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

Case no: 1053/2022

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

20/09/2024

DATE

SIGNATURE

In the matter between:

MUTETELA TSHIPAMBU JEAN PAUL

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Coram: Langa J

Introduction and facts

[1] This is a delictual claim for damages resulting from injuries sustained by the Plaintiff in a motor vehicle collision on the 01 October 2020. The Plaintiff, Tshipambu Jean Paul Mutetela, is an adult national of the Democratic Republic of Congo currently residing at Stand No 3[...], M[...] Street, E[...], Mpumalanga Province. The Defendant is the Road Accident Fund, a juristic person created in terms of section 2 of the Road Accident Fund Act 56 of 1996, (“the Act”).

[2] Pursuant to the separation of issues in terms of Rule 33(4) of the Uniform Rules of Court, (“the Rules”), the merits were decided in favour of the Plaintiff on 24 March 2024. An order was accordingly made for the Plaintiff to pay 100% of the Plaintiff’s proven damages. The matter now proceeded on quantum only.

[3] This claim arises out of an incident which occurred on or about the 01 October 2020 at OR Tambo and Steenkamp Street, Emalahleni (Witbank), Mpumalanga Province. The Plaintiff was a motorcyclist riding a Honda motorcycle with registration number JN 42 RN GP around 20h00 when he collided with an unknown motor vehicle which then drove off after the incident without stopping.

[4] After the collision the Plaintiff picked up his motorcycle and proceeded with his deliveries. He stated that at the time he did not realize that he was injured it was only after about five days that he felt pains and was advised to go to hospital. He eventually went to hospital and received treatment.

Issues in dispute

[5] As the issue of merits was already determined, the only outstanding issue is the quantum in respect of the following heads of damages:

1. Section 17(4)(a) Undertaking for Future Medical Expenses
2. General Damages; and
3. Past and Future Loss of Earnings/Income

[6] At the trial the issue of general damages was not proceeded with by the Plaintiff and the matter proceeded only on the loss of earning capacity. The Plaintiff made an application for the reports of various experts to be admitted as evidence in

terms of Rule 38(2) of the Rules. As the Defendant did not make any objection to the application, it was accordingly granted and the reports of the following experts together with the supporting affidavits were admitted:

1. Orthopaedic surgeon Dr Peter Kumbirai.
2. Occupational Therapist Ms Sophy Mothapo.
3. Industrial Psychologist Mr Oscar Sechudi.
4. Actuary Arch Actuarial Consulting.

Dr PT Kumbirai – Orthopaedic Surgeon

[7] Doctor Kumbirai stated that he examined the Plaintiff on the 1 June 2023 about 3 (three) years after the accident. In his assessment report he stated that according to the Plaintiff and hospital records in file number 2[...], Life Cosmos Hospital, as well as information on the RAF1 Form, the Plaintiff sustained a fracture of the distal left radius. He went to hospital about 5 days after the accident and was referred from Life Cosmos Hospital to Witbank Hospital where he received the clinical and radiological examination. X-rays showed a fracture of the distal left radius and closed reduction of the left wrist. His left upper limb was placed in Plaster of Paris which was later removed. He received analgesics and hand therapy.

[8] Dr Kumbirai records that the Plaintiff is reasonably healthy man with no obvious signs of systemic disease. Physical examination revealed that his gait, head, neck, chest and back were normal. He had a dinner fork deformity on the left wrist with decreased dorsiflexion of the left wrist 0° - 20°. The X-rays of the left forearm and wrist done by Drs Mkhabele and Indunah Diagnostic Radiologists on 01 June 2023 showed a mal-united fracture of the distal left radius with 20° of valgus angulation and shortening.

[9] However, Dr Kumbirai opined that the Plaintiff continues to suffer the inconvenience and discomfort of chronic pain of the left wrist and forearm which is exacerbated by lifting of heavy weights and cold weather. While all other experts relied on by the Plaintiff stated that he continued working as a scooter delivery man after the accident, Dr Kumbirai, however, noted that the Plaintiff never went back to

work as a scooter delivery man because of pain in the left wrist. I will revert to this aspect shortly. (My emphasis).

[10] Concerning the prognosis and future morbidity, Dr Kumbirai opined that as the Plaintiff sustained a fracture of the distal left radius which was treated with closed reduction, he will benefit from corrective osteotomy and open reduction and internal fixation to restore the normal biomechanics of the wrist joint and improve the hand function.

Ms S Mothapo - Occupational Therapist

[11] The Occupational Therapist Ms Mothapo stated that she examined the Plaintiff on 29 March 2023, also about 3 (three) years post the accident. In her report, Ms Mothapo stated that the Plaintiff reported that he was involved in a motor vehicle accident on 1 October 2020 when he was hit by vehicle while riding his motorcycle. After this so-called 'hit and run collision', he continued with his work since he was not feeling any pain. He only went to Life Cosmos Hospital after about four days. X-rays were done and they revealed a fractured left wrist. He was transferred to Witbank General Hospital where a Plaster of Paris (POP) was applied. He currently complains of left wrist pain and that he cannot lift or carry heavy objects. He reported that he takes over the counter pain medication to manage pain symptoms. She stated that his overall score indicated that he experiences a moderate pain related impairment.

[12] Concerning employment Ms Mothapo stated that at the time of the accident the Plaintiff reported that he was employed as a delivery man using a motorcycle. She stated that according to the Classification of Physical Demands in Work and with guidance from the Dictionary of Occupational Titles (DOT), the physical demands of the job fell within the parameters of light physical work. He reported that he was able to return to work 2 weeks post-accident and was dismissed from work in February 2022 and is currently unemployed. The Occupational Therapist stated further that the Plaintiff successfully executed Modapts tasks by continuously lifting without any difficulties and exceeded the open labour market time standards and met

the physical demands and time standards for medium work during execution of the work sample. (my emphasis).

[13] In conclusion, Ms Mothapo opined that the Plaintiff presented with a forearm supination limitation, with active movements limited at 40 degrees. Furthermore, he presented with a protruding left epicondyle with limitations in the left wrist extension movements at 50°. She stated further with his current physical capabilities he is capable of managing medium occupational duties. He will experience challenges attaining employment with high demands on continuous lifting tasks and manual handling and dexterity. Prolonged sessions with these demands are likely to aggravate pain symptoms and impact on his overall work competence. Contrary to the report by Dr Kumbirai, the Occupational Therapist noted that the Plaintiff reported that he returned to work post -accident and sustained his employment until his dismissal in February 2022 due to a labour dispute. She recommended occupational therapy and in particular hand therapy and grip strengthening. (my emphasis).

Mr Oscar Sechudi – Industrial Psychologist

[14] Mr Sechudi also consulted with the Plaintiff about three years after the incident on 01 June 2023. He stated that prior to the accident the Plaintiff enjoyed good health and with no chronic illness. He reported that he completed secondary school (Grade 12) and thereafter obtained an Economics Degree at Kinshasa University in 2008. He also reported that he has a code ABCD driving licence. According to his employment history, he entered the open labour market as a Cable puller for Kusile Power station from January to June 2015 when his contract ended. In November 2019, he secured employment as a motor bike deliveryman. He worked in this capacity before and after the accident up until February 2022 when he was dismissed after a salary dispute.

[15] He reported that at the time of the accident he was earning R10 000 per month with an annual income of approximately R120 000 as a delivery man. Mr. Sechudi reported that the Plaintiff's earnings were equivalent to those of a semi-skilled worker with earnings ranging from the Median [R86 000] and the Upper Quartile [R186 000] per year (Koch, 2020). He however said that the Plaintiff

provided no proof of earnings, and that his earnings are based solely on what the information he provided. Mr Sechudi also confirmed that subsequent to the accident the Plaintiff went back to work although he was experiencing a painful left wrist. He was also struggling to ride his motorbike due to pain which worsened during inclement weather. He currently complains a painful left wrist and difficulty lifting or carrying heavy loads.

[16] Mr Sechudi opined that in light of the findings and opinions of the appointed medical experts, he is of the opinion that the Plaintiff's painful left wrist has hindered his ability to maintain employment and compete equitably in the open labour market. He noted that the Plaintiff is currently unemployed and that he experienced accident-related sequelae in the form of physical and functional limitations which have rendered him a vulnerable competitor in the open labour market compared to his uninjured counterparts. He stated further that in his current condition, he would depend on reasonable accommodation from his employer should he secure another job. He agreed that the Plaintiff's performance and current physical aptitude makes him suitable for medium occupational duties as indicated by the Occupational Therapist.

[17] Concerning the past Loss of income, Mr Sechudi stated that although the Plaintiff was dismissed in February 2022 following a salary dispute, he incurred past loss of earnings of R10 000 per month from the date of his dismissal to date because of the accident under review. He further added that compensation should also be considered for the medical expenses which he incurred from the date of the accident to date.

[18] On future loss of income, Mr Sechudi opined that taking into account his pre-accident and post-accident profile, work experience and injuries he sustained in the accident, the Plaintiff has been rendered an unfair and compromised employee in the open labour market. He therefore opined that although he continues to work to date, his future participation in the labour market remains compromised due to the limitations imposed. In his view the Plaintiff is expected to be restricted regarding his choice of employment and will be limited to work suitable for semi-skilled workers despite his academic achievements. (my emphasis).

[19] Mr Sechudi further opined that should the Plaintiff lose his job; he would likely be a vulnerable candidate when compared to his peers with no limitations. He added that it must be kept in mind that although employers may offer him a job, they would eventually become aware of his limitations and struggle to retain him on the workforce for long. Thus, it may be unrealistic to expect him to retain a single job over extended periods until he reaches the age of 65 years. He stated that he will continue to suffer loss of earnings until he reaches normative retirement age.

Actuarial report: Arch Actuarial Consulting

[20] According to the actuarial report, which is based on the Plaintiff's unconfirmed income of R10 000 per month, the Plaintiff suffered a total loss of R3 507 772 before the application of contingencies. Although the Plaintiff did not stop working after the accident, the report, however, shows that he suffered R292 690 past loss of earnings.

Discussion and Analysis

[21] Although the merits in this case were decided in the Plaintiff's favour, he is however not absolved from proving all the elements of the delict, including the damages suffered. In addition to proving causation, the Plaintiff must also prove the loss of earning capacity. It is trite that the Plaintiff must prove the extent of his loss of earnings and damages on a balance of probabilities. With regard to loss of income, the Plaintiff must adduce evidence of his income in order to enable the court to assess his loss of past and future earnings. In addition, the Plaintiff must prove the amount of income he will reasonably lose in the future as a result of the injury.

[22] In the unreported North Gauteng High Court judgment of *Mvundle v RAF* (63500/2009) [2012] ZAGPPHC 57 (17 April 2012), the court stated the following:

"It is trite that the damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his

or her current job and /or be limited in a number and quality of his or her choices should he or she decides to find other employment”.

[23] Turning to the loss of earnings, it was essentially contended on behalf of the Plaintiff that as a result of the injuries sustained in the motor vehicle accident, he continues to suffer from left wrist pain which is aggravated by cold weather and the lifting of heavy objects. It was in essence argued that the Plaintiff can no longer return to his pre-accident state because of pain.

[24] The question to be decided here is whether the Plaintiff has proved that he is entitled to compensation. Although the Plaintiff has not given any testimony concerning the quantum, it is however common cause that he did not lose his employment as a result of the accident. It is further common cause that although he was injured on 01 October 2020, the Plaintiff nevertheless continued doing the same job from the day of the accident until February 2022 save for a lay-off of one week. When he ultimately stopped working it was as a result of a wages dispute and not accident or injury related cause.

[25] While the Industrial Psychologist stated in paragraph 16.2.1 that the Plaintiff continues to work to date, this is incorrect as he later also stated that he was dismissed in 2022 due to a salary dispute as all other experts reported. In this respect the Industrial Psychologist's report is not only confusing, but it is also contradictory. However, despite this confusion, it has however not been established that the Plaintiff suffered any past loss as a result of the accident. In addition, there is also no proof of how much he earned. The Industrial Psychologist simply stated without more that the Plaintiff has incurred past loss of earnings from the date of his dismissal to date. No basis is laid for this conclusion and there can therefore be no award for past loss of earnings.

[26] Concerning the future loss of earnings, it is worth noting that the Occupational Therapist opined that the physical demands of the Plaintiff's pre-accident work fell within the parameters of light physical work and that he was able to perform the same duties he performed before the accident. The Occupational Therapist opined further that despite the forearm supination and left wrist movements limitations, the

Plaintiff is still capable of managing medium occupational duties. She stated further that the Plaintiff successfully executed Modapts tasks by continuously lifting without any difficulties and exceeded the open labour market time standards. He met the physical demands and time standards for medium work during execution of the work sample. (my emphasis).

[27] It is therefore clear that even if he experiences challenges in attaining employment with high demands on continuous lifting tasks and manual handling and dexterity, the Plaintiff was however not rendered unable to perform work he was doing at the time of the accident. (my emphasis)

[28] In my view, in the light of the Occupational Therapist's conclusions and considering that the Plaintiff was able to continue working immediately after the accident, there is no persuasive and convincing evidence that the accident and the resultant injuries impacted on the Plaintiff's capacity to work. The assumption that his post-accident occupational abilities have been limited by the injuries sustained should be rejected as it is not under-pinned by any evidence.

[29] Furthermore, although the Occupational Therapist and the Industrial Psychologist noted that the Plaintiff is a holder of a degree qualification in economics, this seems to not have been factored in the assessment of his vocational potential by both the Occupational Therapist and the Industrial Psychologist. It is nowhere stated why the Plaintiff would not be able to work as an economist in future based on his qualifications. The issue of his qualifications was totally ignored.

[30] The Plaintiff did not testify in respect of the quantum. There is no proof of what he earned before the accident. The calculations made by the actuary were based on the assumptions made by the experts based on what was reported to them by the Plaintiff. The Industrial Psychologist's opinion on loss of earnings was predicated on what he was ostensibly informed by the Plaintiff. In turn the actuarial calculations were based on the assumptions made by the Industrial Psychologist.

[31] There was therefore no collateral evidence regarding the Plaintiff's earnings. Not even supporting documents such as the employer's certificate showing nature

and period of employment, remuneration, prospects of advancement and retirement age, pre- and post-accident payslips, official confirmation of remuneration and proof of additional income was furnished. The assumptions made constitute a blind speculation. It was on the basis of this speculation that it was contended the Plaintiff is entitled to compensation of R3 507 772 for loss of earnings as calculated by the actuary. I am not satisfied that the Plaintiff has proved on a balance of probabilities that he was working and earning R10 000 per months as alleged.

[32] However, even if it was accepted that the Plaintiff suffered loss and that the calculations were based on the correct figures, there is a basic problem with regard to what the Plaintiff would be entitled to as damages for loss. It is important to note that although it was submitted that the Plaintiff is entitled to the amount of R3 507 772 for loss of past and future earnings as calculated by the actuary, however the amount claimed for loss of earnings in the particulars of claim is R900 000. Despite this incongruity, the particulars of claim were not amended to bring this amount in line with the amount postulated by the actuaries. As the claim is premised on the particulars of claim, the Plaintiff cannot be entitled to more than he has claimed in the summons. Thus, even if it is determined that the Plaintiff is entitled to compensation for loss of earnings, he can at the most only be entitled to a maximum of R900 000.00 claimed in the summons.

Conclusion

[33] In conclusion I find that the Plaintiff has not discharged the onus to prove causal damage. Given the problems highlighted above, the court can either dismiss the action or grant absolution from the instance. On account of the facts of this matter I am satisfied that the latter option would be the most appropriate and fair.

Order

[34] I accordingly make the following order:

1. Absolution from the instance is granted.
2. The costs are granted favour of the Defendant.

MBG LANGA
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Advocate B Nchabeleng
For the Defendant:	Mr N Mhlanga
Date heard:	07 June 2024
Date delivered:	20 September 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 20 September 2024 at 15h00.