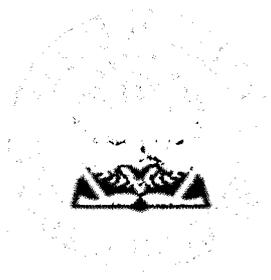


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED 13 FEBRUARY 2024
DATE	SIGNATURE

CASE NO: 60233/19

IN THE MATTER BETWEEN

G [REDACTED] L [REDACTED] G [REDACTED]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

CEYLON AJ

A. INTRODUCTION:

[1] This is an action in which the Plaintiff claims damages from the Defendant ("the RAF") as statutory insurer in terms of the Road Accident (RAF) Act 56 of 1996, arising from the bodily injuries sustained in a motor vehicle collision that occurred on 25 November 2016 at Pretoria, Gauteng Province.

[2] The above collision took place at Simon Vermooten and Lynwood Roads, Pretoria, between motor vehicle with registration number: FCT [REDACTED] GP, driven by MP Mgidi and the Plaintiff, who was a pedestrian at the time of the accident.

[3] In terms of the amended particulars of claim, the Plaintiff's claim is for the following:

3.1 past hospital and medical expenses	R50 000-00
3.2 future medical costs (estimated) undertaking	section 17(4)(a)
3.3 past loss of earning (estimated)	R304 212-00
3.4 future loss of earnings and/or earnings capacity (estimated)	R96 379-00
3.5 general damages	R450 000-00
Total	R900 590-00

[4] The Defendant and its legal representatives was absent at Court on the trial date and the Plaintiff proceeded on a default basis in terms of the Uniform Rules of Court.

[5] The Plaintiff led evidence by way of expert witness reports and case authorities. The Plaintiff was the only witness called to testify at the hearing.

B. THE PLAINTIFF:

[6] The following information regarding the Plaintiff appears from the pleadings, medical records and expert reports on record:

(a) The Plaintiff is G [REDACTED] L [REDACTED] G [REDACTED], an adult male person, born on 04 May 1961 and resident at [REDACTED] Block [REDACTED], Moloto South, KwaMlanga, Mpumalanga Province.

(b) The Plaintiff is married, and he has three children. The family lives in their own dwelling, with electricity and external water amenities. The children are still dependent on the Plaintiff. He has limited access to healthcare and uses public transport.

(c) The Plaintiff was 55 years old, employed as a truck driver and earned an amount of R1500-00 per week at the time of the accident. He stopped working as a truck driver due to the accident due to limitations of movement in the right shoulder and the liability to abduct the right shoulder. He was then employed as a car guard for a period

of approximately two years until the parking business closed down and earned R200-00 per day five days per week. The Plaintiff has been unemployed since the closure of the parking business.

(d) On the day of the accident, the Plaintiff was taken by ambulance to the Mamelodi Hospital where he was admitted for one day. X-rays were taken and his right shoulder was reduced in Casualty the same day. A collar and cuff and neck collar were applied. The hospital provided medication. The Plaintiff received physiotherapy and follow up consultations at the said hospital on 02 February 2017, 01 March 2017 and 05 May 2017.

(e) The Plaintiff had no symptoms in his right shoulder and has not been involved in pedestrian or motor vehicle accidents prior to the present one on 25 November 2016.

(f) The Plaintiff confirmed in general, the details and facts surrounding the accident, injuries sustained and the consequences thereof in his testimony at the hearing and this accords with his statutory affidavit in terms of section 19(f) of the RAF Act.

C. THE INJURIES AND ITS SEQUELAE:

[7] The Plaintiff suffered various injuries as a result of the accident. The injuries will be discussed in more detail below, through the reports of the medical experts.

(i) Dr HB Enslin (Orthopedic Surgeon):

- he reported that the Plaintiff participated in no sport and recreational hobbies. He was in good health prior to the accident and did not undergo any surgery or need medication prior to the accident. He also had no complaints in respect of his right shoulder prior to the accident.

- he found that the Plaintiff sustained a right shoulder dislocation with complete tear of the rotator cuff, an injury to the right eye and right knee, and the Plaintiff reports no epilepsy, but an effected memory, nightmares, travel anxiety, depression and sleep pattern disturbed by accident-related symptoms.

- the Plaintiff experience daily pain on the inside of the right shoulder, taking two pain tablets and rubbing lotion daily for relief from pain. He suffers sleep disturbance and discomfort of the right shoulder. Inclement weather, working with his arm above shoulder height and lifting heavy objects exacerbate the symptoms in the right shoulder. The intensity of symptoms has remained constant since this accident.

- there were no complaints in relation to the right knee.

- the surgeon stated that the Plaintiff has been left with serious long term musculoskeletal impairment due to the full thickness of the tear of the supraspinatus tendon and recommend that he be evaluated by an occupational therapist and industrial psychologist in relation to his work ability and psychological status.

- he proposed that the provision be made for future treatment being conservative treatment in the amount of R70 000-00 and surgical treatment in the amount of R287 000-00.

(ii) Dr T Enslin (Independent Medical Examiner):

- The medical examiner, after conducting the narrative test, confirmed, *inter alia*, a right eye and right knee injuries and a right shoulder dislocation existed. There is a nexus between the injuries and the accident and that said injuries were confirmed by the clinical notes from Mamelodi Hospital. The outcome diagnosis was confirmed as a rotator cuff tear in the right shoulder and post-traumatic stress disorder.

- the expert confirmed that the Plaintiff did not reach the 30% or more whole person impairment but would qualify to be awarded general damages on grounds of serious long-term impairment.

- after taking into account the personal and individual circumstances of the Plaintiff, referred herein-above, the expert confirmed, *inter alia*, that the Plaintiff could not continue working as a truck driver following the accident and earned less than he had before now working as a car guard and will not be able to compete for work as a truck driver with his limited shoulder movement. He has limited education (grade 4) and can only perform manual work.

- the expert confirmed further that the Plaintiff's injuries cannot be regarded as insignificant, mild or trivial, but rather as severe and serious. His pain is constant, chronic and congruent, which interferes with his daily life activities and working ability. His injuries resulted in life-changing sequelae and besides his pain and suffering, he has become an unequal competitor on the open labour market.

(iii) The Occupational Therapist (A Ndabambi, Bester Putter Inc.):

- according to this expert, the Plaintiff had no significant or accident-related injuries or illnesses except for hypertension for which he is on medication. The expert confirms the right shoulder and knee injuries sustained in the accident and dislocation of the right shoulder and rotator cuff tear in said shoulder. She also confirmed the treatment received, *inter alia*, pain medication, X-rays, antibiotics, anti-inflammatories and the follow-up appointments. He also utilised an arm sling for approximately five days.

- the expert noted that the Plaintiff is receiving no medical and rehabilitation consultations.

- the expert made the following observations: the Plaintiff communicates well in Sepedi; was co-operative and followed instructions and completed tasks within his abilities; emotionally he presented with an euthymic effect; he experienced pain in right shoulder and upper limb.

- the expert concluded that the Plaintiff does not present with any significant cognitive fallouts at the time of the assessment.
- the expert reported that it appears that the Plaintiff's mood and emotional functioning has changed since the accident.
- with regards to domestic tasks, the Plaintiff assisted his wife with some of it before the accident, but thereafter his wife has taken over and the Plaintiff helps with light tasks due to the pain in his right shoulder.
- gardening tasks: Plaintiff was responsible for yard cleaning tasks but discontinued it due to pain of the right shoulder.
- home maintenance tasks: he was responsible for lighter tasks and occasionally assisted with heavy tasks but discontinued after the accident due to the limitations occasioned by shoulder pain.
- personal care: the Plaintiff mostly uses his left hand and utilises a small bucket to prepare and discard water due to the right shoulder pain. He adopted ways to dress and groom himself. No accident-related complaints was observed in respect of toileting, eating and drinking.
- sleeping: due to the right shoulder pain, the Plaintiff avoids sleeping. No accident relating complaints in respect of sexual functioning was reported.
- leisure activity: he is less sociable since the accident due to financial stress and prefers to be on his own. His sport and exercise activities and hobbies were not affected by the accident as he did not participate in same.
- transport: the Plaintiff has a valid code ten driver's license and worked as a truck driver. He has not returned to work as a driver after the accident and uses public transport.
- pain: the Plaintiff suffers severe pain due to the injuries of his right shoulder which is aggravated by inclement weather, weight handling, sleeping on the right side and use of the upper limb in any activity. He uses pain medication, resting and changing body positions to relief the pain.
- the expert concludes that the Plaintiff's pain description, pain ratings, the influence it has on its functioning and his non-verbal pain behavior all correlate, and, in general, his pain seems manageable with the aforementioned modalities.

(iv) Industrial Psychologist (Cornél Schoombee):

- previous employers: the expert made efforts to contact the Plaintiff's previous employers but did not succeed.

- pre-accidental occupational career: from 1995-2015 he was mainly a driver (trucks) and earned around R6000-00 per month, but the income could not be verified due to the fact that the erstwhile employers could not be located.
- post accidental occupational career: unemployed from accident date (November 2016) to end of 2018 and worked as car guard end of 2018 to early 2020, worked 3-4 days per week, and from early 2020 to present, works as self-employed car guard earning R100 per day and tips, a total of R150-00 per day.
- losses (earnings): the reported loss of since time of the accident to end of 2018 as at R150-00 per day for a maximum of 4 days per week, a total of R31 200-00 per annum. According to the expert the Plaintiff had a direct past loss of earnings.
- unrelated/pre-existing factors: as reported by the Plaintiff/experts: none reported.
- the expert reported Plaintiff suffered right shoulder and arm, left knee and emotional difficulties and injuries.
- the expert suggested the Plaintiff, in the circumstances that he finds himself in, retire at age 63 or even 60 as he would qualify for government old age pension.
- post-accident career scenario (suggested): the Plaintiff indicated that he could not return to his job as truck driver since the accident. His reported work as car guard, earning R150-00 per day at 3-4 days per week could not be verified as his employer (Mr Steyn) seemingly relocated and simply disappeared in early 2020 after which he worked as independent car guard. Since no objective information could be obtained, his expert proposed that earnings for unskilled workers within the non-corporate sector would likely offer some guidance on the Plaintiff's earnings. He used the Quantum Yearbook 2020 to suggest that earnings in the order of R21 600-00 to R37 900-00 per annum would be applicable. Therefore, the reported earnings of R31 200-00 per annum appears to be in line with the expected range of earnings.

The injuries the Plaintiff suffered, likely of life-long nature, would limit him to work within sedentary to light physical environment and due to his low schooling level and work experience will not qualify him for sedentary type positions. The expert set out factors supporting higher post-accident contingency deductions, *inter alia*, struggling more to find and sustain positions since employer vanished, stiff competition, unable to carry heavy loads (loose tips from clients) and uncertain retirement age.

(v) Actuary (K Pretorius, Prima Actuaries):

The actuary report sets out the calculations and the basis upon which it was done, in respect of the Plaintiff's loss of income/earnings [refer to pg 005-97 of Caselines].

D. MERITS:

[8] (a) At the time of the hearing of this matter, it appears that the issue of liability remains in dispute and none was conceded by the Defendant [Plaintiff's Practice Note,

paragraph 8.1, pg 008-2, Caselines]. This is confirmed by the Plaintiff in his statutory affidavit in terms of section 19(f) of the RAF Act.

(b) From the Particulars of Claim, it is pleaded that the Plaintiff was a pedestrian at the time of the accident which was caused by the sole negligence by the Defendant's insured driver.

(c) In the Defendant's Plea, the Defendant pleaded that it bears no knowledge of the allegations herein contained, does not admit same and put the Plaintiff to the proof thereof. The Defendant offers no defence to the claim in this regard. The plea is a bare denial.

(d) The hospital and medical records, as well as the expert reports, confirm the injuries the Plaintiff sustained as a result of the accident and the sequelae thereof. The Defendant appears not to have filed any expert reports to contradict the findings and advices of the Plaintiff's experts. Accordingly, the Plaintiff's evidence, based on these reports and records, remains unchallenged. In the view of this Court, the Defendant, as the insurer of the driver that caused the accident, is liable towards the Plaintiff to compensate the damages suffered.

(e) In the view of this Court, the Plaintiff's version of events and accident stands uncontested in the circumstances. Accordingly, it is the opinion of this Court that the Plaintiff is entitled to his full (100%) proven damages.

E. QUANTUM:

[9] The Plaintiff relied on the evidence and expert reports, which was admitted in terms of Rule 38(2), to substantiate its claim in respect of its heads of damages hereunder.

- future hospital, medical and related expenses:

From the expert reports and evidence before this Court it is apparent that the injuries sustained by the Plaintiff will attract future medical, hospital and related expenses and costs for the treatment of such injuries. Accordingly, this head of damages should be dealt with in terms of section 17(4)(a) of the Act and this Court is inclined to grant an appropriate order to this effect.

- general damages:

(a) There is a definite dispute between the parties in respect of general damages in view of the Defendant's Special Plea and the Plaintiff's Replication in respect of the seriousness of the injuries sustained by the Plaintiff in the accident.

(b) In the absence of compliance with Regulation 3 of the 2008 Regulations to the RAF Act, this Court is not competent to adjudicate on the issue of general damages and it will have to be postponed in light thereof. This point of view is confirmed by the Plaintiff in the Practice Note of his counsel at paragraph 8.5 [at pg 008-3, Caselines].

- past medical and related expenses:

This head of damages has not been specifically canvassed and it appears that the Plaintiff elected not to proceed therewith at the hearing. The Plaintiff's Practice Note indicated that the issue remains in dispute and he (Plaintiff) will abide by the Defendant's Review Bill in connection therewith. Accordingly, this Court is not called upon to adjudicate on this particular aspect at this stage.

- past and future loss of earnings:

(a) The details of the Plaintiff's past and future loss of earnings/income capacity is set out in the actuary's report. This report dealt with and have taken into account the report and recommendations of the industrial psychologist, the proposed contingency reductions, inflation rates applicable, mortality and the RAF cap.

(b) For a Plaintiff to succeed on a claim for future loss of earnings, he must prove on a balance of probabilities that he suffered a significant impairment giving rise to a reduction in earning capacity. There must be proof that the reduction in earning capacity gives rise to pecuniary loss [Rudman v RAF 2003 (2) SA 234 (SCA)]. In De Jongh v Du Pisani 2004 (5) QOD J2-103 (SCA) it was held that contingency factors cannot be determined with mathematical precision and that contingency deductions are discretionary. This principle was also acknowledged in Zondi v RAF [(2565/2015)[2021] ZAGPPHC 707 (26 October 2021) at para 14].

(c) In Herman v Shapiro & Co [1926 TPD 367 at 379] it was held that:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damage."

(d) It is trite that the trial court has a wide discretion to award what it in the particular circumstances order to be fair and adequate compensation to the injured party for bodily injuries and their sequelae [AA Mutual Association Ltd v Magula 1978 (1) SA 805 (A) at 809]. There are no hard and fast rules to be applied in deciding what a fair and adequate compensation to an injured party should be. Arbitrary considerations must inevitably play a part. An enquiry into future loss of income is by nature speculative because it involves prediction of the future [Moeketsi v RAF (5651/2016)[2021] ZAFSHC 214 (30 July 2021) at para 21; Southern Insurance Association v Baily NO 1984 (1) SA 98 (AD)].

(e) In connection with actuarial calculations, in Baily NO, *supra*, it was stated that:

"...while the result of an actuarial computation may be no more than "informed guess" it has the advantage of an attempt to ascertain the value of what was lost on a logical basis." [at 114E; Moeketsi, *supra*, at para 22].

(f) This Court does not find the submissions of the Plaintiff regarding this head of damages contentious or problematic as advanced by the actuary. It took into account all the relevant factors, including contingencies and advices of the relevant medical experts and is reasonable and fair. Accordingly, this Court is inclined to grant an award in terms of the calculations of the actuary.

F. CONCLUSION:

[10] Having had regard to the factors and circumstances of this matter cumulatively, the expert reports and the case authorities cited, this Court is of the view that the injuries sustained by the Plaintiff will derive benefit from the treatment, medication and processes recommended by the experts in their respective reports, and it will afford some relief and assistance to him. It is clear that the Plaintiff is worse off since the accident and the injuries sustained will have a serious and lasting impact on his health, general well-being and amenities of life.

[11] With regard cited case law, it provides useful guidance to this Court to make a determination on the quantum of damages in the matter.

[12] Taking into account all of the above factors, principles and the decrease in the value of money, the awards made in this matter seems to be just, fair and adequate in the circumstances, which are as follows:

- | | |
|--------------------------------------------------|------------------------------------------------------------------|
| (a) past hospital/medical expenses: | not applicable |
| (b) future hospital/medical expenses: | an undertaking in terms of section 17(4) of the RAF Act awarded. |
| (c) past loss of earnings: | R304 212-00 |
| (d) future loss of earning capacity: | R96 379-00 |
| (e) general damages: postponed <i>sine die</i> : | |

G. COSTS:

[13] There is no reason or factors to suggest to this Court that costs should not follow the result.

H. ORDER:

[14] In the result, default judgment is granted in favour of the Plaintiff against the Defendant as follows:

- (a) that the Defendant is liable for 100% of the Plaintiff's proven damages as a result of the injuries sustained in the motor vehicle accident that occurred on 25 November 2016.
- (b) the Defendant is ordered to pay the amount of R400 591-00 to the Plaintiff.

(c) the Defendant is ordered to pay the aforesaid amount into the trust account of the Plaintiff's attorneys (MacRobert) within 60 (sixty) court days from date of this order.

(d) in the event of default of payment of the above-mentioned amount, interest shall accrue on the outstanding amount at the prescribed rate *per annum*, calculated from the due date until date of payment, both days included.

(e) the Defendant shall provide the Plaintiff with an undertaking in terms of section 17(4) of the RAF Act 56 of 1996 for payment of the costs of the future accommodation of the Plaintiff in a hospital or nursing home for treatment or rendering of a service or supplying goods to the Plaintiff arising from the injuries sustained in the motor vehicle accident on 25 November 2016 after the costs have been incurred and upon proof thereof.

(f) the Defendant is ordered to pay the Plaintiff's costs of suit on a party and party basis on the High Court scale, including costs of the Plaintiff's experts, and qualifying costs of the experts whose notices were served on the Defendant, including costs of counsel.

(g) in the event that costs are not agreed, the Plaintiff will be entitled to serve a notice of taxation on the Defendant. The taxed costs will be due and payable within fourteen (14) calendar days after date of taxation and the taxed costs shall likewise be paid into the trust account of the Plaintiff's said attorneys.

(h) the claim for general damages is postponed *sine die*.



B CEYLON

Acting Judge of The High Court
of South Africa
Gauteng Division,
Pretoria

Hearing date: 09 November 2023
Judgment date: 13 February 2024

APPEARANCES

FOR THE PLAINTIFF: Adv M Mapelane
INSTRUCTED BY: MacRobert Attorneys
Pretoria
FOR DEFENDANT: No appearance
INSTRUCTED BY: No appearance
