

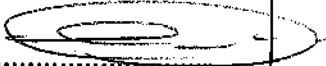
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 13151/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
09/09/2021	
DATE	SIGNATURE

LEBOGANG MOLEFE

APPLICANT

And

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

INTRODUCTION

[1] This is a claim for the recovery of damages by the plaintiff as a result of an injury he sustained in a motor vehicle collision. The collision occurred on the 18th August 2017 at approximately 21h30 at Diepkloof. The matter is undefended as the court struck out the defendant's defence on the 6th May 2021. On the date of the hearing Ms Ameersingh, an employee of the RAF appeared on behalf of the RAF and requested a postponement which I refused. I stood down the matter to allow settlement negotiation between Ms Ameersingh and Ms Molohe-Madondo, counsel for the plaintiff. The issue of liability was settled, with the defendant conceding 80% liability for the plaintiff's proven damages. The issues remaining for determination are general damages, future medical expenses and loss of earning capacity.

EVIDENCE

The plaintiff testified and called three expert witnesses.

[2] Plaintiff testified as follows: he was hit by a motor vehicle while walking with his friends on the 5th October 2015. He sustained injuries to his left hip and was taken to Helen Joseph Hospital by an ambulance, was operated upon and a steel plate fixture was inserted. He was hospitalized for a period of two weeks and went back to school after 6 weeks walking with the aid of crutches. He continued to use crutches until 2016 because he did not want people to see that he was limping. He did not go to school when the weather was cold because of the pain.

[3] He was a scholar in grade 9 when the collision occurred. He went back to school the very same year, he passed and was promoted to grade 10 in 2016. He failed grade 10 and had to repeat the grade in 2017. He failed it again because he chose subjects that were difficult for him. He could not go back to school in 2018 because he was said to be above the age allowed for high school.

[4] He has since gone back to school, he was at the time of the hearing attending ABET classes (night school) doing grade 11. He was coping with the pain because it had reduced in intensity. And was no longer taking medication. He was still limping but he could stand for long periods and he could even jog around a football field four times. He still felt pain especially when the weather was cold and he takes Painblock tablets for the pain. The pain would normally last for 3 hours but after it subsided he was able to resume his normal routine. His career choice was to become a traffic officer.

[5] Dr John Tladi, an orthopaedic surgeon testified as follows: The plaintiff suffered a fractured femur during the collision. He had a childhood femur injury which had healed significantly. The plaintiff was injured on the very same femur during the collision. The nail that was used previously had been removed and replaced with a stronger nail. On the X-rays it showed that the femur had not yet united and this had nothing to do with the previous injury. The non-union resulted in

plaintiff experiencing pain while jumping or ascending and descending stairs. Plaintiff could jog because jogging was the same as walking. The plaintiff was likely to develop post traumatic osteoarthritis and would require a hip replacement surgery in the future but could not say when it was likely to happen.

[6] Thembisile Mahlangu, an occupational therapist, testified as follows: She assessed the plaintiff and amongst others the results showed that the plaintiff's left leg was weak. There was a clicking sound on his left hip joint when he was performing some tasks during the assessment. He experienced moderate pain when carrying weight of 9kg and would change in posture. Plaintiff was able to jog but running was not recommended as it required more exertion. The plaintiff was suited for sedentary to light work ie. admin work, call center jobs or work as an assistant in a technical field because of his injury. It would be difficult for him to be a traffic officer as he did not meet the stress requirements of the job.

[7] Katlego Mokgotla, an industrial psychologist testified as follows: She performed a self-assessment test on the plaintiff which gave an indication of how the plaintiff saw himself. The plaintiff reported mild level of pain, anxiety and hopelessness. It was hard for her to determine which career he would have followed as he was in grade 9 when the collision occurred. At the time the report was compiled the plaintiff had grade 10, was not attending school and was unemployed. She confirmed that the plaintiff would be more suited to more sedentary to light work but that he would struggle to get sedentary work since he did not have grade 12. When she was informed that plaintiff had since gone back to school and was in grade 11, she stated that he would then be able to upskill himself and should be able to work within the semi-skilled category. The plaintiff's injuries did not affect his retirement age and since he has gone back to school, his job choices have not been reduced. She stated that although the plaintiff has cognitive difficulties, they were not accident related.

Injuries and treatment received.

[8] According to Dr Tladi the plaintiff sustained a left femur fracture (intertrochanteric). He was taken to St Hellen Joseph Hospital where he was operated upon and an intramedullary nail was fixed and he walked with the assistance of crutches. As a result of the collision the plaintiff has a 1.5cm leg length discrepancy.

Future Medical Expenses

[9] Dr Tladi reported that the plaintiff would need to consult various medical practitioners intermittently, including general practitioner, orthopedic surgeon and physiotherapist. He would also require prescription analgesics and non-steroidal anti-inflammatory drugs periodically to manage the pain. The fracture has developed a non-union and would require surgical intervention in the future. I intend to make an order that the defendant issue a certificate in terms of s17(4) of the Road Accident Fund to cover the claim for future medical expenses.

Loss of earning capacity

[10] The plaintiff is claiming an amount of R2 609 753.55 for loss of earning capacity. It was the opinion of the industrial psychologist that the plaintiff would have completed his grade 12 and entered the labour market with a diploma. However because of the accident he will enter the labour market 3 years later than his peers without grade 12 and would enter the labour market as an unskilled labourer.

Evaluation (loss of earning capacity)

[11] When the collision occurred in 2015, the plaintiff was an 18 years old scholar in grade 9. He went back to school after six weeks and he was promoted to Grade 10 at the end of that year. He repeated grade 10 twice and according to his own evidence he failed because he chose subjects that were difficult for him. He was expelled from school in 2018 because of his age after he failed grade 10. He registered for ABET classes but could not proceed that year as he was arrested and imprisoned for looting. The above evidence clearly indicates that the plaintiff's late entry into the labour market does not have anything to do with the collision and therefore the defendant cannot be held responsible for that.

[12] The submission that the plaintiff has suffered loss of earning capacity is based on the opinion that the plaintiff will no longer attain his grade 12. In her report, the industrial psychologist stated that the plaintiff's pre-accident potential was that he would have been able to complete his grade 12 and to obtain a diploma. At the time the industrial psychologist prepared the initial report, the plaintiff had left school with only grade 10 and was unemployed.

[13] In this regard the actuarial report prepared by R Koch is such that plaintiff's pre-accident earnings with a matric and diploma were calculated to be R 7 456 439 and post-accident earnings without a matric was calculated at R 1 967 281. The calculations were based on the findings of the industrial psychologist (which are quoted in the report), where she stated as follows:

“noting that he is likely to obtain lower levels of education as compared to what was anticipated pre-accident and that he may have to rely on his physical ability to generate income, the writer is of the opinion that in his post-accident injured state would experience difficulties competing against most physically abled and academically qualified candidates in the labour market ...” the industrial psychologists then concluded “as per expert opinion, Mr Molefe may no longer attain his pre-accident potential, and thus will suffer loss of future earnings potential”.

[14] The plaintiff's circumstances has since changed, he has gone back to night school and was in grade 11 at the time of the hearing. The industrial psychologist confirmed that since he has gone back to school then he should be able to achieve his pre-accident potential. The conclusion that he would enter the labour market without grade 12 was based on the fact that he was not attending school and was unemployed when the report was initially compiled. During her testimony I

enquired whether it would make a difference if plaintiff had since gone back to school. She confirmed that it would in that plaintiff should be able to proceed on the postulated pre- accident scenario.

[15] The educational psychologist stated in the addendum to her report that should plaintiff be motivated enough “he should return to school and try at TVET college where he will be able to nurture and enhance his technical skills”. She opined that plaintiff would be able to reach his pre-accident potential and get admitted to a diploma. This addendum was prepared in 2018 after plaintiff was in night school. The occupational therapist was also of the opinion that plaintiff can go back to school and even go on to complete his diploma.

[16] Having gone back to school, plaintiff should, according to the industrial psychologist, achieve the pre-accident scenario as postulated. As a result, the calculation based on plaintiff entering the job market without a matric is no longer applicable. This would mean that the pre-accident scenario as postulated would be the same as the post-accident scenario.

[17] There is no evidence that the injuries sustained by the plaintiff or the sequelae thereof has impaired the plaintiff’s ability to earn income in the future or that his earning capacity has in any manner been reduced. In my view the plaintiff has not proved loss of earning capacity.

GENERAL DAMAGES

[18] The plaintiff submitted RAF 4 duly completed by Dr Tladi, which stated that the plaintiff qualifies for the Narrative Test due non-union. The Plaintiff submitted that the serious injury assessment has not been rejected by the RAF.

[19] In considering the amount to be awarded for general damages, the courts are expected to take care to see that their awards are fair to both sides; giving just compensation to the plaintiff ‘without pouring out largesse from the horn of plenty at the defendant’s expense’. (see *Pitt v Economic Insurance Co Ltd* 1957 (3) 284 (D) at 287) Past awards can be used as a guideline in the determination of what the court considers to be a fair and just compensation.

[20] Plaintiff submitted that an amount of R500 000 (Five Hundred Thousand Rand) should be awarded for his injuries and the sequelae thereof. The plaintiff referred to the case of *Morris v Road Accident Fund* (99303/15) [2018] ZAGPPHC 486 (12 July 2018) as a comparable case because Morris suffered ‘non-union of the right femur distal two-thirds one third junction with displacement of the distal fragments laterally’. He was left with shortening of 2cm on the right leg.

[21] I have considered the abovementioned case which the plaintiff relied on as comparable. The injuries sustained in that case are described as follows: “(a) Right distal femur fracture (non-union); (b) Non-union of the right femur distal two-thirds one-third junction with displacement of the distal fragment laterally. This injury has left the Plaintiff with a shortening by 2 cm of the right leg; (c) Abrasions to the forehead, nose and chin; (d) Fractured and damaged teeth; (e) The unsightly scars, and

disfigurements. According to Dr Pienaar's report, the Plaintiff will retain considerable scarring which will not lend itself to any further surgical reconstructive surgery, led to a permanent serious disfigurement; (f) Severe symptom of depression with avert agitated mood and, according to Dr Pienaar's report, also severe past-traumatic anxiety which impedes her mobility significantly which results in absenteeism at work." Despite receiving treatment, the plaintiff in that case had the following complaints: pain in the right hip; pain in the right knee; pain in the right ankle; pain over the fractured area in the right leg; pain in the left wrist, pain on the right lower jaw and temporomandibular on the right, problems with her broken teeth; inability to drive due to pain experienced and disruptions in her sleeping patterns.

[22] I have also considered other cases for guidance. In *Mgudlwa v RAF* 2010 QOD E3-1 (ECM) the plaintiff in that case suffered a fractured femur and a fractured tibia. He had a leg-length discrepancy of 5cm. It was anticipated that he would require a knee replacement surgery and realignment of the femur in the future. He was awarded an amount of R300 000, the current value of which is R517 000.

[23] In *Ndaba v RAF* 2011 (6E3) QOD 14 (ECB) the plaintiff in that case suffered a pelvic fracture, femur and tibia fracture, a knee injury and a ruptured bladder. He was awarded R300 000, the current value of which is R820 000.

[24] The orthopedic injuries and the sequelae in the abovementioned cases are more serious than the present matter. The plaintiff sustained a fractured femur which resulted in a leg-length discrepancy of 1.5 cm. It was anticipated that he was likely to develop post traumatic osteo-arthrititis and would require a hip replacement surgery in the future. His current complaints are that he experiences intermittent pain especially when the weather is cold. He cannot run or carry heavy objects.

[25] It is trite that the amount to be awarded for general damages lies in the discretion of the court which should be exercised judiciously. 'The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain', depending on what the court considers fair in the circumstances of the case. (see *Sandler v Wholesale Suppliers Ltd* 1941 AD 194)


[26] I consider an amount of R300 000 (pre-apportionment) to be fair in the circumstances. The defendant is therefore liable to pay 80% thereof to the plaintiff.

In the result I make the following order

1. The defendant is liable for 80% of the plaintiff's proven damages;
2. The defendant is hereby ordered to furnish the plaintiff with a certificate in terms of s17(4) of the Road Accident Fund Act 56 of 1996 as amended, within 21 days of this order for 80% of the costs of all further accommodation of the plaintiff in a hospital or nursing home or

treatment of or rendering of services to the plaintiff arising from injuries sustained in the accident on the 18 August 2017;

3. The plaintiff's claim for loss of earning capacity is dismissed;
4. The defendant is ordered to pay an amount of R240 000 to the plaintiff in respect of general damages.
5. Interest on the abovementioned amount at the applicable rate calculated from the 15th day of this order to date of payment;
6. The defendant shall pay the plaintiff's taxed or agreed costs on a party and party scale.



P D KEKANA

ACTING JUDGE OF THE HIGH COURT

FOR THE APPLICANT: L.R MOLOPE-MADONDO

FOR THE RESPONDENT: NO APPEARANCE

DATE OF HEARING: 19 MAY 2021

DATE OF JUDGMENT: 09 SEPTEMBER 2021