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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:22/2013

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

Signature:

Date:

In the matter between:

OLIVER MUKANSI **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MONENE AJ

INTRODUCTION

[1] On 17 December 2011 the plaintiff, a major male farm supervisor, was a passenger in a motor vehicle when post the excessively speeding motor vehicle driving into a pothole on the Nkowankowa road in Limpopo he fell off from the bakkie onto the road.

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[2] Upon receipt of medical attention the plaintiff was determined to have suffered a right forearm injury as well as left hip soft injury.

[3] In the aftermath of all that he instituted proceedings against the defendant under cover of section 17 of the Road Accident Fund Act 56 of 1996.

[4] The defendant offered absolutely no defense to the plaintiff's claim having failed to file any expert reports, failing to show up for trial despite being properly served with a set down; all this despite initially filing a curious plea which spoke of failure to put on seatbelts by a passenger at the back of an open back bakkie.

[5] The matter served before this court in default with the plaintiff praying that I determine the question of liability, the loss of earnings and the need for the defendant to be ordered regarding an undertaking in respect of the future medical needs of the plaintiff to the extent that those medical needs would be arising from the injuries sustained in the said motor vehicle accident. General damages fell to be postponed sine die it being so that this court's jurisdiction thereon was ousted by the precedence-imposed question of the seriousness of the injuries having neither been conceded by the defendant nor ordered by the court in terms of regulation 3 of the regulations of 2008 promulgated in terms of the Act.

[6] To attend to the issues which lay before me for determination the plaintiff applied for and was granted leave to prosecute his case on paper in terms of Uniform rule 38(2).

<u>*MERITS*</u>

[7] In **Groenewald v Road Accident Fund (74920/2014)[2017] ZAGPPHC 879(5 October 2017)** at para 3, Mavundla J stated the following:

> "It *is trite that the plaintiff, as a passenger claimant, need to prove only 1% negligence on the part of the driver in order to succeed with her claim against the defendant…"*

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[8] I struggle to fathom why negligence on the part of an insured driver is, in passenger claims, sometimes treated as some brainteaser because, save for where the passenger somehow took over or hijacked or interfered with the act of a driver by perhaps contesting over control of the steering wheel of a motor vehicle or the acceleration, clutching or braking system or perhaps frustrating the driving function in any manner, there is simply no way a passenger can be liable for a motor vehicle accident.

[9] *In casu* I have reflected on the elitist and third world reality-divorced notion that perhaps the plaintiff ought to have shared some blame for being at the back of an open bakkie which is said to not be meant for passengers but for parcels, as a way of thinking about some apportionment, but I have found it offensive to my sense of what is just. Given the third world status of our country and the painful reality that is black life in this country, I cannot bring myself to uphold a standard that seeks to suggest that poor people have a liberal choice to make regarding what mode of transport to use. To some of our people the back of a bakkie is the only choice to make they are not to travel for tens of kilometers per foot.

[10] The insured driver was in casu negligent not only from over speeding but also from failing to keep a proper lookout as to have avoided the pothole. The plaintiff's version on this score is unassailable more so because it was not opposed by any evidence by the defendant who was virtually a no-show. The proverbial one percent negligence on the part of the insured driver is, in my view, proven without breaking any sweat at all.

[11] Accordingly, I have no hesitation in finding that the defendant is hundred percent liable for the plaintiff's proven damages.

<u>*LOSS OF EARNINGS*</u>

[12] As already alluded to supra the main take homes as to the injuries suffered by the plaintiff in the accident were a right forearm injury and a left hip soft tissue injury. This was testified to by Dr Orjiako, the orthopedic surgeon who went on to further record the

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sequelae of the plaintiff's injuries as severe left hip pain, inability to hold and lift heavy objects with the right hand;all of which would persist for the better part of the plaintiff's life.

[13] The occupational therapist, Dr Radzuma observed that the plaintiff who was post the accident employed no longer as a supervisor but a general farm worker and further that the plaintiff has a reduced ability in the use of his right hand as well as reduced ability to handle prolonged standing, stooping and squatting all of which are germane to his line of work.

[14] Curiously though, the occupational therapist also made findings about cognitive deficiencies which he found to be caused by the accident. Not only is this court in serious doubt about how there could be a link between the supra stated injuries with any cognitive sequelae, but this court is not aware of how the occupational therapist, being neither a clinical psychologist nor a psychiatrist, qualified to make such a determination.

[15] Cloudious Nyahwema, an industrial psychologist, observed the following:

[15.1] That the plaintiff was at the time of the report in My 2024 41 years of age.

[15.2] That the plaintiff was pre-morbid in very good health.

[15.3] That the plaintiff only went to school up to grade 9 and dropped out due to indigency.

[15.4] That at the time of the accident the plaintiff was employed as a farm supervisor with total monthly earnings of R8 013,72.

[15.5] That post the accident the plaintiff only managed to work for three months after which he was released with pay until his contract ended in 2017.

[15.6] That from 2019 he was employed as a casual labourer by a municipality earning R3 000.00 until 2021 when the contract ended.

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[15.7] That at the time of the assessment the plaintiff was employed as a farmhand earning an amount of R4 000.00 monthly.

[16] This expert observed further that the plaintiff complains of forgetfulness and poor concentration span. It is not immediately available as to whether there is a nexus between these complaints and the accident. There, in my view, shouldn't be any nexus.

[17] This witness further opined that the plaintiff will be able to still work for approximately 36 years until he reaches his retirement age at 65 years. A further expert opinion was that the accident will affect his employability and functionality in the open labour market. It was this witness' further expert opinion that owing to the accident the plaintiff suffered past loss of income and will suffer loss of earnings in the future, that is, despite the plaintiff currently being employed albeit at an earning capacity much less than his pre-morbid situation.

[18] Most instructive about this expert's findings are the following captured verbatim from the report:

> "The *writer states that the plaintiff is likely to forfeit about 5 years of earning capacity due to the accident in question. He may discontinue with income generating activities at the age of 60 years."*

[19] Premising their report solely on the industrial psychologist's report Tsebo Actuaries postulated a net past loss at R1 027 704.00 and a future loss at R2 168 369.00 having factored contingencies at 5 percent for past loss and a sliding scale of 5 to 35 percent for future loss.

[20] In the backdrop of the above uncontested expert evidence, I must determine loss of earnings suffered by the plaintiff in respect of which he lodestar to a proper approach remains, in my view, **Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F** where the following was said:

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"*Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augururs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on evidence. The validity of this approach depends upon the soundness of the assumptions, and these may very from the strongly probable to the speculative.*"

[21] While I note that the occupational therapist opined on cognitive sequelae which do not make sense and are outside her field of expertise, I am unable to find that those findings impacted on or in any way influenced the industrial psychologist's determinations and the actuaries. Nothing in the industrial psychologist's report suggests in the least that the opinion therein was premised on cognitive deficiencies. That being the case and the industrial psychologist's report being the only one which served before the actuaries to help determine their computations, I see no stain from the occupational therapist attaching to the actuarial calculations.

[22] All that said, I cannot fault the expert evidence led before me in any manner and readily accept that evidence without any reservations. What then remains for me is to determine whether in my discretion, contingencies must be applied to the amount of loss of earnings arrived at, at the tail-end of the reports or not. That is the case it being trite that the factoring in of a contingency percentage is a purely discretionary matter.

[23] Given the fact that post the accident the plaintiff was able to work at the farm and further that even upon being released from work he continued to be remunerated up to the end of his contract, albeit at a lower salary rank than the pre-morbid one I find that a contingency higher than the one employed by the actuary for past loss of earnings was

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called for. Afterall the uncertainties of employment life on a contract seen through the lense of the high unemployment rate in this country suggests that it probably could have been worse for the plaintiff even if he had not been involved in the accident. Accordingly, I would apply a 20 percent liability to past loss of earnings, leaving the future loss earnings as computed by the experts. That takes past loss to R960 102,40

FUTURE MEDICAL TREATMENT

[24] According to the orthopedic surgeon's evidence the plaintiff's pain severity is 8/10. He will need medical attention to manage the pain in the light of this expert's finding that the plaintiff has signs of permanent functional impairment.

[25] According to the occupational therapist the plaintiff will need sessions with an occupational therapist to improve his physical limitations and reduce his dependency.

[26] In those premises a case for an order compelling an undertaking for medical expenses in the future has, in my view, been made.

ORDER

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

[27.1] The defendant is liable for 100% of the plaintiff's proven damages.

[27.2] The defendant shall pay the plaintiff a total sum of R3 128 471 .40 (**THREE MILLION ONE HUNDRED AND TWENTY-EIGHT THOUSAND FOUR HUNDRED AND SEVENTY-ONE RANDS AND FOURTY CENTS ONLY**) computed from R960 102,40 past loss and R2 168 369.80 future loss, in respect of the total loss of earnings suffered by the plaintiff in relation to the motor vehicle accident in *casu.*

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[27.3] The amount in order number 27.2 above shall, within 180 days from date of this order, be paid by direct transfer into the trust account of **Maloka Sebola Attorneys** the details of which are as follows:

BANK: STANDARD BANK
ACCOUNT NUMBER: 0[...]
REFERENCE: SEBOLA/MVA/2012/28

[27.4] In the event of the above capital amount not being paid timeously, the defendant shall be liable for interest at the prescribed rate of interest per annum, calculated from the date of *mora* to date of payment.

[27.5] The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) (a) of Act 56 of 1996 in respect of all medical treatment, medical costs and the supply of any medicine and goods and services arising out of the injuries sustained by the plaintiff in the motor vehicle accident implicated in this matter.

[27.6] The defendant is ordered to pay the cost of this suit on a High Court scale inclusive of the costs attendant to obtaining the expert reports relied upon in evidence and the costs of counsel on scale B.

[27.7] The plaintiff shall, if the parties disagree as to the costs referred to supra, serve a notice of taxation on the defendant and shall allow the defendant 14 court days post taxation to make payment of the taxed costs failing which interest at the prescribed rate shall commence to run until date of payment.

27.8 The issue of general damages is postponed sine die.

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MALOSE.S. MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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APPEARANCES

Heard on	*: 22 May 2024*
Judgement delivered on	*: 03 September 2024*
For the Plaintiff	*: Adv. T M Malatji* *: Instructed by Maloka Sebola Attorneys* *: Tel: - 015 307 7496* *: Email: info@malokasebolainc.co.za*
For the Defendant	*: No appearance*

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