REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO LOCAL DIVISION, THOHOYANDOU)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

CASE NO: 46/2017

Signature [redacted]

Date.....

In the matter between:

RAMULONGO NDISHAVHELAFHI **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MONENE AJ

[1] In the unreported matter of **Mukhotho v RAF (Case No 1041/2018) delivered in this Local Division in January 2024**, this court made the following remarks which, in my view, are more apt in casu and deserve repetition and emphasis:

"*[1] Beyond the unnecessary legalese and uncalled for jargon-laced strife between the Defendant and so-called RAF legal practitioners, the simple unadulterated truth is that as its naming suggests, the Road Accident Fund is a government revenue funded social security or insurance fund founded with purpose of ameliorating the plight of victims of road accidents in a third world milieu characterized by high levels of underinsurance or no insurance at all.*

[2] The fund was purposed neither at being a cash cow for legal practitioners to a point of some being referred to as RAF specialist lawyers nor at being an ultra-miserly everyday litigant whose sole aim is to save money while legally qualifying motor vehicle accident victims are left languishing for years and sometimes for life without compensation.

[3] It seems to me unfortunate that what is essentially clerical administrative work in an insurance for road accident victims has been elevated to be the key part of what is regarded as "law" by many of us and occupies too much court time than is necessary for courts characterized by heavy under resourcing as regards judges. Indeed, the reason why the RAF roll constitutes probably

seventy percent of all our civil court rolls in the country is beyond my comprehension because like other insurances road accident victims must routinely be paid upon submission of claims, with litigation reserved for a few disputes. It certainly should not be the norm nor the default position that RAF matters are always all disputed and always bogged down in red tape by the fund, by legal representatives and by courts with routine settling being the exception. Maybe the RAF Act itself is cumbersome and unhelpful and needs a relook if generally suffocating bottlenecks are to be straightened out. Maybe the court rules need fixing. But certainly, something must change. We cannot all keep pretending that compensating a road accident victim is a very elaborate and involved rocket science project."

[2] In these proceedings like in thousands of others in our courts around the country, the plaintiff appears unopposed per default judgement application seeking compensation for injuries and sequelae thereof arising from a motor vehicle accident which occurred more than ten years ago on 5th September 2013.

[3] In the unnecessarily belated wake of the merits in this matter having been settled 80% in the plaintiff's favour per court order dated 27 August 2018 following the launching of these proceedings on 19 January 2017 as evinced by the case number, general damages and medical expenses remain "in dispute" between the parties and are, ten years down the line, curiously not pursued at this

instance with the plaintiff's counsel having prayed that they be postponed *sine die*.

[4] What I am called upon to determine is loss of earnings in the form of past income loss and future loss of income.

[5] This, despite the lapse of more than ten years since the motor vehicle accident, being lamentably yet another matter where the defendant has not bothered to file expert reports to assist the court in arriving at a just compensation amount, the plaintiff sought and was granted leave by this court to proceed in terms of Uniform rules 38(2) and 39(1) the trite effect of which was the admission of the plaintiff's expert witnesses' evidence under cover of affidavit and the plaintiff being permitted to prove her case, in the defendant's absence so far as the burden lies on her.

[6] In brief and for context the evidence available is to the effect that the plaintiff, who was driving a bicycle on a public road in September 2013, was negligently knocked down by a motor vehicle driven by a Road Accident Fund insured driver resulting in the following injuries as diagnosed by Dr Peter T Kumbirai, a specialist orthopedic surgeon:

6.1 Left knee injury resulting in an analgia gait.

6.2 Tender left ilia fossa

6.3 Dislocation of DIP joint index finger

[7] Resulting from these injuries sustained in the accident the evidence of Dr. L K Nkuna, a neurosurgeon, expertly opined that the plaintiff suffers from post-concussion migraine headache, has post-concussive depression and has an amnesia syndrome. Quite serious sequelae these are which have needlessly and sadly beset the plaintiff for a decade without any help owing to unnecessary red tape and lawyering.

[8] L Papo, an occupational therapist who consulted with the plaintiff in November 2018, opined as an expert that flowing from the accident the plaintiff's physical capacity has been severely reduced as he can no longer perform tasks falling within the medium, heavy and very heavy workloads. This, according to this witness's affidavit evidence, made the plaintiff only suitable for work which needs limited mobility and thus which falls within sedentary to lower light types of work, making him competition for him in the open labour market to be unfair. The plaintiff, it was observed and testified to by this expert, had prior to the accident been a 24-year-old semi-skilled worker with a grade 12 certificate and had been studying towards an IT degree. But for the accident, the evidence goes further, the plaintiff would have completed his IT degree and would have progressed either within the semi-skilled or skilled ranks up to retirement at age

65. Observing that post-accident attempts at getting work such as in free-lance acting had all been scuppered by accident related in capacities, this witness opined further that the plaintiff's headaches and depression would further negatively affect his ability to work owing to compromised ability to concentrate, interact, communicate and focus approvingly referencing the neuro surgeon, Dr L K Nkuna's findings that while the migraine headaches may somewhat be mitigated by analgesics at a cost of abut R15 000.00, they had a negative side-effect of hampering the plaintiff's activeness and alertness for work purposes.

[9] Z Fakir, an industrial psychologist's evidence was to the effect that at 24 years of age at the time of the accident, the plaintiff still had 21 years to reach his career ceiling age of 45 years over which period he would have grown in experience and skills to compete for higher paying occupations. Observing that the plaintiff struggled post-accident with doing work as a free-lance actor due compromised memory where he had to repeat acting lines several times, this witness expertly opined that the plaintiff was, owing to the injuries he suffered in the accident and their sequelae, unable to perform physical activities.

[10] Armed with the industrial psychologist report, the neurosurgeon report as well as the educational and clinical psychologist reports, Wim Loots, an Actuary, made two postulations for loss of earnings with the first scenario capping total

loss of earnings at R6 784 657.00 and the second scenario capping it at R6 119 203.00. In both scenarios the expert witness factored in the 20% contributory negligence arising from the 80/20 settlement of merits referred to supra as well as standard contingencies of 5% for past loss of income and 15% for future loss of income.

[11] As I understand the evidence before me, the plaintiff's key injury, to wit the left knee injury is, although chronic, not per se causing him immobility, albeit the sequelae thereof, particularly those determined by the neurosurgeon, are of no small moment. These sequelae have seen him heavily compromised in the employability sphere and while from his matric results he was by any stretch of imagination not a straight "A" student and may have or may have not completed his IT degree studies, he was interrupted therein by the accident and has since not returned to those studies.

[12] He was fairly young at the time of the accident at the age of 24 and, but for the accident, could well have developed far better in his employment as testified to by the occupational therapist and the industrial psychologist. Cognitively there is nothing patently wrong as there really is no brain injury but however, the post-traumatic stress disorder, depression, migraine headache and concussive amnesia syndrome are, in my view quite severe sequelae which deserve due

regard in the determination of by how much the plaintiff's earning capacity has been detrimental.

[13] These considerations both for or against the plaintiff feature a lot in my assessment of loss of earnings and in contextualizing the actuarial calculations expertly made by Wim Loots.

[14] Indeed the test for assessing loss of earnings can be put no better than it was stated in **Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F** where the following was said:

> "*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...*"

[15] I may be without the benefit of soothsayers and prophets as I make a prediction of a future loss in the present day but at least I have the benefit of expert opinions to assist me in that speculation and make it one guided by education. To deviate therefrom I need something better or a counterview from the defendant which, as stated supra, is lacking *in casu*. It does not of course mean I am tied down to slavishly follow the expert actuarial calculations

without questioning manifestly wrong premises of the expert opinion evidence if there be any. Hence Nicholas JA in the timeless matter of **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 114C-D** stated inter alia as follows:

> *"...while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge's "gut feeling" as to what is fair and reasonable is nothing more than a blind guess. (cf Goldie v City Council of Johannesburg 1948(2) SA 913(W) at 920.)"*

[16] Accordingly, the point of departure must be the two scenarios postulated by the actuary *in casu* as I cannot simply thumb suck amounts or rely on my "gut feeling" so to speak. At the same time expert opinions must still be premised on what the court finds to be defensible reasoning if the court is to accept cogency thereof and attach thereto any definitive probative value. As is now trite regarding evaluation of expert evidence, proper evaluation of opinion evidence needs to be done in the context of the expert having clearly disclosed not only her reasoning but also the premises from which the reasoning proceeds. Applying this rational I, having perused all reports *in casu*, can find no fault in the expert witnesses' opinions.

[17] This court has remarked before in similar RAF matters that unlike in general damages, precedence in terms of awards for loss of earnings would, in its view, not be of much use because even in similar type of injuries, additional factors such as age, income level and employability will never be the same. There are just too many subjective variables attendant to loss of earnings to ever have a reliable body of reference points or guiding tools. The best bet is to be guided by evidence led by experts in this computation field, a field in which courts should, while retaining their discretionary powers and avoiding being rubberstamps, humbly still accept their layman status.

[18] But still, I remain alive to the need to be guided by precedence in broadly similar injuries, particularly regarding the key injury in casu, the chronic left knee injury regard also being had to the post-accident functionality disorders. Indeed, I need not completely and obstinately shut my eyes to the trite principle that previous awards are guidelines which need not be slavishly followed but should be given due regard to, if only to ensure some consonancy in similar matters. (**See NK obo ZK v MEC for Health, Gauteng ZASCA 13(15 March 2018**). Indeed, on this score the court in **Protea Assurance Co Ltd v Lamb 1971(1) SA 530(AD) at 536** stated that comparable cases should be used to afford some guidance towards assisting the court in arriving at an award which is not

substantially out of general accord with previous awards in broadly similar cases. In this regard I take note of the following:

18.1 In **Mokoetsana v Road Accident Fund (3901/2021)[2023] ZAFSHC 133(18 August 2023)("Mokoetsana")** a plaintiff who had, almost like the plaintiff *in casu*, suffered a left knee injury, was limping permanently and had sequalae of chronic depressive disorder, anxiety and post-traumatic stress disorder mild head injury with lacerations but was, at the time of the accident and was consequent to the accident unemployed still employable and was awarded loss of earnings in the tune of slightly below a million one hundred rands.

18.2 In **Khakhang v Road Accident Fund (1983/2018) [2021] ZAFSHC 306(2 December 2021**("**Khakhang**") a plaintiff with a knee injury slightly more serious than *in casu* but without the psychological sequelae *in casu* attracted a loss of earnings quantum of R1 184 120,00.

[19] The long lifespan that the plaintiff still must traverse having been injured at 24 years of age is another factor worth magnifying in the determination of loss of earnings. In that context amounts of about 6 million rands in both scenarios postulated by the actuary, which appear at first blush to be undeserved windfalls are, in reality, not much if spaced out over a long period in years still to be lived. In that regard an amount of R6 million rands spread over 40 years equates to

R150 000.00 per year which translates to R12 500.00 per month, hardly a lot for a person who is owing to accident sequelae almost unemployable in a work-shedding economy.

[20] As already alluded to supra, the expert evidence led before me as summarized above is, to me, sound and unassailable. I have no reason nor inclination to critique that evidence which, in my view, is sufficient and probatively pregnant and would have, on the strength of the above reasoning, ordinarily have leaned towards granting a loss of earnings as guided by the higher of the two actuarial scenarios, tempered in whatever direction, of course, by comparative precedence.

[21] I say would have gone that route because I notice that much as the actuarial calculations dated 18 October 2020 pegged loss of earnings at plus R6 million rands, the particulars of claim dated 9 January 2017 and issued on 19 January 2017 quantified loss of earnings at R2 869 482.00. The particulars of claim have never been amended since nor has there been any argument advanced for any curing of same whatsoever.

[22] I understand it to be trite that a party is bound by its pleadings meaning that a party cannot plead one case and prove another. I know of no law, rule of practice nor authority which exempts plaintiffs in RAF matters to be exempt from

the principle of a party having to fall and rise by its papers. It escapes my understanding as to why the plaintiff, duly represented by legal representatives, failed to invoke rule 28 of the uniform rules of court upon receipt of the actuary's report in 2020. I will not speculate but will again refer to the courts' lament in the introductory paragraph to this judgement.

[23] Given the fact of what is claimed in the particulars of claim being manifestly lower than what the expert witness evidence proves, I must go by what the pleadings say and reluctantly also the 20% contributory negligence deduction arising from the 80/20 % merits settlement thereto. Given how the plaintiff's legal representatives have failed the plaintiff in not employing rule 28 to the particulars of claim as regards quantification of loss of earnings as alluded to *supra,* it surely, in my view, would be further uncalled for prejudice to the plaintiff if the legal representatives were still to draw something therefrom, further diminishing the little that they caused him to be awarded.

[24] Looking at the above analysis on what the first scenario equates to in terms of monthly income to the plaintiff and juxtaposing that to what compensation was awarded in almost similar matters in **Mokoetsana** and in **Khakhang** referred to supra, I am persuaded the more serious psychological sequelae visited upon the plaintiff in this matter as well as his manifest youthfulness compared to the two authorities, militate for an award far higher than those two and that the six

million mark of the actuary's two scenarios are not, given the reasoning in the actuarial report, alarmingly high and worrisome. Hence I would, but for the failure to amend the particulars, have needed very little persuasion to defer to the expert computations.

[25] As regards a section 17(4)(a) undertaking, I understand the plaintiff's heads of argument to be suggesting that somehow medical expenses and perhaps inclusive of future medical expenses should, ten years after the accident, be postponed *sine die.* My sense of what is just does not permit me to visit such injustice on the plaintiff. He deserves to be afforded medical evidence as soon as ten years ago and should be held in painful limbo no longer.

[26] In all the above premises the following order is made:

26.1. The defendant shall pay the plaintiff a total amount of R 2 329 585.60 being total loss of earnings arising from a motor vehicle accident which occurred on 5th September 2013. This amount is what has been claimed in the particulars of claim less 20 % contributory negligence.

26.2. The amount mentioned in order 25.1 above shall, within 90 days of this order, be paid into the trust account of M G Mathe Attorneys Inc of Thohoyandou the details of which shall be as supplied by the instructing attorneys to the defendant no later than 14 days from date of this order.

26.3 In the event of the aforesaid amount not being paid beyond the 90 days referred to in order 25.2 above, interest at the prescribed rate of interest shall immediately begin to run until date of final payment.

26.4 The defendant is ordered to pay all the plaintiff's costs on a High Court scale which costs shall include the costs attendant to securing all expert reports *in casu* and their evidence and the costs of counsel.

26.5 Whether or not there is a contingency fee agreement entered into between the plaintiff and his legal representatives, no legal representative shall be entitled to draw any amount from the capital amount fully due to the plaintiff as stated in order number 25.1 above.

26.6 The defendant shall, within 14 days of this order, furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of all future and related medical costs arising from the motor vehicle accident of 5 September 2013.

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M S MONENE

ACTING JUDGE OF THE HIGH COURT, LIMPOPO LOCAL DIVISION, THOHOYANDOU

APPEARANCES

Heard on	*: 18 October 2023*
Judgment delivered on	*: ..... February 2024*
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