

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
GAUTENG DIVISION, JOHANNESBURG

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

.....
Name: M Majozi AJ

Date: 30 January 2024

CASE NUMBER: 34527/2016

In the matter between:

MOTHUDI MODISE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 29 January 2024.

JUDGMENT

MAJOZI AJ:

Introduction

[1] On 2 April 2016 the plaintiff, Mr Mothudi Modise, was involved in a motor vehicle accident that took place at about 13:00 on Wettles Street, in Protea Glen, Soweto.

- [2] At the time of the accident the plaintiff was driving a motorcycle with registration letters and number B[...] GP. The plaintiff alleges that he collided with an unknown vehicle driven by an unknown driver who was at the time driving a silver grey Toyota Tazz of Corolla.
- [3] The plaintiff claims that the sole cause of the said collision was the negligent driving of the unknown driver, who was negligent in that he, amongst others –
- 3.1. failed to keep a proper lookout;
 - 3.2. failed to keep the vehicle he was driving under proper or any control;
 - 3.3. failed to slow down and/or stop and/or apply the brakes of his/her vehicle promptly or at all when he/she had a duty to do so; and
 - 3.4. he/she drove at an excessive speed.
- [4] As a result of the foregoing collision, which was caused by the unknown driver's negligence, the plaintiff claims to have sustained a head injury, laceration on the right foot and a tender left foot and right elbow.
- [5] As a result of the injuries sustained and arising from the accident, the plaintiff was hospitalised and required medical treatment. He will require future hospital and medical treatment and he claims to have also experienced severe pain, shock, suffering and discomfort and will in the future experience pain, suffering and discomfort.

- [6] It is the plaintiff's pleaded case that he also suffered loss of amenities of life and will in the future suffer loss of amenities of life having been temporarily and permanently disfigured. The plaintiff further pleaded that he had suffered past loss of earnings and will in the future suffer loss of earnings or reduced earning capacity.
- [7] The defendant defended the action brought by the plaintiff and delivered a notice of intention to defend on 16 November 2016 and a plea. However, the defendant's plea was struck off on 28 July 2022 by Manoim AJ as a result of the defendant's failure to comply with the interlocutory orders directing it to, *inter alia*, make an election on the appointment of experts and attend a pre-trial conference.
- [8] In terms of the 28 July 2022 Order, the plaintiff was directed to approach the Registrar of this Court for an allocation of this matter for a default judgment trial date.
- [9] As a result, the matter was set down before me on 18 October 2023 and, having stood down at the request of the plaintiff's counsel, it proceeded on 19 October 2023.
- [10] Before me, and in terms of the heads of argument submitted by the plaintiff's counsel, the plaintiff sought that the defendant be held to be liable for 100% of his proven damages. The plaintiff further sought the defendant to provide an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act,

56 of 1996 (“**the RAF Act**”) and general damages in the amount of R1 million as well as and loss of earnings in the amount of R2 251 169,00 making a total claim of R3 251 169,00. However, the draft order handed up to me and oral submissions made to me during argument sought the issue of general damages to be postponed *sine die*.

The evidence

- [11] The plaintiff testified that on 2 April 2016 at approximately 13:00, he was on a motorcycle on Wettles Street, Protea Glen Extension 12, Soweto. Wettles Street has a single lane for traffic in either direction. As he was driving along, approaching a curve, there was a car following him that was speeding. His evidence is that he attempted to get out of the way of the speeding vehicle and as he pulled aside, the unknown vehicle bumped his motorcycle, and he lost control thereof. His motorcycle veered off to the side of the road where he fell.
- [12] The plaintiff further indicated that prior to the unknown vehicle bumping him he had noticed that the vehicle was speeding due to the loud sound that its engine made as it was approaching him. He also saw it in his side mirror.
- [13] As it relates to the driving conditions, the plaintiff indicated that it was a hot day, sunny with clear skies. The surface of the road was tarred and the condition of the road was good as there were no potholes.

- [14] According to the plaintiff, pursuant to the unknown driver and vehicle bumping him from behind, the unknown driver failed to stop. As a result the plaintiff was not able to obtain the full details of the unknown driver and the unknown vehicle. He, however, remembers that the unknown vehicle was a small vehicle, potentially a Toyota Tazz or Toyota Conquest, which was silver-grey in colour.
- [15] Upon questioning by the Court, the plaintiff indicated that after he had sustained injuries, he stood up and attempted to move his bike to the side of the road but could not manage to do so. He then phoned the Police who did not arrive. Thereafter he phoned his friends to alert them to the accident.
- [16] The plaintiff is, however, uncertain as to who between him and his friends, phoned the Netcare Ambulance service which took him to hospital.
- [17] Annexures A, B and C to the plaintiff's particulars of claim confirm that the plaintiff was admitted to the Leratong Hospital on 2 April 2016, he had been involved in a motor vehicle accident and was complaining of, amongst others, backache and painful legs.
- [18] The plaintiff was, in terms of his hospital records, admitted on 2 April 2016 and discharged on 5 April 2016.
- [19] The police accident report is in line with the evidence of the plaintiff. It states that the plaintiff alleged that he was driving a motorcycle and a silver grey

Toyota Tazz vehicle bumped him from behind and did not stop at the scene. In the accident report, the plaintiff indicated that he did not manage to take any details of the Toyota Tazz and he sustained injuries to his left foot.

The applicable legal principles

[20] It is trite that road users, especially drivers are under a duty to, *inter alia*, keep a proper lookout, drive at a reasonable speed given the prevailing circumstances, to maintain a safe following distance and be able to stop within one's range of vision; a driver must drive in such a manner that he can avoid a collision should the vehicle in front of him suddenly stop and must therefore keep sufficient distance between himself and the vehicle in front of him.

[21] A driver who collides with the rear of a vehicle is *prima facie* negligent unless he can give an adequate explanation indicating why he was not negligent.¹

[22] It is also trite that, where the onus rests on the plaintiff as in the present case, it is in instances where there are two mutually destructive stories, that a plaintiff has to satisfy a court on a preponderance of probabilities that his version is accurate and true. The plaintiff, where there is a contrary version, has to persuade a court that the version advanced by the defendant is false or mistaken and falls to be rejected.²

¹ *Fig Brothers (Pty) Ltd v South African Railways and Harbours and Another* 1975 (2) SA 207 (C) at 211H.

² *Liebenberg v Road Accident Fund* (39831/2013) [2015 ZAGPPHC (27 February 2015)] at para 8.9.

[23] The uncontested evidence of the plaintiff is that the unknown driver collided with his motorcycle from behind. The defendant, being under bar, proffered no contrary version to this effect and even though it appears that the plaintiff may have trundled from the road, upon hearing and seeing the unknown driver approaching him at a high speed. The Court only has the plaintiff's version.

[24] In any event, even if the Court doubted the evidence of the plaintiff in certain respects, there is no explanation that would rebut the fact that the unknown driver was *prima facie* negligent in colliding with the plaintiff's motorcycle from the rear.³

[25] In the premises, it is established that the collision happened as a result of the negligence of the unknown driver and the defendant is 100% liable for the damages suffered by the plaintiff.

The injuries and sequelae

[26] As it relates to the plaintiff's case on this aspect, Dr Barlin, an orthopaedic surgeon, concluded that the plaintiff sustained a head injury and his Glasco-scale was 13/15 on admission to hospital; there was a degloving laceration under the right heel. In a supplementary report, Dr E A Mjuza opined that the plaintiff suffered from soft tissue injuries on his left arm, elbow and lower back which required conservative treatment. He suffers from partial impairment due to injuries as well as chronic headaches (suboccipital), pains

³ *Goldstein v Jackson's Taxi Service* 1954 (4) SA 14 (N) at 18A-C.

and presents with signs of neural compression in his left upper limb, and recurrent lower back pain.

[27] In written submissions, it was submitted that Dr Barlin found that the plaintiff is employable in an occupation that does not require standing for long periods or walking long distances and his injuries are likely to require conservative treatment only.

[28] The plaintiff's neurosurgeon, Dr Segwapa, indicated that the plaintiff reported direct trauma to the face and immediate loss of consciousness from which he recovered the same day in hospital. He had features of a mild concussive brain injury and has memory problems. The doctor opined that the plaintiff should undergo formal neuro-physical evaluation by a clinical psychologist to determine the extent of his cognitive impairments. The doctor further indicated that neuro-surgical literature indicated that \pm 80% of patients suffering from post-concussion headaches recover within 2 – 3 years, however, 20% of the patients remain with chronic symptoms.

[29] An interesting feature of Dr Segwapa's report is that the plaintiff reported immediate loss of consciousness from which he recovered the same day in hospital. This is contrary to the evidence proffered by the plaintiff before me and the medical records. The plaintiff indicated that he was fully conscious after the collision, attempted to pull his motorcycle off the road and subsequently phoned his friends to come to the accident scene. He could

not remember who, between himself and his friends, called the ambulance that took him to the hospital.

[30] The clinical psychologist that was engaged as a result of the recommendations of Dr Segwapa, concluded that the plaintiff's neuro-psychological profile should be considered to be 'constant' and the assessment revealed a performance between average and lower average range suggesting cognitive abilities and deficits as contained in his report. There was, however, an existence of emotional distress interfering with his ability to function optimally on a daily basis. Notwithstanding the latter, he demonstrated some low average scores these scores were within the slight to moderate deficits and indicated no cognitive impairment.

[31] Dr Fine, a psychiatrist indicated that the plaintiff recorded a GCS of 13 out of 15 in the hospital records and has ongoing difficulties with memory, mood and behaviour; he has symptoms of a post-traumatic stress disorder and of accident-related depression. Strangely, the psychiatrist refers to a head injury with sufficient organic brain damage with functional effects that can be considered to be permanent and irreversible. These statements seem to be at odds with the report of Dr Segwapa and the GCS score that the plaintiff had of 13 out of 15, with 15 being the highest score. A 13 out of 15 score means that a person is fully awake, responsive and has no problems with thinking ability or memory. The latter also has to be considered against the testimony of the plaintiff who indicated that he was fully conscious and was able to arrange for his friends to come and help him.

[32] Ms Papo, the occupational therapist, noted that at the time of the accident the plaintiff was employed as a railway cleaner / general assistant and the type of work he performed fell within light/medium with aspects of heavy type of work. He was able to return to work after about two months post the accident and was only able to continue with the same duties for a month as he could not cope. He secured employment in 2017 as a waiter and he left due to not coping with work and thereafter he had to leave employment. Due to not coping well he was unable to meet the critical job demands. The occupational therapist further noted that the plaintiff was unable to meet physical work demands within normal work standards for occupations which fall within the ranges of medium, heavy and very activities due to the reported pain and observed structural impairments of backache and his right foot.

[33] The plaintiff's physical capacity, rate of work and work qualification profile is presently suitable for light/medium range types of work with limited mobility demands from a physical capacity point of view and considering his pre-accident physical capacity in the various occupations he attended to, it was noted that the accident has reduced his physical capacity.

[34] The industrial psychologist, Tshepo Tsiu, indicated that the plaintiff has Grade 11 as his highest qualification and his occupation was informal, temporary employment. He completed Grade 11 at Lenz Public School in 2008 and has certificates from various Academies, including a certificate in

first aid. He had been employed between 2010 and 2015 as a barman, a general despatch assistant at Pick and Pay, a cook at KFC and thereafter employed as a general worker as PRASA. It is worth noting that the plaintiff did not present any employment documentation corroborating his employment and his earnings were recorded as reported earnings. Neither the occupational therapist nor the industrial psychologist referred to documents confirming employment prior to the accident.

General damages

[35] In relation to the general damages, I was referred to three judgments by the plaintiff's counsel, namely *De Jongh v Dupisane* 2005 (5) SA 457 (SCA), *Mochonyane v Road Accident Fund* (RAF 69/15) [2017] ZANWHC 99 (30 November 2017) and the matter of *Road Accident Fund v Petrus Jacobus Delport N.O* (1834/2004)[2005] ZASCA 38. In the *De Jongh* matter, the Court, referring to the matter of *Pitt v Economic Insurance Co. Ltd* 1957 (3) SA 284 (D) at 287E-F, said the following:

"The Court 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."

[36] Taking into account the aforesaid principle, the *Mochonyane* case that the plaintiff's counsel referred to, does not assist the plaintiff and in fact points to a lower compensation to the plaintiff. In the *Mochonyane* case, the plaintiff had sustained a severe head injury with a GCS of 3/15, a fracture of the left femur, soft tissue injury thorax and laceration on occipital region. There were impaired movements of limbs and the plaintiff could not stand

independently. In that case, the Court awarded damages in the amount of R1,7 million which translates to R1 960 000,00.

[37] In the *Delpont N.O.* case, a 36-year old female with a GCS score of 6/15 sustained widespread injuries to the chest and had to be incubated and ventilated, was awarded general damages in the amount of R1 250 000, which translates to R2,915 million.

[38] In the matter of *M v Road Accident Fund*, the plaintiff had sustained a severe head injury characterised by a period of loss of consciousness, post-traumatic amnesia, resultant brain damage and resultant neuro-cognitive deficits involving impaired memory and concentration, amongst others, with an admission GCS of 4/15 including an incubation on a T-piece, was awarded general damages in the amount of R1,9 million which currently translates to R2,120 725,00.

[39] The plaintiff's case is far removed from the foregoing considerations. The plaintiff's GCS was 13/15, he was fully conscious pursuant to him falling off his motorcycle, he was not flung off and lost consciousness. He was fully awake and able to use his limbs to motorcycle out of the road and use his cell-phone to call for assistance. Even though heads of argument were provided to me dealt with this issue, I shall not decide it, it is postponed *sine die*.

Loss of income

- [40] The plaintiff's life expectancy has not been affected by the injuries he sustained as a result of the motor vehicle collision. In the particulars of claim, the plaintiff claimed R250 000,00 for past loss of earnings and R3,5 million for estimated future loss of earnings and loss of earning capacity. In the RAF1 form the plaintiff claimed R700 000,00 as future loss of income.
- [41] In the heads of argument, and submissions made before me, the plaintiff sought loss of earnings in the amount of R2 251 169,00. The plaintiff further submitted that as a general rule the Court may apply a sliding scale in respect of contingencies, and apply a half-a-percentage per annum from the date of the accident to retirement age.
- [42] It was also submitted that, allowing for contingencies is one of the elements in exercising the discretion to award damages and I was referred to the case of *CF Southern Insurance Association Ltd v Bailey N.O.* 1984 (1) SA 98 (A) 116H.
- [43] According to the plaintiff, contingencies consist of a wide variety of factors and they include matters such as the possibility of error in the estimation of a person's life expectancy, likelihood of illness, accident or employment which would have occurred and therefore affect a person's earning capacity.
- [44] In the matter of *Maluleke v Road Accident Fund* (98018/2015) 2018 ZAGPPHC 567 at paragraph [33], where the plaintiff's earnings, pre- and post- morbidity were assumed to be the same, the Court held that post-morbidly, 55% should be deducted. The Court held that:

“[33] I am of the view that post the collision, the plaintiff will henceforth primarily depend on sympathetic employment. I am of the further view that this funding should and can be mitigated by a moderately post-morbid higher contingent deduction, although not of the proportion as suggested by the plaintiff’s counsel. This finding is in view of the fact that the plaintiff would be disadvantaged in an open labour market and thus it should weigh in his favour.”

[45] In *Krohn v Road Accident Fund* (1402/2013) [2015] ZAGPPHC 697, the Court, awarding a pre-morbid contingency deduction of 15% and a post-morbid deduction of 50% stated that:

“There is little doubt that having regard to the sequelae of his injuries fully canvassed by the experts, the plaintiff is at a risk of losing his current position and the prospects of him obtaining another position are indeed very slim. The plaintiff is on the proverbial knife’s edge. He can be dismissed from his job any time. There is no other option in my mind other than to apply a 50% post-morbidity contingency deduction. By applying the 50% contingency deduction, the plaintiff is regarded as having a 50% chance to sustain his current employment, alternatively to obtain alternative employment. This is a conservative approach if one has regard to the plaintiff’s condition.”

[46] In the matter of *Yende v Road Accident Fund* (2987/2015) [2020] ZAGPPHC 384, the facts were that a 33-year old male plaintiff was involved in a motor vehicle accident and that he mainly suffered spinal injuries. He was working as an assistant welder at the time and his functional work abilities were impaired. After a consideration of the medical opinions, postulations formulated and the principles relating to contingency deductions, the learned Judge Matsemela AJ made a finding that a contingency deduction of 15% should be applied to the plaintiff’s gross future uninjured earnings and that 45% should be applied to the plaintiff’s gross future injured earnings. The Court at paragraphs [50] and [51] then said the following:

[50] The industrial psychologist note that the current unemployment rate is approximately 31% and it was submitted to court that the semiskilled sector is highly reliant on physical capabilities. The Plaintiff therefore would have been able to compete with able-bodies (sic) individuals pre-morbidly but post morbidly has to compete with “slight” according to the defendant industrial psychology and “significant” according to the plaintiff’s industrial psychologist physical deficits. The reality is that in an oversaturated market he is significantly disadvantaged by any form of physical deficit.

[51] Therefore I am of the view that the contingencies of 30% across the board to the past loss of income, 15% to the future premorbid income and 45% to the future post morbid income would be reasonable under the circumstances. These contingencies are fairly standard considering that the plaintiff is currently 36 years old and had the accident not occurred would have another 29 years to retirement. I will therefore use the rule of 0,5% used in the premorbid future scenario per year until retirement, which amounts to approximately 15%. An additional 30% is added in the post morbid scenario to compensate for the factors cited above.”

[47] When I probed plaintiff’s counsel on a reasonable amount of future loss of income, she indicated that it would be difficult to make a submission as liability had not been determined.

[48] On a further probing from the Court and on assumption that the defendant’s liability was 100%, counsel submitted that an amount of R1, 298 387.50 would be reasonable. I was almost persuaded. However, upon further consideration of the matter, I realised that the heads of argument contained an incorrect calculation of post morbid loss of income of 25% instead of 30%.

[49] Taking into account the facts and the expert reports as well as the factors summarised in paragraph 33 and 34. I am of the view that a 50% deduction

on future uninjured earnings should be applicable. This deduction amounts to R1 385 916,00 and a 5% future loss injured earnings, should be applicable amounting to R324 031,00, thus entitling the plaintiff to an amount of R1 195 761,00 as his total loss of income. The factors listed in the aforementioned paragraphs justify such a deduction.

[50] As it relates to costs, I am only willing to grant costs of the 19 October 2023, as it was the plaintiff's counsel who requested the matter to stand down.

[51] The proposed 5% contingency deduction on past uninjured and injured earnings, is not in issue.

[52] In the circumstances I make the following order:

1. The defendant is liable for 100% of the plaintiff's proven damages as a result of the accident that occurred on 2 April 2016.
2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of Road Accident Fund Act, 56 of 1996 for the costs of the plaintiff's future accommodation in hospital or nursing home treatment of or rendering a service or supplying goods to him arising out of the injuries sustained by him in the motor vehicle collision on 2 April 2016, after such costs have been incurred upon proof thereof.
3. General damages are postponed *sine die*.
4. The defendant shall make payment to the plaintiff in the amount of R1 195 761,00 in relation to future loss of earnings.
5. The loss of income in order 4 above, is payable within 180 days from the date of this Order.

6. The defendant shall make payment of the plaintiff's agreed to taxed costs on the High Court scale, such costs to include but not limited to the following:
 - 6.1. Costs of all expert reports, preparation fees and reservation fees, if any;
 - 6.2. Costs of counsel for appearance on 19 October 2023, including preparation.
7. In the event that costs are not agreed the plaintiff agrees as follows:
 - 7.1. the plaintiff shall serve a notice of taxation on the defendant's attorney of record;
 - 7.2. the plaintiff shall allow the defendant 180 days to make payment of the taxed costs.

M MAJOZI
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 19 October 2023
Judgment: 30 January 2024

Appearances:

For the plaintiff: Adv M Ndubani
Instructed by: S S Ntshangase Attorneys