

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)**

CASE NO: 925/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 12/03/2024

SIGNATURE

In the matter between:

JUSTICE SIPHO MASANGO

PLAINTIFF

And

ROAD ACCIDENT FUND
(LINK NO: 5[...])

DEFENDANT

JUDGMENT

Coram: Langa J

Introduction and background

[1] The Plaintiff Mr. Justice Sipho Masango instituted the action against the Road Accident Fund, (“the Defendant”) as a result of damages suffered in a motor vehicle collision which occurred on 17 October 2021 on the R544 Road, Verena, within the jurisdiction of this court. The plaintiff, who was born on 23 November 1977, alleged

that was a passenger in a motor vehicle with registration J[...] 7[...] M[...] when it collided with motor vehicle with registration number J[...] 2[...] M[...] driven by one Justice Mampse.

[2] The claim is brought on the basis of Section 17 of the Road Accident Fund Act 56 of 1996 ("the Act") in terms of which the Fund or the Defendant is obliged to compensate third parties for any loss or damage suffered as a result of the negligent or wrongful conduct of the driver of a motor vehicle.

The issues

[3] On the issues of liability and general damages the Defendant made offers which were accepted by the Plaintiff. On the issue of future medical the Defendant made an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, ("the Act"), as amended. As a result of the above settlements, the issues which remain in dispute are the past medical expenses and loss of earnings.

[4] It is necessary to point out that the matter was initially undefended until the pleadings were closed. The Defendant only entered appearance to defend and plea on 08 November 2023 with the indulgence of the Plaintiff. Despite having filed appearance to defend and plea, the Defendant did not adduce any evidence or file any expert reports. The Defendant counsel stated that the Defendant is relying on the reports filed by the Plaintiff. As a result, the only evidence before court which the court has to consider in dealing with matter is that of the plaintiff. As a result of the defendant having not filed any expert reports or presented any evidence before this court the Defendant's is unclear.

Past Medical Expenses

[5] I will now deal with the issue of past medical expenses. In her heads of argument, the Defendant's counsel referred to the hospital records relating to medical treatment received by the Plaintiff after he was injured in the accident. Apart from acknowledging that the Plaintiff alleges that he received medical treatment, counsel for the Defendant did not raise any issue with the said treatment. The Plaintiff on the other hand submitted actual proof of the past medical expenses in the form of invoices and other documents which were not challenged by the Defendant.

[6] The Defendant further did not take issue with the Plaintiff's allegation that he was not a member of a medical aid scheme and that he paid out of his pocket and was also assisted by his mother to pay for his medical expenses. The Plaintiff placed evidence before court that he was treated for the injuries resulting from the collision and also provided proof of the expenses. He sustained amongst other injuries the fracture of the T4 vertebra, of the spine which resulted in paraplegia from chest down, fracture and dislocation of the right shoulder as well as abrasions of the upper and lower limbs. According to the uncontroverted schedule of expenses presented by the Plaintiff, he spent an amount of R 120 538.00 for past medical expenses.

[7] In the light of the above, it is not clear on what basis the Defendant did not settle the past medical expenses or on what basis it is resisting this aspect, if at all. However, due to the fact that the Plaintiff's evidence in this regard remains uncontested, the court has no option but to make an order in favour of the Plaintiff in respect of past medical expenses. I accordingly intend making an order that the Defendant pay the Plaintiff R120 538.00 for the past medical expenses.

[8] I now turn to the only remaining head which is the loss of earnings or earning capacity. As already stated, the Defendant submitted that it was also proceeding on the basis of the reports filed by the Plaintiff. The Plaintiff testified and was followed by expert witnesses namely, Dr. RS Ngoben, the Orthopedic Surgeon, Ms. K Montwedi, the Occupational Therapist and Mr B Ramusi, the Industrial Psychologist.

Loss of earnings:

[9] The Plaintiff alleged that he suffered a loss of earning capacity as a result of the accident. In order to prove this the Plaintiff and expert witnesses who filed reports testified. The Plaintiff Mr Masango in his testimony confirmed that he was employed by Imperial, previously Afrox, from about 2005 until the date of the accident. He was employed in the capacity of a general worker, where he *inter alia* operated a forklift, stacked and loaded gas cylinders and occasionally delivered gas cylinders to customers on request. He stated further that he did not return to work after the accident as he became confined to a wheelchair due to the injuries

sustained. As he could no longer work, he has been financially dependent on his elderly mother.

[10] Dr. RS Ngobeni the orthopedic surgeon stated that she assessed the Plaintiff on the 09 February 2023 and compiled a report she made a finding that the Plaintiff sustained injuries to the right shoulder, a fracture to the T4 vertebra of the spine, and that the latter resulted in irreversible paralysis from the chest downwards. She testified that as a result of the paralysis the Plaintiff will be confined to a wheelchair for the remainder of his life. Dr Ngobeni further stated that the Plaintiff's prognosis is poor and that he will require future surgical medical interventions.

[11] The occupational therapist, Ms. K. Montwedi testified that after assessing the Plaintiff she learnt that before the accident he was employed as a general worker and cylinder handler for Imperial which was previously Afrox. His job was classified as being medium to heavy. She testified further that the Plaintiff, after sustaining the injuries in the accident is presently only suited to perform work that has sedentary physical demands. She however further testified that considering his age, low level of education, his incontinence, paraplegia and poor prognosis, he is not likely to gain employment as he is rendered unemployable in the open labour market.

[12] Mr KB. Ramusi, the industrial psychologist, essentially testified that he assessed the Plaintiff and confirmed that given the prognosis of the Plaintiff, he is not likely to secure any gainful employment for the remainder of his working life, particularly when one considers his permanent paraplegia condition. He further accepted that the Plaintiff has been rendered unemployable by the injuries sustained in the accident and is unlikely to attract a prospective employer in his current physical state, with all of the functional and neuro cognitive deficits he currently presents with. The industrial psychologist accepts that the plaintiff has been rendered unemployable by the injuries sustained in the accident under discussion. This is based on the expert opinion that he is unlikely to attract a prospective employer in his current physical state, with all of the functional and neuro cognitive deficits he currently presents with. Based on the aforesaid, as well as his poor prognosis, it is therefore concluded that the plaintiff will continue to suffer a loss of earnings for the remainder of his work life.

[13] This is the sum total of the *viva voce* evidence presented by the Plaintiff. In the light of the totality of this it is evident that the Plaintiff suffered serious life changing injuries which have rendered him incapable of doing any work, including sedentary work even from an accommodative employer. It can therefore be accepted that he suffered loss of earnings. What remains to be determined is the quantum thereof.

[14] I must pause to mention that the evidence of all the experts as well as the Plaintiff was not challenged at all. In fact, the counsel for the Defendant did not even pose any questions to some of the witnesses. As no other version was canvassed by the Defendant, I see no reason why the evidence and the reports of the Plaintiff's experts should not be regarded and accepted as correct. It is on the basis of these reports and evidence that the actuary made certain postulations in respect of the loss of earnings suffered by the Plaintiff.

[15] The Plaintiff's case in respect of the quantum is based actuarial calculation made by Tsebo Actuaries whose calculation are based on the postulations made by the industrial psychologist in particular that the Plaintiff has suffered loss of capacity to work which has rendered him unemployable and that given the poor prognosis, he will continue to suffer loss of earnings for the rest of his life.

[16] Regarding the pre-accident earnings the actuary relied on the collateral on the Plaintiff's earnings and in particular the pay slips, for the months of July, August, September and October of 2021. According to these pay slips, he was earning an average salary of R 11 783.13 per month (R 141 398.00 per annum - Paterson A2 lower quartile. According to information relied on by the actuary, the Plaintiff was on 75% paid sick leave from October 2021, the date of the accident, until November of 2022. He did not return to work thereafter and remained so unemployed from December of 2021 to date.

[17] Mr Masango who was 44 years old, was gainfully employed at the time of the accident. Pre-accident it is assumed that he would have continued on an annual progression until he reached his career ceiling at about age 55 based on the

Paterson B2 median. It is postulated that thereafter his earnings would have continued to escalate in line with inflationary related increases, up to retirement age, postulated at age 65.

[18] However, post-accident it is postulated that the Plaintiff will not be able to obtain employment for the rest of his life due to his paraplegic condition. The factual evidence by the expert witnesses is that he would have resulted in a postulated total loss of future income. As stated above, the industrial psychologist accepted that the Plaintiff has been rendered unemployable by the injuries sustained in the accident under discussion. It is therefore evident that the Plaintiff will continue to suffer a loss of earnings for the remainder of his work life.

[19] In the calculation of the loss the actuary has applied contingencies 5% and 15% contingencies on the pre morbid past and future income respectively whereas 5% was applied for post morbid past income and 0% for the pre morbid future income. These contingency deductions appear to be reasonable in the circumstances in particular considering that the Plaintiff has been gainfully employed from 2005 to the date of the accident and has further provided collateral on his earnings, illustrating the factual position regarding his earnings at the time of the accident. In my view there is no evidence to justify higher than normal contingencies.

[20] According to the actuarial calculations the pre-morbid past loss would amount to **R 227 997.00** while post-morbid past loss will come down to **R86 064.00**. The 5% contingency applied for pre-morbid and post-morbid past loss is **R11 400.00** and **R4 303.00** respectively. The net past loss amounts to **R134 836.00** which is **R216 597.00** minus **R81 761.00**. The future loss is **R2 641 486.00** minus the **R396 223.00** (15 % contingency). The net future loss is accordingly **R2 245 263.00**. Accordingly, the total loss of earnings is **R2 380 099** which is made up of **R2 245 263.00** plus **R134 836.00**. The amount I intend to award as the past and future loss of earnings is therefore **R2 380 099**.

Conclusion

[21] In the light of the uncontested evidence, it is evident that the Plaintiff has established that he has suffered a reduction in his earning capacity and therefore

entitled to damages for loss of earnings. *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA). I am consequently satisfied that the Plaintiff has demonstrated that he suffered damage as claimed in the pleadings. Furthermore, considering the injuries and the sequelae thereof, the amounts proposed by the actuary in my view constitute reasonable and fair compensation to the Plaintiff in respect of the loss of earnings. The Defendant on the other hand failed to provide any shred of evidence to rebut the evidence of the Plaintiff in this regard. I am thus satisfied that the Plaintiff has proven his case on a preponderance of probabilities in respect of past medical expenses and past and future loss of earnings.

Costs

[22] The general rule regarding costs is that the successful party is entitled to costs. As he has substantially succeeded in his claim, the Plaintiff is entitled to the cost of the suit on a High Court and party and party scale. Such costs to include appearance costs for the 20 November 2023 and 21 of November 2023.

Order

[23] In the result the following order is made:

1. The Defendant is ordered to pay the Plaintiff a sum of **R2 500 637.00 (Two million -five hundred thousand- six hundred and thirty - seven rands)** consisting of the following:
 - 1.1 Past and future loss of earnings in the amount of **R 2 380 099.00;**
 - 1.2 Past medical expenses in the amount of **R 120 538.00;**
2. The amount referred to in paragraph 1 *supra*, is to be paid into the Plaintiff's Attorneys' bank account within **14 days** from the date of this Order/Judgment, the details of which are as follows:

NAME OF BANK: **FIRST NATIONAL BANK**

ACCOUNT HOLDER: **MATSAWELA MONYELA & MAKHAFULA**

ATTORNEYS

BRANCH CODE: 2[...]

ACCOUNT NO: 6[...]

TYPE OF ACCOUNT: TRUST ACCOUNT

3. In the event of the Defendant not making the payment, as set out in paragraph 2 *supra* timeously, the Defendant will pay *mora* interest at the prevailing prescribed rate of interest of 9.75%
4. The Defendant is ordered to pay the Plaintiff's taxed or agreed costs of party and party suit of the High Court Scale, which costs include but are not limited to:
 - 4.1 The costs of attending to trial on the;
 - 4.1.1 20th of November 2023;
 - 4.1.2 21st November 2023.
 - 4.2 The costs of obtaining the Plaintiff's medico-legal reports and addendums (if any) filed and served;
 - 4.3 The costs of holding pre-trial conferences;
 - 4.4 The costs of preparation of trial bundles;
 - 4.5 The costs of counsel.
5. Payment of the above costs by the Defendant is subject to the following conditions:

5.1 The Plaintiff is ordered to serve the notice of taxation of Plaintiff's party and party bill of costs on the Defendant's attorneys of record;

5.2 The Defendant is ordered to pay the Plaintiff's taxed and/or agreed party and party costs within fourteen (14) court days of receipt by the Defendant's Attorneys of the taxed accounts, taxed by the Taxing Master and/or agreed between the parties.

6. There is a valid contingency fee agreement in this matter, which accords with the Act.

MBG LANGA
JUDGE OF THE HIGH COURT
MIDDELBURG LOCAL SEAT

Appearances:

For the Plaintiff:	Advocate J Themane
For the Defendant:	Ms A Nefolovhodwe
Date of hearing:	27 November 2023
Date delivered:	12 March 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 12 March 2024 at 12h30.