IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2013/43052

DATE:26 September 2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

26 SEPTEMBER 2023

DATE **PM MABUSE**

FORGIVE KHATHUTSHELO MOGANO Plaintiff

v

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

MABUSE J

[1] By the combined summons issued by the registrar of this court on 18 November 2013, the Plaintiff claims payment of money from the Defendant arising from an

incident that took place on 11 June 2013 in Johannesburg. The Defendant resists the Plaintiff's claim and for that purpose, delivered a plea.

[2] The Parties

[2.1] The Plaintiff is an adult unemployed male who resides at 1736B Nephawe Street, Chiawelo, Soweto, Johannesburg. He sues in this matter in his personal capacity.

[2.2] The Defendant is the Passengers Rail Agency of South Africa (PRASA), a statutory body established as such in terms of section 22(1) of the Legal Succession to The South African Transport Service Act, with its business premises located at Prasa House, 1040 Burnett Street, Hatfield, Pretoria.

BACKGROUND

[3] The Plaintiff's action arises from an incident that took place on 11 June 2013 at Johannesburg Railway Station. On the said date the Plaintiff lawfully boarded a train, heading to Johannesburg Railway Station, at Chiawelo Railway Station. At approximately 8h30 this train arrived safely at Johannesburg Railway Station. This train was however crowded. Because of the overcrowding, the passengers in the train jostled to get off the train before it pulled off from the platform. The Plaintiff prepared himself to get off the train. As he was about to disembark, the train moved and caused him to lose balance. He was dislodged from the train, and as a result, he fell out of the train, underneath it, between the platform and the train.

[4] According to the Plaintiff, the said incident took place because of the Defendant's negligence in one or more or all the following respects, the Defendant:

[4.1] failed to ensure the safety of members of the public in general and the plaintiff in particular on the coach of the train in which the Plaintiff was travelling;

[4.2] failed to take any or adequate steps to avoid the incident in which the Plaintiff was injured when by exercise of reasonable care, he would and should have done so;

[4.3] failed to employ employees, alternatively failed to employ adequate numbers of employees to guarantee the safety of passengers in general and the plaintiff in particular the coach in which he was travelling:

[4.4] allowed the train to be set in emotion without ensuring that the doors of the train and coach in which the Plaintiff was travelling were closed before the train was set in motion:

[4.5] allowed the train to pull off from the platform while the Plaintiff was still in the process of exiting the train:

[4.6] and or his employees in the course and scope of their duty allowed the train to be overcrowded with passengers;

[4.7] neglected to employ security staff on the platform and or the coach in which the Plaintiff travelled to ensure the safety of the public in general and the Plaintiff in particular;

[5] Because of the said incident, the Plaintiff sustained the following injuries:

[5.1] head injury;

[5.2] laceration to the head;

[5.3] loss of consciousness;

[5.4] amputation to both legs.

[6] As a consequence of said injuries, the Plaintiff suffered damages in the sum of R8, 617, 971.00.

[7] Following the said injuries, the Plaintiff:

[7.1] experienced pain and suffering and would in future experience pain and suffering;

[7.2] suffered loss of amenities of life and would in future suffer loss of amenities of life.

[7.3] will in future incur hospital and medical expenses;

[7.4] was disfigured and disabled

[7.5] suffered loss of income and in future will suffer loss of earnings and earning capacity.

[8] After litis contestatio, the parties applied for a trial date which was duly granted.

[9] When this matter came before it, the court was advised that the only issue in dispute was quantum. On the question of general damages, future medical expenses, loss of earnings/capacity, the court was informed furthermore that, according to the practice note dated 21 April 2022, the parties had settled the issue of the merits on a 50-50% basis through offer and acceptance. The agreement was that, so the court was told, the Plaintiff would be entitled to 50 percent of the proven or agreed damages.

[10] The court was further informed that there was a stated case and that such case has been uploaded on case lines. The court did not have the benefit of time to go

through the documents and to establish whether the document so uploaded indeed constituted a stated case or whether it complied with the requirements of rule 33(3) of the Uniform Rules of Court.

[11] He informed the court furthermore that in respect of the orthopaedic surgeon, the only issue in dispute related to the possible future surgeries and that in respect of occupational therapists the dispute related to domestic assistance.

[12] The only issue or area of disagreement related to the production or rather the domestic assistance that would be required by the Plaintiff. Counsel for the Plaintiff called his first witness.

[13] Dr Edward Schnaid (Schnaid)

[13.1] That this doctor was an expert, was not in dispute. He had consultation with the Plaintiff on 17 December 2020 after the Plaintiff had been referred to him by Mnqibisa-Thusi Attorneys. He obtained the history of the incident from the Plaintiff.

[13.2] At Charlotte Maxeke Hospital, the hospital to which the Plaintiff was taken after the accident, the Plaintiff had received the following medical treatment:

[13.2.1] X-rays

[13.2.2] analgesics and antibiotics

[13.2.3] suturing and dressing of the wounds

[13.2.4] neuro observations

[13.2.5] multiple debridement of left foot and relook by a plastic surgeon

[13.2.6] left below knee amputation

[13.2.7] traumatic amputation above right knee

[13.2.8] psychic consultation

[13.2.9] physiotherapy

[13.2.10] crutches.

[13.3] On examination of the Plaintiff, he found him to be a well-nourished male who was wheelchair bound.

[13.3.1] On examination of the head and neck of the Plaintiff, he noted that the cranial nerves were intact. The carotid pulses were palpable. He noticed a 13-centimetre occipital scar. The right and left lateral flexion was decreased to 0-30 degrees, flexion 0-435 degrees.

[13.3.2] the cardiovascular, respiratory systems, gastrointestinal tract and the genital urinary tract were all normal.

[13.3.3] the central nervous system, the Plaintiff was fully conscious. There was no neurological deficit.

[13.4] Current status

[13.4.1] He recorded that the Plaintiff had pain in both stumps, cervical and lumbar spine. The cervical pain radiated into the shoulders and the lumbar pain into the thighs. He was wheelchair bound. He also manifested with headaches, memory lapses, emotional instability, and aggression. He had a phobia for travelling, especially with trains. He was weak and crampy in both arms. The Plaintiff could only walk short distances and stand for short periods. He is unable to run and to lift or carry heavy objects.

[13.5] Assessment

[13.5.1] Doctor Schnaid was unhappy with the amputation. According to him, the amputation was deficient because the bone was not covered by muscles. If it is not covered by muscles an amputation is incomplete.

[13.5.2] According to his assessment, he recommended a revision of the amputation; furthermore, he recommended that a prosthesis should be fitted, followed by physiotherapy rehabilitation. The prosthesis may need to be revised every two to three years because of poor fitting. It may be necessary because of the skin cover may be lost.

[13.5.3] The Plaintiff sustained a cervical injury. He would benefit from physiotherapy and anti-inflammatory agents. Symptoms and dysfunction would probably be ongoing. He recommended that provision be made for a cervical fusion when indicated.

[13.5.4] The Plaintiff sustained a lumbar back pain. Having observed that the X-rays were normal, he recommended that the Plaintiff be put onto a lumbar rehabilitation programme by physiotherapist. He observed furthermore that symptoms and dysfunction would probably be ongoing. Provision should be made for lumbar fusion when indicated.

[13.6] <u>The recommendations</u>

[13.6.1] Doctor Schnaid recommended the following treatment at the then applicable MASA rates;

[13.6.1] (a) physiotherapy for up to one-year R30,000.00

(b) anti-inflammatory agents and

	analgesics for up to one-year	R25,000.00
(c)	bracing	R10,000.00
(d)	revision of amputation both stumps: Hospital stay 5 days rehabilitation 3 months	R80,000.00
(e)	fitted prosthesis both stumps to be replaced every three to five years.	R10,000.00
(d)	lumbar fusion; hospital stay seven days; rehabilitation six months	R180,000.00
(f)	cervical fusion hospitalist 87 days reputation six months	R160,000.00
(g)	assessment by a neurologist and neuropsychologist	R 60,000.00

[14] During cross examination by Mr Magodi, counsel for the Defendant, doctor Schnaid admitted that his report did not assist the court because he had failed to engage with the Defendant's expert. Moreover, there were medical differences in the experts' reports.

[15] Ms Cornelia Myburgh

[15.1] The Plaintiff's second witness was Ms Cornelia Myburgh, an occupational therapist by profession. She has also provided the Plaintiff's attorneys with a medico- legal report. As a starting point, I must express my observation on occupational therapists. I have never come across a situation where I had to

deal with the occupational therapists as someone employed by the state. All the occupational therapists were, even those who prepared reports for the Defendant, in private practice. It therefore goes without saying that the Plaintiff would consult with an occupational therapist who is in private practice.

[15.2] She testified that in their reports as occupational therapists they cover physical, mental, and psychological tests to arrive at their findings. She had read the report of Ms Gail Vlock, the Defendant's occupational therapist, and was familiar with it.

[15.3] She referred to the joints pre-trial minutes compiled by both Ms Robin Kidwell (Ms Kidwell) of Gail Vlock Occupational Therapists and herself and testified that, having received the report of Ms Kidwell, she perused it. She and Ms Kidwell exchanged notes. She had assessed the Plaintiff on 23 December 2020 while Ms Kidwell had done so on 30 April 2021.

[15.4] Ms Myburg had, during her assessment of the Plaintiff, the following documents:

[15.4.1] the medical report of Doctor Schnaid, the orthopaedic surgeon;

[15.4.2] the radiologist's report of Doctor Judelman.

[15.5] In addition, she had the reports by doctor Mazwi, the neurosurgeon, Doctor Miller also the neurosurgeon and Mr Hakopian, the Orthotist Prosthetist.

[15.6] On the other hand Ms Kidwell had access to the following reports:

[15.6.1] medico-legal report of doctor Scheepers, the orthopaedic surgeon;

[15.6.2] Doctor P Miller the neurosurgeon; and

[15.6.3] N Steenkamp, the orthotist prosthetist.

[15.7] Both of them had access to the joint minutes of the Ortho Prosthetics and Mr Hakopian and Mr Steenkamp.

[15.8] However, what is worrisome about their joint minutes is their statement that:

"We note that Mr Mogano was injured when he was reportedly pushed out of the moving train."

This is in stark contrast to the oral evidence of the Plaintiff who testified that he lost his balance when the train moved from the platform while he was in the process of getting off. The experts obtained this statement from the Plaintiff and not from any other report. And if that is true, then the Plaintiff's claim is based on incorrect information. Unfortunately, this issue was never taken up with both experts and the Plaintiff himself while he testified. The Plaintiff was never asked to confirm what he was alleged to have told these experts. I will therefore let sleeping dogs lie.

[16] Mr. Tisani, counsel the Plaintiff, advised the court that initially there was a dispute between the two Occupational Therapists regarding the powered wheelchair. That dispute, according to him and Mr Magodi, has since been resolved between the parties. The Defendant had already allowed an electric wheelchair. In her report Ms Myburg had reported that:

"7.2.3. Impact of the incident on his Employability.

Mr Mogano reported that he did not return to his pre-incident employment and has since remained unemployed. It is the writer's opinion that Mr Mogano's ability to secure and sustain employment is in the open labour market has been significantly compromised considering his level of education which limits him to unskilled employment categories which is physical in nature. The writer further notes that with

physical limitations, Mr Mogano's employability will be significantly restricted rendering him a vulnerable employee/job seek in the open labour market. In this regard, C, Myburg commented that: "he used to be self-employed in the informal sector as a car washer. He will never be able to wash cars again in my opinion, as this job requiring very good agility, is expected to place too much wear and tear on any prostheses he might receive in future. He is limited to only sedentary work in my opinion. However, he has very limited levels of education, which limits him to unskilled work. Unskilled work usually involved manual labour requiring intact physical abilities to work, move objects, etc. He will most probably never work again in my opinion.

Considering the above mentioned, the writer concludes that this incident under discussion has significantly compromised Mr Mogano's employment opportunities and has reduced his competitiveness in the open labour market. In this regard, Dr. Schnaid commented that: "in my opinion he will be unemployable in any physical capacity in future."

[17] In the Joint Minutes Ms Myburg had recommended that provision be made for domestic assistance on three and half days a week at the cost of R100 for a half day. This was made against the recommendation of Ms Kidwell who recommended no personal assistance for the Plaintiff in his current situation. According to her, an assistant will be, and should be, provided for by his unemployed girlfriend. Instead, Ms Kidwell recommends that the Plaintiff be provided with assistive devices listed in .8 of the Joint Minutes, as this will allow him participation in laundry activities.

[18] Among others, the Occupational Therapists agreed that:

"*Mr Mogano is unable to continue working as a car washer, due to the amputation of both his legs, even if he receives prostheses. We agree that he is limited to sedentary work as a result of the double amputation of his legs, even if receives the recommended prostheses that would allow him to walk for short distances.*

We agree that most sedentary jobs require high levels of education, preferably courage 12, and. are more cognitive challenging in nature. We agree that he has no skills, experience, or the education to perform any administrative type of sedentary work.

We agree that his options in the open labour market are significantly restricted because of the injuries sustained in the accident under discussion, and that he would most probably never return to any kind of remunerative work."

[19] There are, in my view, not many areas of dispute between the two Occupational Therapists.

[20] <u>MOGANO KHATHUTSHELO FORGIVE</u>

[20.1] The Plaintiff was the third witness in his case. He testified that he was born on 24 March 1990. When this incident took place, he was only 23 years old. He left school in Grade 8 to go and wash motor vehicles. He started his car wash business in the year 2012. He left school because his mother was unemployed, and he needed to assist with the support of his family. Her mother had some difficulty in finding work. He could not remember the year in which she left school. He started a business of car wash. Sometimes his mother would help him in his business. He started his own business of a car

wash because he had seen good prospects in it. He was able to earn much better in his own business.

[20.2] He did not wash motor vehicles at one place only. He had a mobile car cleaning service which enabled him to go from place to place. His services were restricted to taxis only. He cleaned these taxis while their drivers were having meals or during their breaks. He used to charge R40.00 per motor vehicle and sometimes R50.00. He would work from Monday to Saturday. He would work on Sundays only at the end of a month. He would wash five to seven motor vehicles and make R270 to R300 a day.

[20.3] At one stage while his mother was temporarily employed, they lived in Protea Glen. With the money he made through the car wash business, he bought food for the family. He had no bank account. Before the accident in question, he was planning to grow it. He was also planning to go back to school. After the accident he did not return to the car wash business because it was no longer possible for him to do the work.

[20.4] During cross-examination, he testified that he ran his car wash business at two places and that there was no specific place where he worked or did this business. He moved about.

[20.5] The motor vehicle drivers or owners knew him by sight. They would sometimes call him to come and wash their motor vehicles. When he was asked why he did not go back to the people who whose motor vehicles he used to wash he said it was no longer possible because he is wheelchair bound. He was adamant that he had no witnesses to call.

[21] DORAH MOGANO

[21.1] This witness was the fourth witness who testified in support of the Plaintiff's case. Of crucial importance about this witness is that she was the Plaintiff's mother. The Plaintiff was her first-born child.

[21.2] In June 2013, she testified, the Plaintiff stayed with the whole family at Protea Glen, Soweto. In the year 2012, the Plaintiff was attending school but in 2013 the Plaintiff was no longer at school as he was running his car wash business while she was doing odd jobs. During this year, she was the only person who was responsible for buying grocery for their family, although from time to time the Plaintiff also contributed.

[21.3] The Plaintiff would sometimes report his daily earnings to her. He would say that he had earned R200.00 on one day and R300.00 on another day. In doing his work of car wash business, the Plaintiff would go as far as Germiston.

[21.4] She tried to find out from the Plaintiff why he sometimes went as far as Germiston in doing his work. The Plaintiff told him that there was someone he was seeing in Germiston.

[21.5] She did not know the Plaintiff's customers. She was given some of the money the Plaintiff made in his business. The Plaintiff never returned to work after the incident of 11 June 2013 because he could no longer carry his buckets of water in that condition.

[21.6] During cross-examination, she testified that the Plaintiff was not at school in 2012 but was already at his business. She said that in 2012 she was doing odd jobs which she started in 2012.

[21.7] She testified furthermore under cross-examination that she had no proof that the Plaintiff was engaged in any car wash business but what she

remembered was that she used to help buy him polish for the car wash business. She never went out to Johannesburg or Germiston to see him work. She relied entirely on the information given to her by the Plaintiff. Then she said that the Plaintiff was conducting the same business also in Protea Glen.

[22] TALENT MATURURE

[22.1] The fifth witness that counsel for the Plaintiff called was the Industrial Psychologist, a certain Mr Talent Maturure. He had been requested by Mcqibisa Attorneys to interview the Plaintiff and thereafter to prepare a report about him and his findings. This report was required for the purposes of the determination of the impact of the accident on the Plaintiff's pre-accident and post-accident options in the open labour market. The purpose of the assessment was to determine the Plaintiff's pre- and post-incident employability.

[22.2] Towards the preparation of this report he had access to the following supporting documents:

[22.2.1] Hospital records of the Plaintiff from Charlotte Maxeke hospital;

[22.2.2] Orthopaedic report by Dr E Schnaid;

[22.2.3] Occupational Therapist report by Ms C Myburg.

The Plaintiff reported his pre-accident situation to him as being a self-employed car washer earnings of R240.00 to R300.00 per day, working for six to seven days a week from 2012 – 11/6/2013.

The Plaintiff reported to him that after the accident he did not return to his work.

[22.2.4] He observed that the Plaintiff could not provide him with his pre-incident client's details for employment and earnings. Instead, the Plaintiff submitted to him an affidavit confirming his earnings and employment. The said affidavit was dated 8 January 2021. It was not before court.

[22.2.5] Before the accident, the Plaintiff was employable in the unskilled categories of employment. He was earning above the medium quartiles of the semi-skilled workers.

[22.2.6] He reported that but for the accident, he is of opinion that, considering various factors, such as his age, he was 23 years of age at the time of the incident, level of education and working experience, the Plaintiff was likely to have remained employed in similar categories of employment, earning within similar ranges, receiving inflammatory increases and with the potential of growing his business and subsequently increasing his earnings.

[22.2.7] <u>Pre accidental retirement</u>

[22.2.7.1] The witness was of opinion that the Plaintiff would have worked until he retired at 65 years, depending on a variety of factors, such as health status, personal circumstances, and conditions of employment.

[22.2.7.2] <u>Post Accident</u>

The Plaintiff reported to him that after the accident, he was detained at a hospital for approximately one month

for medical treatment. After his discharge from hospital, he spent a period of three weeks at home recovering. During that period he could not work and as a result received no income. Of paramount importance, he did not return to his pre-accident employment. He has remained unemployed since the accident. There are therefore implications for loss of earnings.

[22.3] Post Accident Impact on The Employability

The witness held the view that, based on the information available to him, the scope of the Plaintiff's employment has been significantly compromised by the sequelae of the incident. He refers to an observation by Dr. Schnaid where he stated that;

"This patient is severely disabled with bilateral lower limbs amputations which need prostheses and physiotherapy for life""

Based on the said observation, he expressed a view that the Plaintiff's employment opportunities have been compromised and that he may be disadvantaged in terms of his scope of efficacy and productivity when compared with his counterparts. Deferring to Ms C Myburg's report where she stated that

"He suffered significant loss of amenities as he lost the use of both his feet, is wheelchair bound, and has lost the ability to work on an unskilled level, the only level he is able to work on considering his limited education";

[22.4] Impact of the Incident on his Employability

[22.4.1] This witness' opinion was that the Plaintiff's ability to secure and sustain employment in the open labour market has been

significantly compromised, considering his level of education which limits him to unskilled employment categories, which is physical in nature. With his physical handicap, the Plaintiff's employability will be significantly restricted rendering him unfavourable job seeker in the open labour market.

[22.4.2] His conclusion was that this incident has significantly compromised the Plaintiff's employment opportunities and has reduced his employment opportunities.

[22.4.3] He recommended that a higher post-morbid contingency be applied to compensate the Plaintiff as the incident has significantly compromised his employability in the open labour market.

[22.4.4] Referring to Robert Kock's Quantum Yearbook as of July 2020, he stated that as the Plaintiff was in the unskilled category, he was entitled to be compensated at R86,000.00 per year.

[22.4.5] During cross-examination, he admitted that the Social Security Department does provide invalid people with some stipend. He admitted further that the Plaintiff has the potential to learn new skills, although initially he had written him off. He admitted that he never asked the Plaintiff to produce any proof of earnings or income and that he relied entirely on the Plaintiff's affidavit that he only received after he had consulted with the Plaintiff. So, he read the affidavit, and dealt with it, in the absence of the Plaintiff. Mr Tisane then closed the Plaintiff's case, whereupon Mr Magodi called the Defendant's only witness.

[23] Anje Coetzee

[23.1] Ms Coetzee, the Defendant's Industrial Psychologist, testified that she had an opportunity to consult with the Plaintiff and, having consulted with the Plaintiff, prepared a medico-legal report for the Defendant's attorneys, at their request, having perused copies of the following documents:

[23.1.1] medico-legal report of Doctor P Miller, the neurosurgeon, dated 22 April 2021.

[23.1.2] Professor Scheepers' report.

[23.1.3] Mr N Steenkamp's report.

[23.1.4] Ms G Flock's report.

[23.1.5] Claims Investigation Report dated 30 May 2014 from PRASA and.

[23.1.6] The Clinical hospital records.

[23.2] The history of the incident that the Plaintiff gave to Ms Coetzee was that on the day in question he was a passenger in a train when he was pushed out of the moving train. He reported that he lost consciousness for approximately 5 days. He was transported by an ambulance from the scene to Charlotte Maxeke Hospital.

[23.3] During this incident, she continued with the history of the incident as related to her by the Plaintiff, he sustained the following injuries;

[23.3.1] severe head and skull injury.

[23.3.2] right leg above knee amputation.

[23.3.3] left knee below amputation.

[23.4] At the time of the consultation with him, the Plaintiff was staying with his parents and siblings in his parents' brick house in Protea Glen.

[23.5] During the consultation with him, he asked the Plaintiff to provide her with proof of income, but the Plaintiff could not. She and Mr Muturure compiled Joint Minutes. They debated the issues in their Joint Minutes dated 23 March 2022.

According to Ms Coetzee, the scale that Mr Muturure used was a semi-skilled scale. It was wrong to use such a scale in the situation of the Plaintiff. Mr Muturure should instead have used the unskilled scale. She had a problem with the use of this scale.

[23.6] According to her, in the informal sector the Plaintiff might have remained in that section permanently. He was young and his salary might have fluctuated. The Plaintiff's motivation was to secure a more stable employment. Her main gripe was that Mr Muturure used an incorrect scale.

[23.7] In cross- examination, she said that it is not unusual to have no proof income from a person. She had had clients who did not have any proof of income. Sometimes such people are unable to provide even bank statements. The Plaintiff would not provide any proof. According to her, the amount projected by Mr Muturure was unlikely high for somebody who did that form of work for a few months before the accident. There is a duty on Industrial Psychologists to benchmark their findings. Her calculations or postulations were based on facts and figures and not on theory. According to her, if something was not documented, it did not exist. The Plaintiff's mother was not neutral and was therefore not objective. Mr Muturure used a wrong scale. The Plaintiff was an unskilled labourer. Ms Coetzee testified that she was not informed that the car wash business started in 2012.

[23.8] Both of them agreed that Mr Mogano is unable to continue working as a car washer due to the amputations of both his legs, even if he received prosthetics.

ASSESSMENT

[24] The nature and extent of the injuries suffered by the Plaintiff were not in dispute. According to the parties, the outstanding issues that this court was called upon to decide were, initially, the quantum in respect of the following aspects:

(1) General Damages.

(2) Past and future medical expenses; and,

(3) Loss of Income/or earning capacity.

[25] The issue of general damages was resolved between the parties when the Defendant made an acceptable offer of R1.2 million on the first day of the trial and the Plaintiff accepted it. So, general damages were agreed upon between the parties at R1.2 million. The issues of past and future medical expenses, loss of income and or loss of earning capacity remained outstanding. These accord with the parties' Pre-trial Minutes of 18 January 2022 where Adv S Tisani and Attorney Tsoarelo Manaka represented the Plaintiff while Adv James Magodi and Attorney Vincent Vos represented the Defendant.

[26] In the amended particulars of claim, the Plaintiff has pleaded his claim for past and future medical expenses as follows:

"The aforesaid amount (R4, 539, 253.00) is based on the costs of past medical and future treatment in the form of Neurosurgeon, Orthotics and prosthetics,

Orthopaedic surgeon, plastic surgeon, Radiologists and Physicians, controlled X-rays, medication, transport costs, assistive devices and costs to attend medical treatment." Having made that allegation, no breakdown of the amounts in respect of each of the items mentioned therein was given. Just a global amount has been given. No amount has been indicated in respect of past medical expenses. These would be special damages. Hospital or medical accounts would be required as proof of past medical expenses.

[27] In the heads of argument counsel for the Plaintiff concluded by claiming

"R3, 502, 761.52 calculated this follows:

how 3 come on 627, 248.75 for future medical expenses

R2, 178, 274.30 in respect of past and future loss of earnings/ earning capacity

R1.2 million in respect of general damages"

[28] Referring to the recommendations made by doctor Schnaid, there is no clarity regarding when this revision of the amputation should be done. What is clear though about the recommendation is that it should be done over a period of five days at a hospital. I must assume though that all the revisions at the hospital and rehabilitations will be done at a government or provincial hospital for that is the place where the Plaintiff was taken to for medical treatment after the accident. This is the place where, among others, the amputations were dressed. In such case, I doubt if the costs of revision of the Plaintiff's amputations and rehabilitation would be R80, 0 00.00. This is unheard of. in my view, this court is at large to make its own costs assessment, based on the place where he initially was treated for his injuries after the accident and the amounts he paid for such treatment.

[29] The evidence before this court is that after the accident in question the plaintiff was conveyed by ambulance to Charlotte Maxeke hospital, a government hospital. There his injuries were treated thereafter he was kept at the hospital for some time for purposes of recovery. There is no evidence before court that after his discharge from the said hospital he went back to the hospital for checkup but as it is normal even in the absence of such evidence, the court may accept that he went back to the same hospital on unknown dates for check-up. According to the Plaintiff, he went a clinic for follow-up.

[30] It is therefore accepted by this court that the Plaintiff would have to go back to the same hospital or another government institution for revision of the amputations of both stumps; hospital stay for 5 days and three months rehabilitation. No costs estimate for such procedures were furnished to this court. There was no such suggestion in both the medico-legal reports and the expert witnesses' evidence that the procedure should be done only at private hospitals. There is also no evidence that the recommendations could not be done at a government hospital. Furthermore, there was no evidence placed before court that the costs of such recommendation would be R80,000.

[31] The evidence on record is that for all the procedures that the Plaintiff underwent at Charlotte Maxeke Hospital, he paid a mere R13.00.

[32] Dr Schnaid has also recommended a sum of R30,000 for physiotherapy. In my view, the same hospital to which the Plaintiff will go for revision of the amputation of

both stumps will be able to provide the Plaintiff with physiotherapy and bracing facilities. All these procedures should be provided at normal hospital rates of R13.00. This therefore does away with the Plaintiff's projected medical expenses. Doctor Schnaid did not express any opinion as to what the costs of all such procedures at the public hospital would be.

[33] The situation in this case is made unique by the circumstances I have set out above. This situation may not apply in all the cases. In his heads of argument Mr. Tisane stated that in essence the dispute between the parties relates to future medical expenses, whether provision should be made for certain surgical procedures, assistive devices, or assistance, namely the following orthopaedic surgeon's procedures. The court is not bound by any agreement between the parties. It will consider objectively the facts placed before it and will thereafter apply its mind to such facts.

[34] Where the plaintiff claims future medical and hospital expenses, the court will be guided by the basic principle that a plaintiff must mitigate his damages. He cannot indulge in expensive private treatment at the expense of the defendant. There exists a duty on the plaintiff to mitigate his damages. The remarks by Baker J. in *Williams v Oosthuizen* 1981 (4) SA 182 C at 184-185 are apposite:

> *"In this country, a Plaintiff is obliged to mitigate his damages: and I am of opinion that when he is able to choose between medical treatment at two institutions equally good, he is obliged to choose the least expensive in the case where the defendant has to pay for the treatment."*

Again, with regards to future hospitalisation the following remarks of van Den Heever J in *Dyssel NO v Shield Insurance Co. Ltd* 1982 (3) SA 1084 (C) at 1086H-1087A apply in equal measures:

> *"The father cannot at the insurer's expense choose a more expensive way of life for his child that he did not consider earlier."*

[35] While the court is disinclined to make any award in favour of the Plaintiff in respect of future medical expenses, some allowance should be made for the costs of obtaining experts' reports. Accordingly, for reasons already mentioned above, the Plaintiff's claim for future medical expenses stands to be dismissed in total, save to the extent of the costs of engaging experts.

[36] The Plaintiff has tendered no proof for any past medical expenses. No hospital or medical accounts have been submitted to the court in respect of the medical treatment for the Plaintiff. This part of the claim cannot succeed due to Plaintiff's failure to prove it.

LOSS OF EARNING/EARNING CAPACITY

[37] The Plaintiffs claim for loss of income/earning capacity demonstrates the confusion that reigned supreme in the minds of those who framed this claim. Loss of earnings is not the same as loss of earning capacity. These two claims should not be confused. Proof of one is not proof of the other.

[38] Where, because of his injuries a Plaintiff has been prevented from carrying on the activities whereby, he normally earns a living, he is entitled to claim damages representing income or wages he would have earned during the period of his

incapacity. There is a duty imposed on the Plaintiff to establish, by way of evidence at the trial, that his injuries prevented him from earning his living in the normal way and to prove what earning would have earned had he not been so prevented.

[39] The claim for loss of earnings lies irrespective of whether the Plaintiff is in someone else's employment and earns a definite wage or whether he is self-employed and derives from his profession, occupation, or business income. In the case of self-employment, as in the instant case, it may be difficult for him and for the court to determine with any precision word his loss has been. See Sandler v Wholesale Coal Supplies Ltd 1941 AD 194.

Damages for loss of earnings usually relate to the Plaintiff's loss up to the date of trial and therefore, constitute special damages.

[40] It is crucial that the Plaintiff should discharge his duty to prove that he was self-employed. This is the starting point. I will deal with this duty later.

[41] Now, the injuries suffered by the Plaintiff may have impaired his future ability to earn a living, either temporarily or permanently. In such a case at the trial Plaintiff is entitled to claim damages for future loss of earnings, or more accurately stated, for his reduced earning capacity over the period of his impairment. See *Santam BpK v Byleveldt* 1973 (2) SA 146(A) at 150A-C where Rumpff J, as he then was, had the following to say:

> *"In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie van benadeelde voor die onregmatige daad en daarna. Kyk, bv., Union Government v Warneke, 1911 A.D. 657 op bl. 665, en die bekende omskrywing*

deur Mommsen, Beitrage zum Obligationenrecht. Band 2, bl.3. Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoensvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie."

See also *Southern Ins Association v Bailey NO* 1984 (1) SA 98 (A) 111D. Therefore, if the Plaintiff has been permanently incapacitated or his incapacity occupies a period extending beyond the date of the trial and such incapacity affects his power to earn, he will be entitled to claim damages for loss of future earnings or loss of earning capacity. This is an item for general damages.

[42] The Plaintiff has pleaded his case of Loss of Income/ and or earning capacity as follows in his amended particulars of claim:

"At the time of the accident the plaintiff was self-employed as a car washer earning about R270.00 per day and worked for about 6 to 7 days per week. This in essence means that the Plaintiff earned about R91, 260.00 per annum. The Plaintiff would have remained employed until the age of 65 had the incident not occurred. Now that incident occurred, the Plaintiff is currently unemployed/unemployable and is unable to compete in an open labour market. The Total loss of the Plaintiff is R2, 878, 718.00."

Up to so far, it is not known how the Plaintiff arrived at the figure of R2, 878, 718.00 as claimed in the amended particulars of claim.

[43] Now, to succeed with his claim of Loss of Earnings or Loss earning Capacity, the Plaintiff must prove that:

[43.1] he was self-employed as a car washer;

[43.2] that he earned between R270.00 and R300.00 per day through his car wash business.

[43.3] that the injuries that prevented him from earning any income; are of a permanent nature; and,

[43.4] that he is unemployable.

The last two requirements have been satisfied by the reports and evidence of the experts. It is the first two requirements that the court must now determine. There is a duty on the Plaintiff to satisfy the above-mentioned first two requirements. The Plaintiff must prove the facts alleged in paragraph [41.1] and [41.2] above. It is the function of the law of evidence to regulate the proof of facts. In the judgment of *Pillay v Krishna and Another* 1946 AD at p 951, the court had the following to say:

> *"It consequently becomes necessary at the outset to deal with the basic rules which govern the incidence of the burden of proof- the onus probandi- for upon them the decision of this case must ultimately rest. And it should be noted immediately that this is a matter of substantive law and not a question of evidence.; Tregea and Another v Godart and Another (1939, A.D. 16, at p.32)'*
>
> *The first principle in regard to the burden of proof is thus stated in the Corpus Juris: "Semper necessitas probandi incubit illi qui agit" (D.22.3.21). If one person claims something from another in a Court of law, then he has to satisfy the court that he is entitled to it.*
>
> *But there is a third rule, which Voet states in the next section as follows: He who asserts proves and not he who denies, since a denial of fact cannot naturally be proved provided that it is a fact that is denied, and the denial is absolute." This rule*

is likewise to be found in a number of places in the Corpus Juris: I again give only one version: "Ei incumbit probatio qui dicit non qui negat" (D.22.3.2). The onus is on the person who alleges something and not his opponent who merely denies it."

The incidence of onus of proof determines who must satisfy the court. The quantum of proof that is required by the court to be satisfied must necessarily be provided by the party that bears the onus."

[44] It will be recalled that the Plaintiff testified that he left school in Grade 8 to go and establish his car wash business in 2012. The incident in question took place on 11 June 2013 the following year after he had allegedly established his car wash business. So, he ran this business until the accident in question took place. The Plaintiff produced no evidence of the existence of such business. He could have called some of the taxi drivers or owners as witnesses to verify his evidence and give him support. He failed to inform the court of any attempts he made to find such drivers or owners of the taxis he used to wash or those who used to call him to come and wash their taxis. When he was asked why he did not call some of the drivers or owners of the motor vehicles he washed as witnesses he said he could not do it because he was wheelchair bound. But nothing prevented him from his asking his attorneys to do it. Nothing prevented him from furnishing his attorneys with the contact details of some of the people who used to call him to come and wash their motor vehicles. This court finds it difficult to accept that he was unable to strike any close relationship with some of the taxi drivers whose motor vehicles he used to wash. According to the heads of argument of Mr Tisane, the Plaintiff was familiar with the taxi owners and taxi drivers on a first name basis. So, he knew them, and they knew him.

[45] His mother, testified that the Plaintiff used to run a car wash business and furthermore that sometimes she used to buy car polish for him. That was how far she could support the Plaintiff's case. She never accompanied him to all those places he went to for the purpose of conducting his business. She never saw the Plaintiff in action washing motor vehicles. In fact, she relied entirely on the reports given to her by the Plaintiff. She had no way of verifying such reports. Her testimony did not add any value to the Plaintiff's case.

[46] In my view, there are no adequate grounds upon which, on the actual issue, this court can find that the Plaintiff was indeed running a car wash business. The Plaintiff's testimony does not satisfy the objective standards required to satisfy this court of the existence of his business. Finally, there is no proof before this court of the earnings that he made while he was conducting his business. Accordingly, the Plaintiff has failed to prove that he was conducting any car wash business. This court accepts the argument by counsel for the Plaintiff that the Plaintiff essentially lived a hand to mouse existence in which all the money earned was utilized either to buy food for the household or to cover the costs of the carwash. This courts accepts furthermore, the argument by Mr Tisane that the Plaintiff consequently dealt solely in cash and had no need of the bank account facility. But having argued that, this court still does not have any proof of his earning. Perhaps the way in which he conducted his business, as described by his counsel, was his feet of clay in this case, for he finds himself unable to satisfy this court about his earnings.

[47] In his heads of argument, counsel for the Defendant argued that the sum of Ms Coetzee's evidence was that there was no proof of any earnings supplied by the

Plaintiff to support his claim for loss of earnings. The Plaintiff himself admitted that he had no recordings of his earnings and furthermore that he had no bank account. According to him, the absence of any evidence in respect of this head of damages upon which this court could apply its mind reasonably has left the Defendant with no option but to seek an absolution from the instance.

[48] According to the Plaintiff's counsel, no sensible or credible alternative explanation was put forward by the Defendant to gainsay how the Plaintiff, Ms Mogano and the Mogano family were subsisting in 2012 and 2013. The highwater mark of the Defendant's dispute was that in the absence of external documentary proof, and corroboration from one of the customers of the Plaintiff the evidence tendered was unreliable. According to him, this was an entirely incorrect basis from which to approach the assessment of evidence. In assessing the evidence tendered in support of allegations contained in the pleadings, the court is enjoined to be mindful of the following principles, namely, all the evidence must be weighed as a whole, taking account of:

[48.1] all the probabilities;

[48.2] reliability and opportunity for observation of all the witnesses;

[48.3] the presence or absence of interest or bias;

[48.4] the intrinsic merits or demerits of the testimony;

[48.5] the inconsistencies, contradictions, or corroboration thereof

In this regard Mr Tisane relied on the judgment of S v Giva 1974 (3) SA 844 (T)

[49] Mr Tisane then dealt with corroboration in his heads of argument. He stated that corroboration can be a vital aspect of the assessment of evidence and relates to evidence that confirms or supports a fact of which other evidence is given. As he

correctly stated in his heads, it stands to reason that evidence that is corroborated carries greater weight, and significantly enhances the case of the party presenting it. It renders the factum probandum more probable by strengthening the proof of one or more *facta probanda*. In this regard, counsel for the Plaintiff relied on the judgment of R v P 1957 (3) SA 444 at 454. Essentially, this is what lacked in the evidence of the Plaintiff, material corroboration. The fact that there was food on the table of Mogano family and money to travel with cannot be regarded as corroboratory proof of the Plaintiff's earnings. Corroboration is confirmatory evidential material independent of the evidence to be corroborated. I find support in this regard in the judgment of *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) in which Harms JA, as he then was, had the following to say:

> "*a plaintiff has to make out a prima facie case- in the sense that there is evidence relating to all the elements of the claim- to survive absolution because without such evidence no Court could find for the plaintiff…."*

[50] Finally, the evidence of Mr Muturure and of the Actuarial calculations is not helpful on the issue of loss of earnings and loss of earning capacity. Before the Actuarial calculations can be accepted, there must be proof that the Plaintiff was running a business. The calculations were obviously done on the information supplied by the Plaintiff that he was running a car wash business and furthermore, that he was making so much money per day. Therefore, the calculations depended entirely on whether the Plaintiff was running a business. In the absence of such proof, the calculations do not advance the Plaintiff's case. The same principle applies to Mr Muturure's determination.

[51] In conclusion, I make the following order:

[1] The Defendant is hereby ordered to:

[1.1] pay the Plaintiff 50% of the sum of R1,2 million in respect of General Damages pursuant to the Agreed apportionment of damages of 50/50.

[1.2] pay the costs of all the experts the Plaintiff has appointed, including the fees of such experts' Joint Minutes, and witness' fees, where applicable.

[1.3] pay the Plaintiff's costs of this suit.

[2] The Plaintiff's claim for past and future medical expenses is hereby dismissed.

[3] Absolution from the instance is hereby granted in respect of the Plaintiff's claim for Loss of Earnings/Earning Capacity.

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MABUSE J

JUDGE OF THE HIGH COURT

APPEARANCES

FOR PLAINTIFF	:	ADV S M TISANI INSTRUCTED MNGQIBISA ATTORNEYS
FOR DEFENDANT	:	ADV J MAGODI INSTRUCTED BY KEKANA, HLATSHWAYO, RADEBE INC.
DATE OF HEARING	:	1-3 FEBRUARY 2023
DATE OF JUDGMENT	:	26 SEPTEMBER 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to Caselines. The date and time for hand-down is deemed to be 10h00 on 26 September 2023.