

REPUBLIC OF SOUTH AFRICA



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

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED:

11 March 2024

DATE:

SIGNATURE:

CASE NR: 14412/2021

In the matter between:

SEBOTSENG MOREMI ANTIPAS

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 11 March 2024

JUDGMENT

MARUMOAGAE AJ

- [1] This is a delictual claim for damages where the plaintiff seeks to hold the defendant liable for the injuries he sustained because of a motor vehicle collision in which he was a passenger that occurred on 26 December 2019.

- [2] On 7 December 2020, the defendant made an offer where it concluded that the collision resulted from the sole negligence of its insured driver, which was accepted by the plaintiff. The appeal tribunal of the Health Professions Council of South Africa found that the injuries sustained by the applicant may be classified as serious in terms of the narrative test.

- [3] The merits are clearly settled 100% in favour of the plaintiff. The only issue that this court is called upon to determine is the fair and equitable amount to be awarded for general damages as well as past and future loss of earnings to the plaintiff by the defendant.

- [4] To prove his claim for damages, the plaintiff relied on the reports of several expert witnesses. The first report was compiled by Dr Mafeelane who is an Orthopaedic Surgeon. Dr Mafeelane reflected on the medical records that were obtained from Zeerust Hospital where the plaintiff was taken after the accident and noted that these records states that the plaintiff sustained a right inferior public fracture and a right acetabulum fracture.

- [5] Dr Mafeelane further observed that the plaintiff continues to suffer the inconvenience and discomfort of chronic pain from the injured areas. He also stated that the plaintiff experiences great difficulty in carrying and lifting heavy objects, bending, running, prolonged walking, and standing. He concluded that the injuries sustained by the plaintiff resulted in serious long-term impairment.

- [6] A report by Ms Adelaide Phasha who is an Occupational Therapist was also submitted in support of the plaintiff's claim. Ms Phasha noted that the plaintiff passed Grade 11 and left school to seek employment. Further, the plaintiff underwent a one-year information technology internship and has a code 10 driving license.
- [7] Ms Phasha stated that at the time of the accident, the plaintiff had been employed as a foreman in a mine for close to seven years. After the accident, he was found unfit and was given lighter duties which were mostly clerical. He later resumed pre-accident duties, but experienced pain in the right hip after standing for a prolonged period during cold weather conditions.
- [8] The plaintiff's supervisor indicated to Ms Pasha that while the plaintiff retains his title as a Foreman, after the accident he has been allocated light duties in the form of paperwork due to the injuries sustained. Ms Pasha opined that the plaintiff is currently suited for the sedentary to light work category because he suffers occupational dysfunction due to the presenting physical challenges and would always require an understanding and sympathetic employer in any job.
- [9] An Industrial Psychologist, Mr Tshepo Tsiu also submitted a report. Mr Tsiu opined that the plaintiff is likely to continue in his current role until retirement. According to the actuary that was requested to calculate the plaintiff's past and future loss of earnings, the defendant's past loss of earnings amounts to R 75 004.00 and future loss of earnings amounts to R 484 001.00.
- [10] It was submitted on behalf of the plaintiff that even though the plaintiff is likely to continue in his current position as a Foreman, he will nonetheless, experience residual pain symptoms and restrictions in the future. Further, he may need time away from work to attend recommended medical interventions. It was contended that this would likely further put a strain on his ability to compete in the open labour market. Further, his physical limitations will hamper his ability to remain gainfully employed.

[11] It was submitted on behalf of the plaintiff further that in the circumstances, the fair and reasonable compensation for the loss of earnings be R 500 579.50 and the award of general damages be R 600 000.00. Further, the defendant be liable for the plaintiff's future medical expenses.

[12] Nicholls AJA in the Supreme Court of Appeal case of *Road Accident Fund v C K*, held that:

'[a]ny claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss'.¹

[13] The difficulty with this case is that the plaintiff is still employed in the same 'rank' he was employed before the accident. While it was illustrated that the plaintiff currently cannot perform the functions that he was able to perform before he sustained his injuries because of the accident, there is no evidence before the court that his earnings have decreased or will likely decrease. It has been indicated, however, that he is sympathetically employed, and the situation might change should a new supervisor be appointed.

[14] It is clear that the plaintiff no longer performs the duties he was originally employed to perform and it is easier for him to be deployed elsewhere and there is a possibility that his earnings may be affected. In *Mvundle v Road Accident Fund*, it was held that:

It is trite that damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or

¹ [2019] 1 All SA 92 (SCA); 2019 (2) SA 233 (SCA) para 40.

be limited in the number and quality of his/her choices should he/she decide to find other employment. ²

[15] There is no doubt, at least from the assessments of various expert reports, that the plaintiff's employment situation has manifestly changed. He is only now able to lift one 5 kg metal plate instead of the four that he used to lift before the accident. It was also testified that the plaintiff needs to replace his right hip which has contributed to his functional capacity deteriorating. In my view, a case has been made out for the plaintiff to be compensated for loss of earnings.

[16] Concerning general damages, the court has the discretion to consider what is fair and adequate compensation to the injured party for the *sequelae* of the injuries. The discretion must be exercised judiciously having regard to comparable previously decided cases.³ To arrive at a fair and just amount of compensation, the court should be guided, among others, by the nature, severity, and permanency of injuries that the plaintiff sustained in the accident.⁴ In *Mashigo v Road Accident Fund*, it was held that

'[a] claim for general or non-patrimonial damages requires an assessment of the plaintiff's pain and suffering, disfigurement, permanent disability and loss of amenities of life and attaching a monetary value thereto. The exercise is, by its very nature; both difficult and discretionary with wide-ranging permutations'.⁵

[17] Among others, the defendant referred me to *Ndaba v Road Accident Fund*,⁶ where a 42-year-old informal hawker sustained multiple injuries which included a pelvic fracture, fractures to the right femur and tibia, and the left knee. In this case, the court opined that because of degenerative changes, the plaintiff was bound to have a total knee replacement in the future. Further, her shoulder and hip might also later require replacement.⁷ The court awarded R 300 000.00 general damages, which is currently equal to the value of R 552

² (63500/2009) [2012] ZAGPPHC 57 (17 April 2012)

³ *Ambrose v Road Accident Fund* (255/09) [2010] ZAECPHC 24 (1 June 2010) para 48.

⁴ *Burts v Road Accident Fund* (60234/2019) [2022] ZAGPPHC 88 (1 February 2022) para 11

⁵ (2120/2014) [2018] ZAGPPHC 539 (13 June 2018) para 10

⁶ (EL 321/08) [2011] ZAECELLC 6 (30 June 2011)

⁷ *Ibid* para 9.

962.00. I am persuaded that an amount of R 600 000.00 general damages is fair and just under the circumstances.

[18] In the result, I make the following order:

- 1 The defendant is ordered to pay to the plaintiff an amount of R 1 100 579.50 (One Million One Hundred Thousand Five Hundred Seventy-nine Rand and Fifty Cent), which is made up of:

1.1 R 500 579.50 Loss of earnings

1.2 R 600 000.00 General Damages

- 2 The amount referred to in paragraph 1 of this order must be paid into the plaintiff's attorneys trust account with the following details:

ACCOUNT HOLDER: MPHELA & ASSOCIATES

BANK: STANDARD BANK

ACCOUNT NUMBER: 23 00 27 00 8

BRANCH CODE: 05 26 27

REFERENCE NUMBER: MMM/TP5341/PS

- 3 Payment must be made within 180 calendar days from the date of this order. The defendant shall be liable for interest on the amount stated in paragraph 1 at the rate of 11.75, calculated from 181st day after the date of this order.
- 4 The defendant shall furnish the Plaintiff with an undertaking, in terms of the prevailing legislative provisions, in respect of the plaintiff's future accommodation in a medical facility for treatment after costs have been incurred and upon submission of proof thereof, for treatment relating to

the injuries sustained in the motor vehicle accident subject to these proceedings.

5 Should the defendant fail to furnish an undertaking to the plaintiff within 30 days of this order, the Defendant shall be held liable for the payment of the additional party to party costs incurred to obtain such undertaking.

6 The defendant is ordered to pay the plaintiff's taxed party to party costs, up to and including the trial date of 8 November 2023 in respect of the merits and quantum, which costs shall include:

6.1 Payment of all reserved costs;

6.2 Counsel fees;

6.3 Correspondence fees;

6.4 Reasonable cost of obtaining all expert medico legal reports and any other reports of an expert nature which were furnished to the defendant;

6.5 Reasonable cost of obtaining documentation, evidence, and scans that were considered by experts to finalise their reports;

6.6 Reasonable taxable qualifying, preparation and reservation fees of all experts whose reports were provided to the defendant;

6.7 Reasonable cost of consultation between the plaintiff's experts and the plaintiff's legal teams regarding the matter;

6.8 Reasonable cost of consultation between the plaintiff and the plaintiff's legal team to consider the offer to settle;

- 6.9 The reasonable taxable reservation fees and attendance fees of the following experts,
- 6.9.1 Dr SK Mafeelane (Orthopaedic),
- 6.9.1 Ms Adelaide Phasha (Occupational Therapist),
- 6.9.3 Mr Tshepo Tsiu (Industrial Psychologist),
- 6.9.4 Actuary (Manama Actuaries and Consultants),
- 6.10 The reasonable traveling and accommodation cost incurred in transporting the plaintiff to all medico-legal appointments;
- 6.11 The reasonable cost for an interpreter's attendance at court and at the medico-legal appointments for translation of information;
- 7 Should the defendant not agree to pay all these fees, the plaintiff shall serve the notice of taxation on the defendant.
- 7.1 The plaintiff shall allow the defendant 180 calendar days to make payment of the taxed costs.
- 7.2 In the event the defendant defaults on payment, interest shall accrue on the outstanding amount at the more rate of 3,5% above the repo rate on the date of settlement or taxation of the bill of costs, calculated from the 15th calendar day after the date of settlement or taxation, until the date of payment.
- 8 A valid contingency fee agreement exists between the plaintiff and the plaintiff's attorneys, which complies with the terms set out in the Contingency Fee Act.

C MARUMOAGAE

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA**

Counsel for the applicant: Adv Besty Nchabeleng

Instructed by: Mphela & Associates

Attorney for the respondent: Mr Nonkoliseko Xegwana

Instructed by: State Attorney

Date of the hearing: 8 November 2023

Date of judgment: 11 March 2024