

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: YES / NO |

CASE NO:18983/2021

In the matter between:

EXCELLENT LUNGISA DLANGWANA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Mazibuko AJ

Introduction

1. This is an action for damages stemming from a motor vehicle collision where the plaintiff, a laboratory team leader, 39 years of age, was the driver of a motor vehicle that collided with another motor vehicle driven by an identified insured

driver (hereinafter referred to as "insured driver") on the N2 road, Mount Frere, Eastern Cape. He sustained injuries as a result of that car accident.

2. By consent between the parties, the court granted the application for the evidence to be adduced by way of affidavits in terms of rule 38(2) of the Uniform Rules of Court.¹

Rule 38(2) provides:

"The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

3. The oral evidence of the plaintiff, orthopaedic surgeon, neurosurgeon, clinical psychologist, plastic and reconstructive surgeon, physiotherapist, Occupational therapist, Dr Schutte, industrial psychologist, and actuary was dispensed with, and they were excused from attendance. The parties further confirmed that none of the expert reports were in dispute.
4. The defendant contends that the plaintiff is the sole cause of the accident and resultant damages. Alternatively, the plaintiff contributed to the damages suffered.

Issues

5. This matter turns on the issue of liability and quantum as well as whether the plaintiff was guilty of contributory negligence.

¹ Uniform Rules of Court, Act 59 of 1959.

Legal framework

6. Section 17(1) of the Road Accident Fund Act² ('the RAF Act') reads:

"The Fund or an agent shall-

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic if the injury or death is due to the negligence or other wrongful Act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

7. The defendant's liability is conditional upon the injury having resulted from the negligence or wrongful Act of the driver. See MP Olivier, 'Social Security: Core Elements', LAWSA³. The onus rests on the plaintiff to prove such negligence.
8. Contributory negligence on the part of the plaintiff can reduce such loss or damage in terms of the provisions of section 1 of the Apportionment of Damages Act⁴ ('the Apportionment Act'), which reads as follows:

² 56 of 1996 ('the RAF Act').

³ MP Olivier, 'Social Security: Core Elements', LAWSA (LexisNexis, Vol 13(3), 2ed, July 2013), at paragraph 163.

⁴ 34 of 1956 ('the Apportionment Act').

'(1)(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.'

Liability

Evidence

9. The content of the plaintiff's affidavit reads:

"Paragraph 3: I was driving from Mt Frere direction towards Umtata travelling on my rightful lane. When I was at Kumtwana curve, an oncoming motor vehicle suddenly left its lane and veered to my path of travel. Then I quickly swerved to the right as it was not safe for me to swerve to the left since there were guardrails and a cliff. Suddenly the insured driver decided to move back to his lane, and a head on collision occurred."

10. The defendant contended that both parties contributed to the accident and had no witnesses; therefore, the merits should be settled at 50/50 apportionment.

11. The accident report, sketch plan, key to plan and photographs were handed in at the trial.

Discussion

12. The defendant does not dispute liability but sought only to reduce its liability. What remains to be determined is whether, on his version, the plaintiff did not make himself guilty of contributory negligence.

13. It is uncontroverted that the insured driver's motor vehicle suddenly left its lane and

veered towards the plaintiff's lane of travel. The insured driver's statement about the accident was not presented before the court. The defendant did not adduce any evidence to support its allegations that the plaintiff exhibited contributory negligence. It stated that it would rely on the accident report, photograph, the police officer's affidavit and the sketch plan.

14. The plaintiff contends that the sketch plan has no supporting affidavit. I do not agree with the plaintiff. It is common cause between the parties that the accident was reported to the Mt Frere police station. In his statement, Constable Jerry Xolile David (hereinafter referred to as "*Constable David*") stated that he attended the accident scene and that measurements were taken. On the sketch plan and key to plan, measurements indicating, among others, the width of the road and the distance between the fixed object along the road and the point of impact are depicted. In my respectful view, the contention by the plaintiff that the sketch plan is hearsay evidence cannot be sustained as Constable David, in his statement, deals with this aspect.

15. To answer whether the plaintiff was negligent depends on whether his conduct in the circumstances fell short of that of a reasonable person. The test for negligence was set out in *Kruger v Coetzee*⁵, where it was said:

"For the purposes of liability, culpa arises if -(a) a diligens paterfamilias in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard such occurrence; and (b) the defendant failed to take such steps."

16. In his affidavit, the plaintiff stated that he moved to the right lane, the insured driver's lane of travel, to avoid the collision. He did not explain what prevented him from driving further to the right to avoid the head-on collision or collision, as there was space for him to manoeuvre his motor vehicle.

⁵ [2021] ZASCA 125,1966 (2) SA 428 (A) at 430.

17. It is trite that where contributory negligence and apportionment of damages are pleaded in the alternative, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities in respect of the counterclaim. The onus can only be discharged by adducing credible evidence to support the case of the party on whom the onus rests with respect to their respective claims.
18. At the commencement of the proceedings, the defendant indicated that there were no witnesses and relied on the accident report, sketch plan, and key to plan.
19. In his statement, Constable David confirmed the point of impact. He stated that he found two motor vehicles which had collided head-on with each other in the insured driver's lane of travel. He completed the accident report form, and the measurements were taken. The measurements he referred to in his statement are depicted in the sketch plan and the key to plan.
20. The point of impact of the accident is not in dispute in that it occurred in the insured driver's lane. It is apparent from the sketch plan, key to plan and photographs depicting the area where the accident occurred that the road is two-way, with each lane going opposite the other. They also depicted the cliff and the guard rails on the left, which was the plaintiff's side of travel. On the other side, the right lane, where the insured driver was, had a wider space further right. The width of the road is about 18 metres. I accept that at the Kumtwana curve, the insured driver veered to the plaintiff's lane.
21. In my view, the plaintiff's conduct at the time he swerved into the insured driver's lane was reasonable. He saw the insured driver's motor vehicle veering into his lane. To avoid the collision, he drove into the oncoming traffic lane, and suddenly, the insured driver moved back to his correct lane.

22. I do not agree with the respondent that the plaintiff orchestrated a dangerous manoeuvre by merely travelling in the wrong lane, which was the insured driver's lane. It can be accepted that whilst manoeuvring the Kumtwana curve the insured driver veered to the plaintiff's lane, causing the plaintiff to be faced with a sudden emergency. It is undisputed that he avoided the collision with the insured driver, who had veered into his lane.
23. In judging the action of the motorist or pedestrian faced with a sudden emergency, due allowance must be made for the possible error of judgment. See **Hornton and Another v Fisser**⁶.
24. Considering the evidence adduced by the plaintiff and that of Constable David, the accident report, sketch plan and key to plan placed before me and the circumstances of the collision, I believe the plaintiff should have veered more to the right and avoided the collision. No evidence was presented that the plaintiff tried to avoid the collision whilst driving in the insured driver's lane or that the opportunity and space, or the busy road in terms of traffic, were a barrier to him, which caused him not to attempt to avoid the collision. Nothing is said about the open area he could have used at the time to avoid the collision and the condition of the road's surface where he would have swerved to avoid the head-on collision. By failing to travel further in the empty right lane, seeing that danger was about to occur, there can be no doubt that he acted negligently, as his actions drifted from those of a reasonable driver.
25. Section 1(1)(a) of the Apportionment of Damages Act, *supra*, gives the court discretion to reduce the plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the courts consider the evidence as a whole in assessing the degrees of negligence of the parties.

⁶ 1928 AD 398 at 412.

26. There is sufficient evidence from the plaintiff's version, the accident report and the sketch plan displacing the inference that the only cause of the accident was the insured driver's negligent act of omission when he did not veer more to the right to avoid the collision. The extent of the plaintiff's contributory negligence calls for determination. It is not a mathematical calculation. The approach is that of carefully considering all the facts and exercising discretion. Given these considerations, the plaintiff's conduct fell 10% short of what would have been expected of a reasonable person in his position. As a result, the defendant is liable to pay 90% of the plaintiff's proven damages.

Quantum

27. The defendant did not procure any medico-legal reports in relation to quantum. They indicated they would rely on the plaintiff's expert reports.

Hospital records

28. The plaintiff relied on the hospital records and experts' reports to support his case. According to the hospital records and specialists' reports, the plaintiff suffered the following injuries as a result of the accident: severe head injury, fracture of the right and left femur, knee injury, lower back injury, bruises on the face and laceration on the chin, visible scars on the right arm and both legs and soft tissue injury on the chest. Open reduction internal fixation of bilateral femur fractures and left tibia plateau fractures was performed.
29. He deteriorated neurologically and had paralysis of the right arm and leg, difficulty speaking and a decreased level of consciousness for about a month. He was unresponsive, could not understand instructions and could not move himself.
30. He presented with hypertension, and a sizeable left-side infarct (obstruction of blood supply to an organ or region of tissue, typically by a thrombus or embolus, causing local death of the tissue) was noted on a brain scan. He was thereafter admitted for rehabilitation and speech therapy. He was admitted for six months at different Hospitals.

Experts' reports

Dr Oelofse

31. Dr Oelofse is, by qualification, an Orthopaedic surgeon. In examining the plaintiff, he confirmed the diagnosis in the hospital records. It was stated that he had a left leg fracture and chronic painful knee, post-traumatic osteoarthritis of the knee joint, and a painful swollen mass posterior to the knee. Severe weakness and atrophy in both legs, especially the right leg. Lower back injury with residual pain and spasms. He is permanently in a wheelchair.

32. He opined that permanent deficits would remain. His injuries, especially the head injury and left knee, had a profound impact on the plaintiff's amenities of life, productivity and working ability and will continue to do so in future. He will never be able to work again, and the whole person's impairment is more than 30%. He recommended conservative and surgical treatment, as well as physiotherapeutic and biokinetic rehabilitation. Further provisions must be made to remove the instrumentation.

Dr Okoli

33. Dr Okoli is, by qualification, a Neurosurgeon who attended the plaintiff. He stated that since the accident, the plaintiff complained of headaches almost daily. He has impaired sensation, right hemiparesis and short-term memory, and also a speech disorder. He has poor hearing, more severe on the right ear, erectile dysfunction, dizzy spells, and traffic anxiety. He lives with his sister and is dependent on her for his daily activities. He is short-tempered and self-isolates. Since the accident in 2018, he has had hypertension and a stroke. He has reached maximum medical improvement. In view of hemiparesis and immobility, his life expectancy may be curtailed by 3 to 5 years due to cardiovascular complications.

Dr Mureriwa

34. Dr Mureriwa is, by qualification, a Clinical psychologist. He noted that the plaintiff suffered a severe brain injury, and disability is severe. Maximum medical improvement (MMI) has been reached. He has poor sleep and low motivation and

no longer enjoys previously enjoyed hobbies as he cannot walk or stand for prolonged periods, misplaces items, and struggles to find things.

35. At the time of the accident, he was a laboratory team leader. His contract of employment was terminated post-accident. He cannot do anything with his right arm (right-sided hemiplegia). He needs assistance with most basic household chores and activities of daily living (i.e. bathing and dressing). He feels pain and discomfort when sitting for a long time, exacerbated by cold and cloudy weather.
36. He is rated 60-69 for moderate to severe depression and mild to moderate for anxiety in terms of the Depression and Anxiety scales. His disability is severe, and he has a Severe Brain Injury Permanent Impairment Evaluation at 68%. He will remain with significant psychological symptoms because of the cognitive problems, persistent pain and discomfort and other forms of continuing accident-related stress.

Amanda Peter

37. Amanda Peter is a physiotherapist by qualification. She opined that the plaintiff's balance is poor as he cannot maintain standing unaided. He requires moderate assistance to sit and stand.
38. Advanced osteoarthritis of the left hip joint can be seen with significant joint space narrowing and subchondral sclerosis.

Dr Leslie Berkowitz

39. Dr Leslie Berkowitz is a qualified Plastic surgeon. It was stated that though the plaintiff has reached MMI, he has been left with serious permanent disfigurements. Multiple post-traumatic scars cover an area of 120 mm x 60 mm on the lateral aspect of the right elbow. There are six post-surgical scars, each measuring (a) 25 mm x 3 mm, lying longitudinally on the lateral aspect of the right thigh, (b) Multiple small scars on the anterior aspect of the right leg, (c) 80 mm x 10 mm running longitudinally along the midline of the lateral aspect of the proximal third of the left thigh. (d) 50 mm x 10 mm running longitudinally on the postero-lateral aspect of

the proximal third of the left thigh. (e) 50 mm x 15 mm with cross-hatching running longitudinally along the midline of the lateral aspect of the middle third of the left thigh. (f) 20 mm x 3 mm lying distal to scar number 7), (g) 50 mm x 3 mm lying distal and anterior to scar number 8), and (h) 110 mm x 12 mm running longitudinally along the midline of the lateral aspect of the left knee, and (i) 25 mm x 12 mm lying posterior to scar number 10). There are other small scars on the anterior aspect of the left knee.

General damages

40. Regarding the general damages, when the matter was heard, the respondent had not accepted that the plaintiff's injuries were serious. Therefore, the issue of general damages will be postponed.

Future medical and hospital expenses

41. In terms of section 17(4)(a)⁷ of the RAF Act regarding the plaintiff's future medical and hospital care, the defendant will furnish the plaintiff with an undertaking.

Loss of earnings

42. In respect of actuarial calculations, the expert has provided two scenarios, one having considered the disabilities grant already received by the plaintiff due to the inability to return to work and the other without such considerations of the disabilities grant.

43. In answering the question of which one should be used, the defendant, through its counsel, relied on the case of **Mtila v Road Accident Fund**,⁸ in which it was decided that the disability benefits received by the plaintiff should be deducted from the total amount calculated for loss of earnings.

44. The legal position on whether benefits paid following an injury or disability should be deducted or not from the loss of earning award is settled. In **Road Accident**

⁷ No. 2 *supra*.

⁸ 73306/2014 ZAGPPHC 294 (12 May 2021)

Fund v Magdalena Lechner⁹. The Supreme Court of Appeal stated that where benefits are paid in return for contributions that were made by the plaintiff, those benefits are *res inter alios acta*. This is so because had the plaintiff ceased paying contributions, the benefits would have also ceased. The court found that the insurance benefits should not be deducted.

45. Considering the aforesaid, I have no justification for not following the Supreme Court of Appeal. The defendant is, therefore, not entitled to deduct the amount payable to the plaintiff under the disability grant.
46. The defendant conceded the plaintiff is compromised post-morbid. He is 45 years old and lost his employment due to the accident. He never went back to work after the accident. He is now unemployable and dependent for daily basic activities. There will never be any future income.
47. *The determination of the general contingency deduction to be made falls squarely within the discretion of the court, which must decide what is fair and reasonable.*¹⁰ When the court considers an order for future losses, it is expected to use contingency deductions to provide for any future circumstances that may occur but cannot be predicted with precision. It is accepted that the extent of the period over which a plaintiff's income has to be established directly influences the extent to which contingencies must be accounted for. With the unforeseen contingencies, the longer the period can influence the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies must be applied. The actuarial calculations are helpful, though not binding, as the court has wide discretion to award what it considers fair and reasonable compensation.

⁹ (711/2010) [2011] ZASCA 240 (1 December 2011).

¹⁰ *Fulton v Road Accident Fund 2012 (3) SA 255 (GSJ)*, at paragraphs [95] to [96]; and *Nationwide Airlines (Pty) Ltd*

(in liquidation) v SA Airways (Pty) Ltd [2016] 4 All SA 153 (GJ), at paragraph [147].

48. A contingency deduction is made so that any possible and relevant future event which might otherwise have caused or influenced the extent of the damages sustained by the plaintiff is considered¹¹. Contingencies have been described as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement, and other unforeseen factors'¹². The courts have recognized, however, that the fortunes of life are not always adverse; they may be favourable¹³.
49. As they stand, the actuarial calculations are based on a scenario that the plaintiff will not be employable and earn the income he would have earned pre-morbid. Through its counsel, the defendant proposed a 5% spread to be applied to come to a fair and reasonable amount for future loss of earnings. The plaintiff's submissions regarding the past loss of earnings were that it was fair and reasonable for the plaintiff's uninjured earnings of R1 275 700 to be deducted with 5% and a deduction of 10% on the future loss of earnings postulated at R4 448 100.
50. Having considered the plaintiff's circumstances, which must influence the assessment of the general contingencies to be applied and the content of the expert reports, as agreed by the parties. The court is of the view that a 5% contingency on the plaintiff's past loss of income and the 15% contingency deduction on the plaintiff's future uninjured earnings is fair and reasonable. The result is a total loss of past and future earnings in the amount of R4 951 000 minus 10% (apportionment), which equals R4 455 900 awarded in favour of the plaintiff.
51. In relation to costs, the plaintiff has been successful, and there is no reason why he should not be entitled thereto.

¹¹ Erdmann v Santam Insurance Co Ltd [1985] 4 All SA 120 (C); Ncubu v National Employers General Insurance Co Ltd [1988] 1 All SA 415 (N); and Burns v National Employers General Insurance Co Ltd [1988] 3 All SA 476 (C).

¹² Road Accident Fund v Guedes 2006 (5) SA 583 (SCA), at paragraph 3.

¹³ Southern Insurance Association v Bailey NO, at paragraph 117B.

52. Consequently, the following order is granted.

Order:

1. The defendant is ordered to pay 90% of the plaintiff's proven damages.
2. The defendant shall pay the plaintiff the sum of R4 455 900 (four million four hundred and fifty-five thousand nine hundred rand) concerning the plaintiff's loss of earnings or earning capacity.
3. The above amount shall be payable into the attorney's trust account as follows: -
 - Name of Bank : Standard Bank
 - Account Holder : Godi and Zangwa Attorneys Inc
 - Account Number : 011-668-946
 - Branch Number : 010545
 - Type of Account : Trust Account
 - Branch Name : Silverton (Pretoria).
4. The defendant will furnish the plaintiff with an Undertaking in terms of Section 17 (4) (a) in respect of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on the 19 December 2018.

5. The defendant shall pay the plaintiff's agreed or taxed High Court costs as between party-and-party subject to the discretion of the Taxing Master, such costs to include, but not limited to the following:

5.1. The actual costs for obtaining medico – legal reports, which

include travelling, accommodation, and subsistence fees as well as the reservation, qualifying and court attendance fees, 26 January 2024, if any, for all the experts that the plaintiff has attended to and the actual costs of witnesses, which include the travelling, accommodation, and subsistence fee, if any:

5.1.1 Dr LF Oelofse – Orthopaedic Surgeon.

5.1.2 Dr BA Okoli – Neurosurgeon.

5.1.3 Dr JFL Mureriwa - Clinical Psychologist.

5.1.4 Amanda Peter – Physiotherapist.

5.1.5 Dr Leslie Berkowitz – Plastic and Reconstructive Surgeon.

5.1.6 Ncumisa Ndzungu - Occupational Therapist.

5.1.7 Ben Moodie – Industrial Psychologist.

5.1.8 Dr JJ Schutte, a General Practitioner.

5.1.9 Burger Diagnostic Radiologists.

5.1.10 Munro Forensic Actuaries.

5.2. Costs of Counsel including attending court on the 26 January 2024.

5.3. The plaintiff's reasonable travel and accommodation costs for attending expert appointments.

6. The plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the defendant's attorney of record, and shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs, after service of the taxed bill of costs.
7. There is no contingency fee agreement signed between the plaintiff and his Attorney.
8. The issue of General Damages is postponed *sine die*.
9. The net proceeds of the payment referred in paragraph 2 above, after deduction of the plaintiff's attorney legal fees ("the capital amount"), shall be payable to a Trust in respect of the plaintiff, to be established within 12 (twelve) months of the date of this order, which Trust will:
 - 9.1. Be created on the basis of the provisions as more fully set out in the draft Trust Deed.
 - 9.2. Have their main objective, controlling and administering the capital amount on behalf of the plaintiff.
 - 9.3. Have as its trustee as NOMINEE of Absa Trust Ltd, with powers and abilities as set out in the draft Trust Deed. Marked "A".
10. Should the aforementioned Trust not be established within the 12 (twelve) months period the plaintiff is directed to approach this court within one month thereafter in order to obtain further directives in

respect of the manner in which the capital amount is to be utilized in favour of the plaintiff.

11. Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of Trust Deed, the plaintiff's attorneys:
 - 11.1 Are authorized to invest the capital amount in an interest-bearing account in terms of Section 86(4) of the Legal Practice Act to benefit of the minor with the Registered banking institution pending finalization of the directives referred Paragraph 3 above.
 - 11.2 Are authorized and ordered to make any reasonable payments to satisfy any of the needs of the minor that may arise and that are required in order to satisfy any reasonable need for the treatment, care, aids, or equipment that may arise in the interim.
12. That the cost of establishing the aforementioned Trust, administration and remuneration costs of the Trustees will be paid by the defendant.

N. Mazibuko
Acting Judge of the Gauteng Division, Pretoria

This judgment was handed down electronically by circulation to the parties' representatives by email.

Representation:

Counsel for the plaintiff: Ms N. Mathe-Ndlanzi

Attorneys for the plaintiff: Godi Attorneys

Counsel for the defendant: Mr SB Mabena

Attorneys for the defendant: State Attorney (Pretoria)

Heard: 26 January 2024

Date of Judgment: 17 April 2024