

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

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

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S Kaze

19 May 2023

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2016 / 30396

In the matter between:

RAJU MOHAMED RASHID

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Neutral Citation: *Raju Mohamed Rashid v Road Accident Fund* (Case No: 2016/30396) [2023] ZAGPJHC 525 (19 May 2023).

JUDGMENT

KAZEE AJ

- [1] The Plaintiff instituted action proceedings in his personal capacity against the Defendant for damages in terms of the Road Accident Fund Act 56 of 1996 pursuant to a motor vehicle collision that occurred on 20 February 2016.
- [2] The Defendant (“RAF”) no longer disputes the merits of the claim. On 12 May 2023 the RAF rejected the Plaintiff’s Form 4 claim of a serious injury for general damages and this aspect is accordingly not before me.
- [3] I am only called upon to make a determination on the liability and quantum of the future loss of earnings resulting from the accident.
- [4] On the first day of the hearing, counsel for the RAF moved an application from the Bar seeking a removal of the matter from the roll, alternatively a postponement of the matter on three primary grounds. First, that the Court should avoid dealing with the matter on a piecemeal basis, given that the question of general damages and the severity of the injury is still to be resolved before the HSBC. Second, that the remaining claim for determination before this Court is the Plaintiff’s loss of earning capacity and that this will be affected by the determination on the general damages. Third, that in light of the fact that there has already been a delay of seven years, a further delay of some months will not severely prejudice the plaintiff.
- [5] Counsel for the Plaintiff opposed any removal of the matter from the Court roll.
- [6] I have considered the judgment in *Botha v RAF* 2015 (2) SA 108 (GP) par 42, in which this Court confirmed that the determination of the loss of earning capacity by the Court is not subject to or dependent on any findings by the RAF appeal tribunal. As such, the Defendant’s submission that future loss of earnings is not a component which can be determined by the Court if there is a non-serious injury, is incorrect.
- [6] More fundamentally, however, is the fact that the Defendant has not brought the application in the proper way and with notice to the Plaintiff, nor has condonation been sought. No reason has been given why a substantive application has not been placed before the Court. While it is understandable that the RAF operates under significant constraints, no substantive reasons were placed before me why the matter cannot proceed. The application was dismissed.

THE PLAINTIFF'S INJURIES AND TREATMENT

- [7] The Plaintiff was 28 years old at the time of the accident and is currently aged 35. The Plaintiff sustained a fracture of the proximal right femur and a soft tissue injury of the lumbar spine.
- [8] The Plaintiff was admitted at Lenmed Hospital. On admission at the hospital the Plaintiff's Glasgow Coma Scale (GCS) recorded 15/15 and the hospital records noted no loss of consciousness. The Plaintiff received surgery on the right femur and a rod was placed in his leg. He was hospitalised for 5 days, from the 20 to 25 February 2016.
- [9] The rod was removed in March 2019.

THE PLAINTIFF'S CURRENT COMPLAINTS

- [10] The Plaintiff complained of ongoing symptoms concerning documented and undocumented orthopaedic injuries. Following the accident the Plaintiff reported mild traumatic head injury (frontal lobe organic injury), anxiety and mild depression.
- [11] The Plaintiff testified that he feels sad and depressed. He remains traumatised and where possible does not drive past the accident site. He is always cautious with his right leg and is unable to sit or stand for long periods of time. He takes non-prescription pain medication and his leg is particularly sore in cold weather. He is also unable to focus for long periods of time and his work performance is not as it was before the accident.

SEQUELAE OF INJURIES

[12] The joint expert orthopaedic surgeons agreed on the complaints raised by the Plaintiff. While the surgeons did not foresee that the orthopaedic injuries sustained should have long-term effects on the Plaintiff, this matter was deferred to the expertise of the industrial psychologist.

FUTURE MEDICAL TREATMENT

[13] The Defendant offers the undertaking in terms of section 17(4)(a) in relation to the Plaintiff's future medical expenses. The claim has been settled at 80% merits. It goes without saying that all injuries that were caused as a result of the above-mentioned motor collision will be dealt with in terms of the undertaking.

MEDICO-LEGAL REPORTS

[14] The Plaintiff filed 12 expert reports and the Defendant filed 8 expert reports. Joint expert minutes were filed in respect of the clinical psychologists, the occupational therapists and the orthopaedic surgeons.

[15] The RAF did not call any witnesses and restricted itself to cross-examining the Plaintiff's experts.

[16] The Plaintiff called four witnesses. The Plaintiff himself, followed by Dr Bingle (neurosurgeon), Ms Kotze (industrial psychologist), Ms Hovsha (neuropsychologist) and Mr Wittaker (actuary).

[17] Dr Bingle gave evidence that the plaintiff "*probably sustained a mild traumatic brain injury*" and further that "*although ongoing neurocognitive ad psychological sequelae are not usually expected following a mild traumatic brain injury, the Plaintiff reported such sequelae for which deference is given to the clinical psychologist and psychiatrist*".

[18] The Defendant does not contest the orthopaedic injuries in question but rejects the diagnosis of mild traumatic brain injury and mild depression. The representative of the Defendant argued that even if mild depression were accepted, the Plaintiff testified that over the past seven years he has not sought treatment for the depression nor has he been prescribed medication. The Plaintiff admitted to self-medicating on occasion on prescription medication made out in wife's name.

LOSS OF INCOME AND EARNING CAPACITY

[19] It is common cause that the Plaintiff was employed at the time of the accident. He was and is still employed by Diner's Club as a consultant in the Authorisations and Fraud Department. He has grade 12 qualifications (2005) and completed a short programme in PC Technologies from Damelin College in 2006.

[20] The position is sedentary and is office-based, shift work. Accordingly, the Plaintiff is remunerated through a basic salary and overtime work, which fluctuates based on the weekend or overnight shifts.

[21] The Industrial Psychologist makes the following postulation for the Plaintiff's post morbid/accident earnings. First, that pre-accident the Plaintiff was described as a great performer prior to the accident by his supervisor and that he was known to step in for his supervisor when she was away. Following the accident his performance drastically dropped and he was no longer meeting his targets, was not motivated and was accordingly placed on performance management for one year. It was clarified in oral evidence, that the Plaintiff is no longer on performance management and has received discretionary performance bonuses and salary increases in the years since the accident.

[22] Second, the Industrial Psychologist graded the Plaintiff at Patterson level B4 and projected a progression to a B5 / C1 salary grading. A straight line increase was applied to the age of 45, followed by inflationary adjustments. The Occupational Therapist confirmed that the Plaintiff retains the physical abilities necessary to work in a position requiring light work demands and that "his current position is a good match for his limitations at present".

- [23] Given these reports, counsel for the Plaintiff placed emphasis on Dr Bingle's findings that the Plaintiff probably sustained mild brain injury. The doctor's finding was stated no higher than this, given that no MRI or CT scans were carried out or additional medical evidence presented. The doctor noted that on clinical examination there was no evidence of neurophysical deficit due to the head injury sustained in the accident. The sequelae relied on by the plaintiff therefore emphasised not the injury to the right femur but rather the likelihood of mild brain injury.
- [24] Ms Hovsha, the clinical psychologist, found that the Plaintiff suffers from depressive symptoms and from travel-related anxiety. Following the relevant standard tests, Ms Hovsha found that the Plaintiff's mental control (ability to sustain attention, awareness of errors) was severely impaired.
- [25] It clear that the Plaintiff's injuries may require future medical attention and the undertaking in terms of section 17(4) was properly made. I turn now to consider the claim for future loss of earnings.

ANALYSIS

- [26] To succeed in the claim for loss of income or earning capacity, the Plaintiff must establish on a balance of probability that as a result of the accident, he has lost future earning capacity (*Rudman v RAF* 2003 (SA)234 (SCA)). The Plaintiff should be placed in the position he would have been in had it not been for the accident. On fairness of the award, the Courts must take care to see that its award is fair to both sides – "it must give just compensation to the Plaintiff, but it must not pour out largesse from the horn of plenty at the Defendant' s expense." In *Southern Association Ltd v Bailey* 1984 (1) SA 98 (A), the Court confirmed that any enquiry into damages for loss of earning capacity is of its nature speculative and a judge is required to arrive at an estimate of an amount that is both fair and reasonable in the circumstances of the case.

- [27] The principal difficulty with the Plaintiff's case is that there are no medical records of the frontal lobe organic injury that the Plaintiff is said to have suffered. The plaintiff's expert himself was unable to confirm a diagnosis of frontal lobe organic injury. However, absent an alternative expert on the behalf of the RAF, I am not in a position to wholly dismiss the expert opinion of Dr Bingle. He has made a postulation and that it is on this basis that the industrial psychologist has based her findings and recommendations. In *McGregor and Another v MEC Health Western Cape* [2020] ZASCA 89 para 17, the Supreme Court of Appeal confirmed that one of the functions of an expert is to give evidence concerning their own inference and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions. I do not lightly disregard the inferences drawn by the neurosurgeon.
- [28] There is no doubt that the Plaintiff lost earning as a result of the injuries suffered due to the accident. Neurologically, I am satisfied that, on balance, the Plaintiff suffered a mild brain injury with mild effect. I accept Ms Hovsha's finding that the Plaintiff suffered symptoms of travel-related anxiety and mild depression. In cross-examination it was pointed out that the Plaintiff has not sought treatment for the diagnosis of mild depression over the past seven years. Should the Plaintiff elect to receive treatment for the diagnosis of mild depression, there is no reason why the effects of the disease will not be ameliorated.
- [29] I am also satisfied that on balance of probabilities, the plaintiff has proven that he has lost earnings in the past. In considering the appropriate contingencies to apply, general contingencies cover a wide range of considerations. This varies from case to case. It has generally been accepted that contingencies of 5 % to 15 % for past and future loss of income have been accepted as 'normal contingencies (Koch, *The Quantum Yearbook* (2015) at 120). A number of issues are considered when an actuarial assessment is done, including considerations of early death, promotion prospects, and taxes.

[30] I am not persuaded, however, that the Plaintiff may not achieve further career progression in the Company. Although evidence was tendered that the Plaintiff may find it more difficult to find alternative employment in the future, this consideration is a consideration on which I have not placed great weight, given that the Plaintiff is currently employed and has remained with his employer for seven years post-accident. Moreover, on cross-examination, the Plaintiff conceded that although a suitable vacancy did arise in the past, some years after the accident, he elected not to apply for the position. I accept further that the Plaintiff is in employment that is suitable to the injuries sustained in the accident and that he has received discretionary annual bonuses over the past several years. The contingency deduction must take this into account.

[31] Having considered the Plaintiff's age, educational background, the injuries sustained and the expert opinions, I am of the view that 5 % contingencies must be applied to the pre-morbid position and 10 % to the post morbid position, calculated as follows:

Pre-morbid earnings:

Past loss of earnings:	R 2,400	
Less contingency deduction: 5%	R 120	
<i>Net past loss</i>		R 2,280

Post morbid earnings:

Loss of income uninjured	R 9,353,175	
Less contingency deduction: 15%	R 1,402,976	
	R 7,950,199	
Value of income injured:	R 8,373,931	
Less contingency deduction: 10%	R 837,393	
	R 7,536,538	
<i>Net future loss</i>		R 413,661

Total net loss:

R 415,941.00

Order

[42] In the circumstances, the following order is made:-

1. The Defendant is liable for 80% of the Plaintiff's proven or agreed damages.
2. The Defendant shall pay the Plaintiff the net amount (after apportionment) of R 415,941.00 in settlement of the plaintiff's claim ("the settlement amount").
3. Payment of the settlement amount, shall be made to the Plaintiff's Attorneys of Record, by payment into their trust account within 180 days from date of this court order, with the following details:

RENE FOUCHE INC
STANDARD BANK – TRUST ACCOUNT
ACC. NR: [...]
BRANCH CODE: 004305
REF: GPS/JDK/SM/R137

4. The Defendant shall furnish to the Plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for **80% (eighty percent)** the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on **20 February 2016**, after such costs have been incurred and upon proof thereof.
5. The statutory undertaking referred to in paragraph 4 supra, shall be delivered by the Defendant to the Plaintiff's Attorney of Record within 14 (Fourteen) days of the date of this Order.
6. The Defendant shall within 14 days of receipt of this Court Order register the

matter on the RNYP list.

7. The Aspect of Past Medical Expenses is postponed sine die;
8. The Aspect of General Damages is postponed sine die;
9. The Defendant shall pay the Plaintiff's Taxed or agreed Party and Party costs of suit on the High Court Scale to date of this order, such costs including but not limited to:
 - 9.1. The costs of the reports (including RAF 4 Forms and addendum reports, if any) of Ms Aires, Dr. Bingle, Dr. Fine, Dr.A. Peche, Dr. O Guy, Dr. J. Goosen, Ms Hovsha, Dr Read, Sandton Radiology, Prof L.A Chait, Dr. C. Kahanovitz, Ms. A. Reynolds, Mr. L.J. Van Tonder, and Ms. N. Kotze;
 - 9.2. The costs of all experts who attended to the preparation of joint minutes;
 - 9.3. The qualifying, and preparation costs, including affidavits of experts;
 - 9.4. The qualifying and testifying fees for Ms Kotze for trial purposes on 15 and 16 May 2023;
 - 9.5. The qualifying and testifying fees for Dr Bingle for trial purposes on 16 May 2023;
 - 9.6. The qualifying and testifying fees for Ms Hovsha for trial purposes on 16 May 2023;
 - 9.7. The qualifying and testifying fees for Mr Whittaker for trial purposes on 17 May 2023;
 - 9.8. The Plaintiff's travelling expenses for testifying on 15 May 2023;
 - 9.9. Costs of senior-junior Counsel, Advocate Johan Killian, for trial preparation and on trial for 15 May 2023 in respect of the issue of liability as well as quantum, inclusive of the costs in preparing for and appearing at, the pre-trial conference and judicial case management;
 - 9.10. Costs of senior-junior Counsel, Advocate Amelia van der Merwe, for trial preparation and on trial on 15, 16 and 17 May 2023 in respect of quantum;

- 9.11. The costs of the actuarial reports, inclusive of the amended reports, of Mr. G Whittaker (Algorithm Consulting Actuaries);
 - 9.12. The costs of attending to an Inspection in Loco;
 - 9.13. The costs of the preparation of copies of two sets of bundles and uploaded the matter onto CaseLines;
 - 9.14. The costs of preparation of comprehensive heads of argument by senior-junior counsel; and
 - 9.15. Plaintiff's reasonable travelling expenses to and from medico-legal appointments in respect of the experts of the plaintiff and the defendant and consultations at trial.
10. In the event the costs are not agreed, the Plaintiff's attorney shall serve a Notice of taxation on the Defendant and/or the Defendant's attorneys of record. The Defendant shall be granted a period of 60 days post taxation to pay the taxed costs.

S KAZEE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 15 - 17 May 2023
Judgment: 19 May 2023

Appearances

For Plaintiff: Adv J Killian
Instructed by: Rene Fouche Attorneys

For Defendant:
Instructed by:

Adv T Naidoo
Lesege Moroiane