaintiff's qualifications.

20 The Industrial Psychologist indicates in her report that she perused through Mr Mboweni copies of academic qualifications, but she doesn't list or describe the academic qualifications. I have no evidence before me relating to the Plaintiff's qualifications and I do not believe that I have the best information before me regarding the Plaintiff's qualifications. The onus rests on the plaintiff to discharge the onus.

21. According to the information obtained by his brother Mr Mboweni he reported that the Plaintiff was employed as an Artisan Fitter. He was living a healthy life with no health related complains. Post accident, Mr Mboweni is still employed as an Artisan Fitter, he complains of back pains, and he is unable to lift or carry heavy loads.

22. According to his employer Mr Robin Khavhadi (Site Manager at Eskom Rotek Industries, Medusa Power Station) who confirms that the Plaintiff earnings were confidential. Pre-accident he was employed on a contract basis and after the accident he is currently employed permanently under Eskom as an Artisan fitter. His duties remained the same after accident however since he had a doctor's note he was placed on light duties for some period after the accident. He complains of back pains and general body pains. Mr Mboweni is currently doing his normal duties. His work performance and attendance are affected as he usually reports absent from work to consult with doctors due to accident-related injuries.

23. Dr Kheswa under discussion, confirms that Mr Mboweni reportedly sustained facial abrasions and currently presents with headaches. Deference is thus given to the Neurosurgeon/Neurologist to comment on the nature and severity of her reported facial abrasion in relation to this employment. Therefore, his reported headaches will have a detrimental affect on his concentration and may negatively influence his ability to work to his full potential and will render him more prone to error or negligent mistakes which might affect his work quality and competence. He might even be involved in work injuries due to distractibility while working.

24. The actuary calculated the Plaintiff's loss of income having regard to the Industrial Psychologist report. I have page though the actuary report and pay slips from prior to the accident. The Plaintiff failed to provide his educational qualifications, experience of his profession. The onus is on the Plaintiff to ensure that the court has all the necessary and relevant evidence to assist the court in arriving at a just and fair decision.

#### General Damages:

25. The RAF has failed to either accept or reject the Plaintiff's serious injury assessment. As a result this court can therefore not presently pronounce on the issue. Mr van Der Berg made submissions that the issue of General Damages must be postponed sine die.

#### Onus:

26. In RAF actions, being delictual claims, the onus to prove the elements of the claim lies upon the Plaintiff for where the onus lies is determined by the substantive law. Onus is described in Wireman and Schutte NNO v Masondo and Others 2002 (1) SA 811 (SCA) para 17 as follows:

"In any event onus, in the sense of the duty that is cast on a particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on

his claim or defence is a matter of substantive law and not of procedure. In *During NO v Boesak and Another* Grosskopf JA said:

‘Die ligging van die bewyslas word deur die substantiewe reg bepaal’

Soos gestel word in *Hoffmann en Zeffertt The South African Law of Evidence* 4de uitgawe op 495:

“Any rule of law which annexes legal consequences to a fact...must, as a necessary corollary, provide for which party is support to prove that fact”

#### Manner of proof:

27. A Plaintiff proves his or her case through presenting evidence to the Court. A defendant likewise does so in proving his or her defence. It is no different in RAF matters. Section 8 of the Civil proceedings of Evidence Act 25 of 1985 provides:

“Save in so far as this Act or any other law otherwise provides, every person shall be competent and compellable to give evidence in any civil proceedings”.

28. As pointed out by Corbett:

“Before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the Plaintiff as a result of the defendant’s wrongful act..”

29. The Plaintiff bears the onus to prove his or her loss. There is therefore a duty upon the Plaintiff in RAF actions to prove the elements of their claims on a balance of probabilities. It is for the court to determine what should be paid.

30. With regards to Loss of earnings/earning capacity there is a shortage of information



of sufficient evidence. In the event of justice the Plaintiff must be granted an opportunity to supplement to there claim and in view of the foregoing I grant the order to the issue of loss of earnings.

## **ORDER**

In view of the foregoing, I grant the following order:

31.1 The Defendant is liable for 100% of Plaintiff's proven or agreed damages;

31.2 The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of the provisions of Section 17(4)(a) of the Road Accident Fund act 1996 (Act No 56 of 1996) in respect of future accommodation of the Plaintiff in a hospital or nursing home for treatment of or reddening of a service or supplying of goods to him pursuant to the injuries which the Plaintiff suffered in the collision on 20 August 2020 and to compensate the Plaintiff in respect of the said costs, after the costs have been incurred and on proof thereof.

31.3 The issue of General Damages is postponed sine die.

31.4 As the claim for Loss of Earnings is postponed sine die, leave is granted to supplement the evidence in respect to the claim for Loss of Earnings/ earning capacity.

31.5 The Defendant is ordered to pay the costs which costs shall include:

31.6 Subject to the discretion of the taxing master, the Defendant pays the Plaintiff's taxed or agreed party and party costs as well as actual traveling costs incurred in the prosecution of this matter costs of consultation with the below mentioned experts, preparation and research, including the following:

31.6.1 The costs of obtaining of the medical legal reports, which include the

traveling, accommodation fees (if any) for the following experts that the Plaintiff has attended:

31.6.2 Dr R Ngobeni (Orthopaedic Surgeon)

31.6.3 T Sibiya (Occupational Therapist)

31.6.4 M Kheswa (Industrial Psychologist)

31.6.5 N Waisberg (Actuary)

31.7 The costs of senior-junior counsel's day fee on 24 March 2023, the costs for perusing of documents uploaded on case lines, the drafting of heads of argument, practice note and preparation for trial.

31.8 The payment of the tendered costs by the Defendant will be paid into the following bank account:

<b>ACCOUNT HOLDER:</b>	<b>H[....] M[....] I[....]</b>
<b>BRANCH:</b>	<b>THE REDS</b>
<b>BRANCH CODE:</b>	<b>250655</b>
<b>TYPE OF ACCOUNT:</b>	<b>[....]</b>
<b>ACCOUNT NUMBER:</b>	<b>6[....]4</b>
<b>BANK:</b>	<b>FIRST NATIONAL BANK</b>

31.9 The payment of the above tendered costs by the Defendant is subject to the following conditions:

31.9.1 The Plaintiff shall, in the event that the costs are not agreed between the Defendant and the Plaintiff attorneys, serve the notice of taxation on the Defendant's attorneys of record;

31.9.2 Following agreement or taxation of the costs, the Plaintiff shall allow the Defendant 14 (fourteen) court days after the allocated has been made available to the Defendant, to make payment of the taxed or agreed costs.

MPIENAAR  
**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES**

Counsel for the Applicant: Adv J G van den Berg  
Instructed by: Mamba H Incorporated Attorneys  
email: info@mambainc.co.za

Counsel for the Respondent: No appearance  
Instructed by: Road Accident Fund  
Link no 5132110

Date of hearing: 24 March 2023  
Date of judgment: 10 May 2023

- [1] Caselines : 4 Lodgment documents
- [2] Caselines : 8 Notice in terms of Rule 41A
- [4] Caselines : 13 Notice of Set down
- [5] Caselines : 17 Confirmatory Affidavits
- [6] Caselines : 3 Expert reports
- [7] Wireman and Schutte NNO v Masondo and Others 2002 (1) SA 811 (SCA)
- [8] Hoffmann en Zeffertt The South African Law of Evidence 4de uitgawe op 495