

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 33875/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	25 April 2023

.....	DATE

In the matter between:

BOK GRENWEL MACNAM

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Neutral citation: *BOK GRENWEL MACNAM v ROAD ACCIDENT FUND* (Case No. 33875/2017) [2023] ZAGPJHC 378 (25 April 2023)

JUDGMENT

Mazibuko AJ

1. On 27 June 2014, the plaintiff, 31 years of age, was a passenger in a motor vehicle. The motor vehicle got involved in an accident, and he sustained injuries.
2. On 7 September 2017, he instituted an action for damages suffered as a result of the injuries sustained by him in a motor vehicle accident. The action was defended, and the defendant filed a plea.
3. On 4 November 2021, the court ordered the defendant to conduct a pre-trial conference with the plaintiff and file pre-trial minutes. The defendant did not comply with the court order. On 2 March 2022, the defendant's defence was struck out, and the plaintiff was granted leave to enrol the matter on the default judgment roll. The matter was thus enrolled.
4. Rule 39(2)¹ of the Uniform Rules provides: *"(2) When a defendant has by his default been barred from pleading, and the case has been set down for hearing, and the default duly proved, the defendant shall not save where the court in the interests of justice may otherwise order, be permitted, either personally or by an advocate, to appear at the hearing."*
5. Generally, where the matter is set down on a default judgment basis, the defendant and or their legal representative are not permitted to appear at the hearing. In *casu*, to consider whether or not to allow the defendant's appearance, the court had regard to the following: After being served with the default judgment application, the defendant participated in curtailing issues that the court would have ordinarily needed to hear evidence on and make a determination. The plaintiff had opened itself to engagements with the defendant. The defendant is a custodian of a purse funded by the public. The matter is for the damages claim, and the amount claimed is relatively

¹ Uniform Rules of Court, Act 59 of 1959

substantial.

6. On the day of the hearing, the parties had considered the matter and the merits were conceded. The offers were made and accepted in respect of other heads of damages. It was not in dispute that the defendant was entitled to loss of earnings due to the said motor vehicle accident. The submissions were, at this stage, limited to the contingencies and the application thereof. Consequently, the court found it was in the interest of justice to allow the appearance on behalf of the defendant and to hear its submission.
7. Both counsel confirmed that the merits had been 100% conceded. The defendant made an offer regarding the past loss of earnings and general damages, which the plaintiff accepted. Regarding the future hospital and medical expenses, the defendant made an undertaking in terms of Section 17² of the Act.
8. The determination of past medical expenses was postponed *sine die*. The issue to be determined by the court is the future loss of earnings and the contingencies applicable to it.
9. On behalf of the plaintiff, the medico-legal reports were served on the defendant and filed in respect of injuries sustained, diagnosis, received and anticipated treatment, past and current complaints, medical prognosis, employment history and associated earnings, past, current and future employment disabilities, career postulations for the calculation of the plaintiff's past and future loss of earnings as well as actuarial calculations of Munro Actuaries.
10. The parties agreed that the plaintiff could tender evidence in terms of rule 38(2)³

² Road Accident Fund Act, No. 56 of 1996 (The Act)

³ Number 1 *supra*

Rule 38(2) provides: “(2) *The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.*”

11. The plaintiff referred the court to the report of Dr GA Versfeld, the Orthopaedic Surgeon, who concluded that due to the accident, the plaintiff sustained multiple injuries, including (a) a fracture of his left humerus, with a radial nerve palsy and evidence of damage of the median nerve. (b) a dislocation of his left acromioclavicular joint and the need for surgical intervention. (c) a shoulder injury with ongoing symptoms; and (d) a head injury with a period of loss of consciousness.

12. He stated that the plaintiff's symptoms and disabilities have rendered him unsuited to electrician-type work for which he had trained. His symptoms and disabilities impact his ability to do traffic officer work with the long-term prospect of being unable to do long-distance driving in future. Further, his symptoms and disabilities significantly affect his physical activities and social amenities. This situation is likely to continue and deteriorate in future. He has sustained significant pain and suffering as a result of the accident. He has suffered serious long-term impairment of body function due to the accident.

13. Ms E Kruger, the occupational therapist, stated in his report that the plaintiff completed his apprenticeship as an electrician. His apprentice contract was then terminated. He could not secure a job as an electrician. Depending on the specific industry and employer, this job requires light to medium physical

effort. His description of his work indicated that this required light physical effort.

14. Following the accident, he completed his training as a traffic officer when he could not secure a job as an electrician. This job requires light physical effort. At the time of the assessment, he was assigned to escort abnormal load vehicles between provincial boundaries. This requires frequent (if not constant) vehicle driving with manual gear transmission. The endpoint duty requires a high degree of standing and bilateral upper limb movement. When he stands for a long time, plantar pain is elicited. His left arm aches if he sits for too long. He occasionally develops shoulder pain. He struggles to elevate his left upper limb.
15. Ms Kruger concluded that the plaintiff is no longer fit for his job as an electrician (for which he completed his training). He meets work demands as a traffic officer, but this would depend on specific deployment. He should not drive a vehicle with manual gear transmission frequently or constantly. He will not be suited for end-point duty, which requires long periods of standing and frequent bilateral upper limb function. He would be most suited for deployment in a more sedentary administrative position.
16. His residual problems render him a compromised and unequal contender in the open labour market, negatively impacting his competitiveness compared to his non-injured counterparts. Even with all the recommended interventions being adhered to and implemented (regarding treatment and adjustments), he will find it difficult to secure a job as an electrician. His physical abilities leave him handicapped for his job as a traffic officer, with specific limitations which are not expected to improve.
17. He sustained permanent nerve damage in his left upper limb. Furthermore, his condition is expected to deteriorate over time, with further surgical interventions being envisaged. His vocational prospects, from a physical point of view, are expected to remain limited and deteriorate in future.

18. Dr W Pretorius, the Industrial Psychologist, opined about the impact on earnings vulnerabilities. He stated that since future deterioration is expected from a physical perspective, the plaintiff would be at risk of losing his employment in future, especially if he needs to continue in his current role as Traffic Officer or Provincial Inspector. As a result, a loss of earnings may be evident as he would need to seek new employment in a compromised capacity.
19. He further faces a risk of long periods of unemployment and risk of no earnings should he lose his employment and need to secure new employment in future, as he needs to be more selective as he is limited to sedentary or some light work. He also requires an accommodating employer or work environment. He is at a very high risk of not securing promotional growth as a supervisor due to his compromised physical capacity and inability to compete fairly against uninjured peers for such a role. He faces the risk of losing earnings while away from work for treatment or recuperation. Further, risk of retiring earlier than expected due to future expected deterioration.
20. A report by Munro Actuaries was also referred to. Munro Actuaries analysed the plaintiff's salary information. They used the Government Earnings scales (notches), including the normal additional state benefits.
21. It was stated that the plaintiff had no earnings from the accident date up to 31 December 2014. From 1 January 2015, his earnings would be R20 421.00 per month, increasing to R522 518.00 per annum at the age of 45 years, with annual inflationary increases thereafter up to the retirement age of 65 years.
22. On behalf of the plaintiff, it was submitted that a contingency deduction of 5% should be applied, as this is the normal, standard and appropriate contingency deduction. A contingency deduction of 5% was applied to the plaintiff's gross past uninjured earnings of R2 309 300.00. This resulted in a net past uninjured earnings (after the 5% contingency deduction) of R2 193

835.00. A further contingency deduction of 14% was applied to the Plaintiff's gross future uninjured earnings of R7 670 600.00.

23. The plaintiff, through its counsel, argued that in terms of the 14% contingency deduction, according to the sliding scale of Dr Robert Koch of applying a half percent per annum for the remainder of the plaintiff's working life, the contingency deduction will equate to 13%, (which is a retirement age of 65 years less current age of 39 years, which equals to 26 divided by two, which gives 13%). Therefore, the normal "sliding scale" contingency deduction is 13%. It was further submitted that this 13% contingency deduction should be rounded off further to 15%.
24. The net future uninjured earnings (after the deduction of a 15% contingency deduction) accordingly amount to a figure of R6 520 010.00. In respect of the injured scenario calculation, the actuaries followed the postulations as formulated by Dr W Pretorius in both scenarios, and the average of these two scenarios was used.
25. The Actuaries applied no contingency deduction to the plaintiff's gross past injured earnings of R809 500.00. It will be recalled that the defendant made an accepted offer to the plaintiff regarding this head of damages.
26. The Actuaries applied a contingency deduction of 44% to the plaintiff's gross future injured earnings of R5 657 400.00, which was reduced to 35%, which will be a 20% increase of the 15% contingency deduction to be applied to the plaintiff's gross future uninjured earnings.
27. Reference was made to the case of Naude v RAF, delivered on 19 February 2013, where a 10% higher contingency deduction was applied to Naude's future injured earnings. It was argued that in *casu*, the injuries and the sequelae of the injuries are far more severe than those sustained by Naude, which would naturally result in a much higher than the 10% increase as allowed in the Naude matter, considering Dr W Pretorius's report. It was

submitted that the plaintiff would suffer a net future loss of earnings of R2 842 700.00

28. It was argued on behalf of the defendant that the court needed to consider to what extent the plaintiff was compromised due to the motor vehicle accident. After the accident, the plaintiff looked for employment, and in 2019, he got employed. Subsequently, he became permanent. Though he is compromised, the plaintiff is highly motivated. He was participating in a skilled job. In all disciplines, there are no job guarantees. Therefore, in applying contingencies relating to the future loss of earnings, that must be considered.

29. Considering the principles laid down in the Naude matter above and the impact

of the injuries on the plaintiff's career and employability, the court accepts the 20% increase to a final contingency deduction of 35% concerning the future loss of earnings.

30. Consequently, the following order is granted.

Order:

1. By agreement between the parties: The defendant is liable to compensate the plaintiff for 100% (one hundred percent) of the proven delictual damages suffered as a result of the motor vehicle collision which occurred on 27 June 2014.
2. The issue pertaining to Past Hospital and Medical Expenses is separated in terms of Rule 33(4) from all the other heads of damages and is postponed *sine die*.
3. The defendant shall pay the capital amount of R4 761 570.00 (four million, seven hundred and sixty-one thousand, five hundred and seventy rand) in full and final payment of the plaintiff's claim for Past – and Future Loss of Earnings and General Damages, which is calculated as follows:

3.1	Past Loss of Earnings (By agreement):	R1 268 870.00
3.2	Future Loss of Earnings:	R2 842 700.00
3.3	General Damages (By agreement):	<u>R 650 000.00</u>
3.4	Total	R4 761 570.00.

4. The capital amount is payable using direct fund transfer by no later than 180 (one hundred and eighty) days from the date hereof into the trust bank account of the Plaintiff's attorneys; Mills & Groenewald Trust Cheque Account, Absa Bank, Vereeniging, Account no: 4042179809, Branch code: 630 137, reference: A VAN ZYL / DK / B2565.

5. Interest calculated on the capital amount referred to in paragraph 3 *supra* will be payable at the rate of 10.75% after a period of 14 (*fourteen*) days from the date hereof.

6. By agreement between the parties; The defendant shall furnish the plaintiff with an unlimited Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital and nursing home and treatment of and rendering of a service to the plaintiff and the supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the motor vehicle collision of 27 June 2014 after such costs have been incurred and upon proof thereof.

7. The defendant shall pay the plaintiff's taxed or agreed party and party costs up to date on the High Court scale, which party and party costs shall include, but not be limited to:
 - 7.1 The reasonable costs in respect of the preparation of the actuarial calculations, medico-legal and addendum reports of the experts as per paragraph 7.4 below.

- 7.2 Costs of counsel to date hereof, including the preparation for and trial appearances on 1 March 2023 and 2 March 2023, as well as the preparation and drafting of the written Settlement Proposal, Heads of Argument and annexures.
- 7.3 The travelling costs of the plaintiff to and from all medico-legal appointments and consultations.
- 7.4 Qualifying and preparation fees for the drafting of the following medico-legal reports:
- 7.4.1 Dr G A Versfeld (Orthopaedic Surgeon) – Report and RAF4 Serious Injury Assessment Form.
 - 7.4.2 Sunninghill Radiology.
 - 7.4.3 Mrs E Kruger (Occupational Therapist).
 - 7.4.4 Dr W Pretorius (Industrial Psychologist) - Report and Addendum Report and
 - 7.4.5 Munro Actuary reports.
8. The preparation and qualifying fees of the plaintiff's experts for attending to the expert affidavits pertaining to evidence and the content of their medico-legal reports.
9. Subject to the following conditions:
- 9.1 The plaintiff shall, in the event that costs are not agreed upon, serve the notice of taxation on the defendant's attorney of record; and
 - 9.2 The plaintiff shall allow the defendant to make payment of the taxed or agreed costs on the 28th of the month following the month in which the costs were taxed and/or settled.

9.3 No interest will be payable except in the event of default of payment of such costs, in which case interest will be payable at the rate of 10.75% from the date of taxation.

N. Mazibuko
Acting Judge of the Gauteng Local Division,
Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation:

Counsel for the Plaintiff: Mr D. Grobbelaar
Attorneys for the Plaintiff: Mills & Groenewald Attorneys

Counsel for the Defendant: Mr T. Ngomane
Attorneys for the Defendant: State Attorney (Johannesburg)

Heard: From 1 to 2 March 2023

Date of Judgment: 25 April 2023