



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 39977/2017

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

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SIGNATURE

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DATE

In the matter between:

MAHLAKE, L

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

(Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 18 May 2022.)

JUDGMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

[1] The Plaintiff has instituted action against the defendant (ROAD ACCIDENT FUND) for damage suffered as a result of injuries sustained in a motor vehicle collision that occurred on 28 March 2015. The action is not defended.

THE MERITS:

[2] At the start of the trial I was informed that merits became settled in that the Defendant offered a concession on merits and the plaintiff accepted the offer. The only issue for determination by this court is therefore the quantum of past and future loss of earnings and earning capacity.

QUANTUM:

[3] Following the accident the Plaintiff sustained the following injuries:

3.1 A comminuted open tibia fracture. The tibia has medial and anterior angulation.

3.2 A midshaft and proximal fractures of the fibula extending to the neck midshaft with significant malalignment and posterior displacement of the fracture fragments.

3.3 A chest injury.

3.4 The plaintiff presents with the following scars:

3.4.1 A scar of about 12cm in the medial aspect of the left mid-tibial region;

3.4.2 He has 5 (Five) scars of about 1cm each over the left tibial area anteriorly where he had the external fixation applied

3.5 Significant associated soft tissue swelling involving the entire left lower leg in keeping with soft tissue injury.

3.6 Severe depression was measured in the Beck Depression Scale.

3.7 The plaintiff received x-rays of the cervical spine, chest and pelvis and received a backslap cast. He was given Panado, Augmentin and Brufen.

3.8 The plaintiff underwent a debridement and external fixation of the left leg. The plaintiff's left ex-fix tibia was converted to a tibia intramedullary nail on 22 September 2015.

3.9 In hospital the plaintiff used a wheelchair and underwent an operation of the left leg.

3.10 The plaintiff used crutches for approximately 18 (eighteen) months as he had a second operation in September 2015.

[4] In his addendum report the Orthopedic Surgeon reports that the intramedullary pin is not present. In fact, the fixation appears to have been external. There is no non-union present. The fractures have healed. The expert further says *“having seen today’s X-Rays, estimate the patient’s loss of work capacity to be in the region of below 10%, i.e at 7% to 8%”*. The plaintiff will not have to retire early as a result of the accident.

[5] The industrial psychologist reports that the plaintiff is expected to resume work within the same areas than before, following optimal and successful treatment. This implies that Mr Mahlke will only be able to compete for suitable jobs again after he has received the required operation and recommended rehabilitation/treatment.

[6] In paragraph 8.1 of the amended particulars of claim the plaintiff claims against the defendant future hospital, medical and related expenditure. Should the defendant be furnished with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, Act 56 of 1996, the plaintiff will have capacity to undergo the recommended treatment.

LOSS OF EARNINGS AND EARNING CAPACITY:

[7] At the time of the accident the plaintiff was working as a general worker for the Mologadi A Nape (a construction company) from 2007 until the date of the accident. The plaintiff’s working hours were from 08h00 to 17h00 five days a week. His job tasks included checking stock, checking at the cars, trucks and construction vehicles were in working order, painting, installing ceiling boards, building and renovating houses and tiling. The inherent demands of the plaintiff’s occupation included standing, walking, lifting and carrying heavy objects such as bag of cement, tiles, toolboxes, climbing stairs and ladders, bending, stooping, crouching, kneeling, crawling, reaching overhead and using both hands. The plaintiff’s qualifications include a Grade 12. When the plaintiff returned to work, he returned to Mologadi’s sons business namely “Balo Holdings” as a general worker. In this job he was required to put doors into RDP houses which he currently does. At the time of the clinical evaluation by Dr Truter in February 2018 the plaintiff was unemployed. He now assists his grandmother with care of his grandfather. In the subsequent report by Dr Birell, he indicated that the plaintiff’s loss of work capacity is 10% as a general worker noticing the pain he has over the tibia and loss of extension of the ankle.

[8] The Occupational Therapist reports in the addendum report that the plaintiff tried to run 4km in March 2021 but suffered too much pain in the inside of his left

groin. He has also not resumed activities such as dancing and playing soccer.

The plaintiff still presented with severe atrophy in his left thigh compared to his right thigh and mild swelling in the left over malleolus compared to the right over malleolus area at the onset of testing. From an occupational point of view, the plaintiff could not sustain medium endurance over the expected time frame, this with impeded load capacity of work tasks in capacity as a plumber, carpenter or painter. A job match could not be established at the time of the subsequent assessment, enabling the plaintiff to be efficacious in the execution of work tasks in capacity as a plumber, carpenter or painter. The plaintiff will probably continue to find himself compromised and vulnerable in his ability to complete with peers (who are symptom and impairment free) in the open labour market, as he also competes mainly in the unskilled scope where employment requires mainly medium and heavy strength exertion and constant sustaining of lower limb dynamics (thus load exertion).

- [9] The Industrial Psychologist further reports that collateral information obtained from the plaintiff's previous employer indicates that there were no problems with the plaintiff work performance. He had a good chance to be appointed permanently. But for the accident, he could have continued with his employment and could have worked as a carpenter, driver/messenger. He could have become a supervisor (based on performance and good interpersonal relationship / skills). Supervisor earning is between R6 000.00 to R8 000.00 per month (2020 terms) plus medical aid contribution of R1 200.00 per month. Post-accident the plaintiff worked for Balo Holdings as a storeman for about a year in 2017. He earned approximately R3 000.00 to R3 500.00 per month. The current pay rate for this type of position is R4 800.00 per month.

Post-Morbidly:

- [10] The plaintiff is expected to resume work within the same areas as before, following optimal and successful treatment. This implies that the plaintiff will only be able to compete for suitable jobs again after he has received the required operation and the recommended rehabilitation / treatment. Deference is given to appropriate medical expert's opinion regarding a realistic timeframe for such intervention and recovery.

[11] Addendum Report by C Schoombee (Industrial Psychologist) suggests that from January 2018 to present the plaintiff has sought employment and he has only been able to get piece jobs (about 1 (one) to 2 (two) days per month). From a physical point of view, he still has problems with the left knee and cannot walk far. He has pain symptoms, and the knee becomes swollen at times. He cannot participate in sport or running. Inclement and cold weather conditions aggravate the symptoms. There has been no improvement over time.

- [12] The plaintiff only returned to work in November 2015, after he received surgery for a second time. He reportedly changed employer Balo Holdings – the

owner (Mr C Baloyi) appears to be related to his previous employer (Mologadi A Nape Construction). The plaintiff reported that he earned R2 000.00 to R3 000.00 per month for a period of 13 (thirteen) months (November 2016 to December 2017) working for Balo Construction – the employer confirmed earnings between R3 000.00 to R3 500.00 per month. Since then, he has been unemployed earning only occasionally for piece jobs (R100.00 to R150.00 per day in 2020 and R200.00 to R300.00 per day in 2021) at a frequency of one to two jobs per month.

[13] In order for the plaintiff to succeed in his claim for future loss of earning capacity the plaintiff must show that the injuries he sustained caused the diminution of his estate. This aspect was well articulated in the often quoted judgment of **Rudman v Road Accident Fund**¹ where a claim by the plaintiff for loss of earning capacity was dismissed on the ground that although the appellant has proved disabilities, which potentially at any rate could rise to a reduction of his earning capacity he had failed to prove that this has resulted in patrimonial loss since the loss of earnings and earning capacity he had suffered was a loss to the company and not to his private estate.

[14] In **Van Heerden v Road Accident Fund**² Strauss AJ said the following: “now, turning to the law in general on a claim for loss of future income. It is so that the mere fact of physical disability does not necessarily reduce the estate or patrimony of the injured person. Put differently, it does not follow from proof of physical injury, which impaired the ability to earn an income, that there was in fact a diminution of earnings.” See also **Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE)**.

[15] In this case the plaintiff could not present sufficient evidence regarding why he left Mologadi A Nape. All we know is that the owner of the company which hired the plaintiff was related to the owner of Mologadi A Nape. What the plaintiff's departure from Mologadi A Nape proves is that the plaintiff could secure employment post-accident. It is clear that the plaintiff's capacity to earn a living had not diminished. I am of the view that the plaintiff left his pre-morbid employment on his own volition, not because of the accident.

[16] The experts recommended future treatment and should the plaintiff undergo this treatment he should be able to realize his pre-accident employment potential. I am therefore satisfied that the plaintiff has suffered a residual earning capacity and thus his pre and post-morbid scenarios are the same.

[17] In calculating future loss I am of the view that I should apply a 10% contingency spread on the basis of pre and post-morbid scenario being the same. In my view a fair and reasonable contingency deduction will be 15% on the pre-morbid amount and 25% on the post-morbid amount. The following will be the result of my calculation:

Amount had the accident not occurred
accident

Amount having regard to the
accident

¹ 2003 (2) SA 234 (SCA)

² [2014] ZAGPHHC 958 paragraph 70

R 1 492 858
Less 15% R 223 928.7
= R 1 268 929.3

R 1 492 858
less 25% R 372 941
= R 1 119 643.5

TOTAL FUTURE LOSS= R 149 285. 8

[18] It is clear from the evidence that the plaintiff suffered a past loss of earnings. I am satisfied that the past loss of earnings was properly calculated and the correct contingencies were applied. I am therefore awarding the plaintiff the amount as reflected in the actuarial report for past loss of income.

[19] In the result I make the following order:

- (a) The defendant is liable for 100% of the plaintiff's proven damages.
- (b) The defendant shall pay the plaintiff a sum of **R 149 285.80** (One hundred and forty nine thousand two hundred and eighty five rand and eighty cents) as compensation for future loss of earning capacity, and **R 334 472.00** (Three hundred and thirty four thousand four hundred and seventy two rand) as compensation for past loss of income. **Total R 483 757.80** (four hundred and eighty three thousand seven hundred and fifty seven rand and eighty cents).
- (c) The defendant is ordered to pay costs.

Kganki Phahlamohlaka
Acting Judge of the High Court,
Gauteng Division, Pretoria

JUDGMENT RESERVED ON: 23 FEBRUARY 2022
FOR THE PLAINTIFF: ADV S MARITZ
FOR THE DEFENDANT: NO APPEARANCE
DATE OF JUDGMENT: 18 MAY 2022