

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 16810/2019

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

.....**24 April 2023**.....
SIGNATURE **DATE:**

In the matter between:

LOPES MANUEL ALBERTO GASPAR

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

NEUTRAL CITATION: *Lopes Manuel Alberto Gaspar vs Road Accident Fund* (Case No: 16810/2019) [2023] ZAGP JHC 370(24 April 2023)

This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 24 April 2023 at 10h00.

JUDGMENT

JORDAAN AJ

INTRODUCTION

[1] On the 30th of January 2018 the plaintiff -a 53year old self-employed businessman- was driving his vehicle with registration number and letters TBH 414 GP on the R59 Highway towards Johannesburg, when a truck with registration number and letters DFX 640 FS (the insured truck) collided into the rear of the Plaintiff's vehicle, crushing the Plaintiff's vehicle between the insured truck and a truck in front of the Plaintiff's vehicle. The Plaintiff was trapped inside his vehicle necessitating extrication by emergency services.

[2] The plaintiff consequently instituted action in terms of the provisions of the Road Accident Fund Act 56 of 1996, as amended, to recover damages initially computed at R 5 831 699,34 comprising of:

2.1 Past hospital expenses incurred R96 277,84

2.2 Past medical expenses incurred R28 621,50

2.3 Estimated future hospital, medical and related expenses R656 800,00

2.4 Past loss of earnings R250 000,00

2.5 Estimated Future loss of earnings/loss of earning capacity/loss of employability

R4 000 000,00

2.6 General Damages for pain and suffering, loss of amenities of life and disablement

R800 000,00

ISSUES FOR DETERMINATION

[3] This matter came before me as a default trial pursuant an order by Vorster AJ dated the 31st of January 2022, in terms of which RAF's defence was struck out. The plaintiff sought judgment against the Road Accident Fund(RAF) on the merits and general damages.

[4] At commencement of the hearing, Ms Nziya-Nziya from the State Attorneys' Office on behalf of the Defendant, though barred from defending the matter, confirmed the Plaintiff's

submission that RAF settled the merits 100% in favour of the Plaintiff. A written merits settlement was subsequently uploaded on CaseLines. She further confirmed the Plaintiff's submission that RAF undertook 100% of the future medical expenses of the plaintiff. The plaintiff no longer pursued their claim for past hospital and medical expenses as his medical aid settled same in full.

[5] The only heads of damages for determination by this court is the issue of the plaintiff's general damages and past and future loss of earnings/earning capacity.

[6] In establishing that as a consequence of the accident the plaintiff sustained injuries and the sequelae of same, the Plaintiff submitted Exhibits "A" to "G"- the experts' reports.

EVIDENCE OF THE EXPERT WITNESSES

[7] The following is the evidence of the expert witnesses as submitted by plaintiff's counsel:

[8] Mr Ormond-Brown (Clinical and Neuropsychologist) records that there is no objective evidence indicating that the plaintiff sustained a brain injury in the accident, with no recorded loss of consciousness in the hospital records and a Glasgow Coma Scale score ("GCS") of 15/15 when the plaintiff was first examined in the emergency unit at the Garden City Clinic- indicating that he was fully conscious and oriented. The paramedics' records indicate that the plaintiff's GCS was 15/15 in Vereeniging (before his transfer to the Garden City Clinic). The plaintiff suffered blunt chest trauma causing a sternum fracture and a right sided pulmonary contusion. He was admitted to the intensive care unit.

[9] The only evidence to suggest that there might have been a brain injury was in respect of the plaintiff's re-admission to the clinic on 13 February 2018 complaining that he could not sleep, was anxious all the time and could not remember things. He was discharged on the 16th of February 2018, the discharge summary recording a diagnosis of a head injury. After the impact or collision, he tried to open his door but it was wedged close. Paramedics had to cut the plaintiff's motor vehicle's door in order to extricate him while he was conscious and observed this.

[10] The plaintiff described his symptoms following the accident as an inability to concentrate adequately (noting that his customers complain because he tends to forget), inability to multi-task and that he makes too many errors. He reported a history of heavy cannabis consumption indicating that he started smoking "weed" when he was about 14 or 15 years of age. As an adult he would smoke 7 – 8 times a day.

[11] Mr Ormond-Brown notes that such a high intake for such a prolonged period of time (roughly 40 years) will have an adverse effect on brain injury. The plaintiff was treated for post-traumatic stress disorder and for depression. According to Mr Ormond-Brown, the fact that the plaintiff experienced a few minutes of post-traumatic amnesia (PTA) in the immediate aftermath of the accident is consistent with the plaintiff having sustained a mild concussive brain injury. Mr Ormond-Brown is however of the opinion that the brain injury sustained in the accident was an innocuous brain injury, and that it is impossible for such a minor injury to cause the serious memory problems seen on psychometric testing, and therefore, there must be some other cause for the cognitive deficit. The plaintiff developed post-traumatic stress disorder (PTSD) after the accident which later transformed into depression with anxiety.

[12] Chronic substantial cannabis use causes volume loss (atrophy) of the hippocampi and to a lesser degree of the amygdalae. The younger the age onset, the greater the damage. White matter (axonal) connectivity is impaired in the fimbria of the hippocampus, the splenium of the callosum and in the commissural fibres in the brain. There is a direct association between radial and actual axonal diffusivity and age at which cannabis use commences. Chronic cannabis abuse is associated with impaired executive brain functions, including decreased mental flexibility, increased perseveration, reduced learning and difficulties shifting and sustaining attention. This, in Mr Ormond-Brown's opinion, is precisely the neuropsychological profile identified in the plaintiff.

[13] According to Mr Ormond-Brown the plaintiff was already compromised at the time of the accident (thin skull victim) but because he was functioning in his routine in a familiar environment he was able to get by adequately from one day to the next and was able to successfully run his business. After the accident the plaintiff developed an acute PTSD in the immediate aftermath.

[14] The report stated that the onset of PTSD is associated with massive neurochemical changes in the brain. When such exposed brain has been compromised by years of cannabis abuse, the capacity to recover from the neurochemical barrage of PTSD is significantly reduced.

[15] Therefore, a pre-existing vulnerability was significantly magnified by the effects of PTSD, and while the emotional shock has worn off, the damage to the plaintiff's brain is permanent.

[16] Dr Versfeld (Orthopaedic surgeon) confirms the plaintiff's fractured sternum, an injury to his left ankle, a right shoulder injury and a head injury with a period of loss of consciousness in the accident.

[17] Dr Versfeld concluded that the plaintiff sustained a fractured sternum and a fractured rib in the accident. The clinical record noted that the plaintiff's sternal fracture and pulmonary contusion. This injury remains symptomatic, and include a hot feeling on the plaintiff's sternum when he performs heavy work, an abnormal feeling with certain movements of his

shoulder, shortness of breath when he lies on his left side and an inability to sleep. Also shortness of breath when walking and shortness of breath when climbing ten to fifteen stairs. Clinically there was tenderness over the plaintiff's proximal sternum just distal to the manubriosternal joint. In Dr Versfeld's opinion these features suggest that the plaintiff sustained a significant chest injury.

[18] The plaintiff also sustained a left ankle injury with symptoms remaining to the present time, submitting that the plaintiff sustained a significant left ankle injury in the accident with a poor long-term prognosis.

[19] The plaintiff also sustained a right shoulder injury in the accident with continued symptoms. These symptoms include shoulder pain when he lies on the right, when he works above shoulder height, when he puts his hand behind his back, when he lifts his arm above shoulder height, when leaning on his right elbow and when he lifts heavy objects. Clinically, the plaintiff has a reduced range of movement of his right shoulder with pain on movement. There was also evidence of impingement of the right shoulder and evidence of a painful arc of the right shoulder between 60 and 90 degrees. These features suggest that he sustained a significant right shoulder injury as a result of the accident with a poor long-term prognosis. In the longer term (approximately five years), the probability is that his right shoulder symptoms will deteriorate and require surgical intervention. This intervention is likely to be in the form of a rotator cuff debridement/repair, associated with an acromioplasty. This procedure is likely to entail a period of hospitalisation of approximately four days and a period of disability of approximately eight weeks. Following this procedure, the plaintiff is likely to require conservative treatment on an ongoing basis.

[20] In Dr Versfeld's opinion, the plaintiff has effectively become unfit for his normal work on the open labour market as his symptoms and disabilities significantly adversely affect his physical activities and social amenities. This situation is likely to continue to deteriorate in future. He sustained significant pain and suffering as a result of the accident, and suffered serious long-term impairment of body function as a result of the accident. This renders him unfit for the physical components of his work.

[21] Dr Versfeld assessed the injuries that the plaintiff sustained to have resulted in 28% of the whole person impairment, but concluded that the plaintiff's injuries qualify as serious in terms of the Narrative Test.

[22] Dr Longano (psychiatrist) interviewed and assessed the plaintiff on two occasions and consequently delivered two reports. The plaintiff reported to Dr Longano that he has no memory of the accident until the emergency medical service responders were cutting the door of his vehicle in order to extract him from the car. At this point he recovered his senses and was hospitalised for several days. He was re-admitted to the clinic on the 13th of February 2018 due to problems with his left ankle and a degree of mental disturbance.

[23] The plaintiff was referred to a psychiatrist, Dr Kajee for severe PTSD. He struggles to do elementary things such as measuring and calculating. He also became unable to do quotations properly, either over-quoting or under-quoting. His condition deteriorated to the extent that his brother-in-law, Dr S G Wouters (an orthopaedic surgeon) referred him to another psychiatrist, Dr C Weinbrenn in June 2019. Dr Wouters confirmed to Dr Longano telephonically that the plaintiff had indeed been in a very bad psychological shape and that in the aftermath of the accident the plaintiff, in Dr Wouters' opinion, suffered a very severe PTSD. The plaintiff saw Dr Weinbrenn in May 2019 and was put on different anti-depressant medication.

[24] Dr Longano opined that an explanation of the documented cognitive deficits, which rests on the "concatenation" of a pre-existing condition and a traumatic event, causing a clinical picture resembling head injury, when the possibility exists that his deficits were indeed simply caused by a head injury.

[25] Ms Blom (occupational therapist) interviewed and assessed the plaintiff. In respect of the plaintiff's erstwhile business, Tymic Steel and Engineering, his responsibilities included interaction with clients, doing quotations, on site supervision and being physically involved in the work, using welding machinery and grinders while handling heavy pipes. The physical demands of work as a boilermaker and pipefitter are extensive and include standing and walking about for long periods of time, carrying out actions such as stooping, bending, crouching, squatting, reaching high and low, climbing stairs, climbing ladders on to structures while handling machinery, tools and objects varying in weight. The physical strength demand characteristics of the work fall into the median work category.

[26] In Ms Blom's opinion the plaintiff's residual functional capacity, from a physical perspective, would restrict him to work with mainly light physical strength demands, which do not place undue strain on the right shoulder and left ankle. In Ms Blom's opinion further the plaintiff's symptoms and disabilities rendered him unfit for the physical components of his work, and in addition thereto, the effect of the head injury seriously impairs his ability to do lighter work. In her opinion he has effectively become unfit for his normal work on the open labour market.

LOSS OF EARNING CAPACITY

[27] Ms Barbara A. Donaldson (Industrial & Counselling Psychologist) interviewed and assessed the plaintiff on two occasions. The plaintiff was born in Portugal and came to South Africa in 1987. The plaintiff started to work for Foster Wheeler SA in Witbank for two to three months at the end of 1987 and thereafter worked for a variety of companies in South Africa and in Portugal, all on shutdowns and at refineries as unqualified welder/pipefitter until approximately March/April 2013 when he decided to start his own business. The plaintiff "did everything" in the business, including being a director, the production manager, a welder, a pipefitter and a boilermaker. This business focused on the process engineering sector and clients included SAB, Coca-Cola, Pritt and Anchor. Before the accident the

business had up to thirty employees at any given time. The plaintiff responsibilities included interaction with clients, doing quotations, doing site supervision and being physically involved in using welding machinery and grinders “*while handling heaving pipes*”. The physical demands of work as a boilermaker and pipefitter are extensive and include standing and walking about for long periods of time, carrying out actions such as stooping, bending, crouching, squatting, reaching high and low, climbing stairs, ladders and on to structures while handling machinery, tools and objects varying in weight. The physical strength demand characteristics fall into the median work category and occasionally in the heavy work category.

[28] Ms Donaldson had an opportunity to consider Tymic Engineering invoices, suggesting that, after materials purchased and salaries paid, the plaintiff’s own profit was in the order of approximately R30 000,00 and R67 000,00 per month, from which fringe benefits pertaining to him were paid. The plaintiff informed Ms Donaldson that had he not been injured in the accident his work for Tubemech would have continued and he would probably also have continued to secure work from Henkel in Alrode.

[29] The plaintiff informed Ms Donaldson that after the accident there was ongoing work for Henkel and his daughter attempted to supervise that contract. After the accident the plaintiff was unable to get quotes accepted except for an insignificant contract “*with two guys in September 2018*”. The plaintiff was unable to concentrate and kept making mistakes. He secured a small contract in Polokwane but made multiple errors and after two weeks his services were terminated. Apart from another small project from Tubemech, the business of Tymic ground to a halt during or about June/July 2019, except for the little projects referred to hereinbefore. The overheads of the business amounted to approximately R10 000,00 in respect of rental for a workshop in Alrode South and R3000,00 per month in respect of water and electricity. The plaintiff found it very difficult to get work and “*Nothing was coming in from the quotations*”. Ms Donaldson noted that it appears that payment for work performed in 2018 tax year came in during 2019 tax year, and therefore, according to the Tymic Engineering invoices and income received, the turnover increased during the 2019 tax year but decreased significantly in the following tax period.

[30] The plaintiff secured a contract with E-Quale Labour Brokers in Rotterdam, where he started to work as a moulder. He worked for approximately three weeks earning €17.50 per hour but was asked to leave because his performance was not acceptable. The plaintiff noted to Ms Donaldson that “*Physically I was still not right there were complaints about me*”.

[31] But for the accident, Ms Donaldson concludes that one must accept that Tymic Engineering would probably have suffered the kind of economic difficulties which have characterised small and medium business enterprise since the hard Covid-19 Lockdown restrictions came into operation in March 2020. In this regard she took note of the significant drop in the plaintiff’s turnover even prior to the Covid-19 lockdown restrictions, which led to him closing down Tymic Engineering in July 2019. Thereafter the plaintiff was able to find employment in Holland where he continues to work as a pipefitter. Ms Donaldson’s opinion the plaintiff earning would thus probably have characterised his income prior to the accident

under review in any event. In whatever vocational environment the plaintiff had found himself in, the results Ms Donaldson's current assessment indicate that he would probably have continued to work in a stable, secure and financially responsible manner until at least the normal retirement age of 65.

[32] Having regard to the *sequelae* of the injuries sustained by the plaintiff in the accident, Ms Donaldson is of the opinion that the plaintiff experienced considerable difficulties in coping with his duties which led to the business of Tymic Engineering being grounded to a halt during June/July 2019.

[33] Ms Donaldson had regard to the plaintiff orthopaedic, psychiatric and neuropsychological condition and prognosis and his associated physical and functional limitations. Of special importance to Ms Donaldson is the cumulative effect of all these limitations, as a result of which she concludes that it would be a very rare employer in her experience that would be prepared to take the plaintiff on in preference to the similarly experience but probably considerably younger, better educated, hale, abled bodied, psychiatrically and neurologically intact counterparts.

[34] Ms Donaldson further had regard to Dr Versfeld's opinion that the plaintiff has already been precluded from his previous work and that it is improbable that he could maintain the work he currently does until a normal retirement of 65. In the result, Ms Donaldson concludes that a wholistic overview of all the factors negatively affecting the plaintiff's employment prospects and employability, suggests that it is improbable that he could continue working for longer than the age of 60 years. In her final conclusion Ms Donaldson postulates that the most reasonable way of quantifying the plaintiff's loss of income would be by means of the application of an increased post-accident contingency deduction.

[35] Mr Whittaker (consulting actuary) performed calculations to determine the capitalised value of the plaintiff's loss of income. performed calculations to determined capitalised value of the plaintiff's loss of income. In respect of the plaintiff's past loss of earnings during the tax year ending 28 February 2019 Mr Whittaker assumed that the plaintiff was employed as a director of Tymic Steel and Engineering. In this regard Mr Whittaker notes that had the accident not occurred, one has valued earnings of R171 676,00 during the tax year ending 28 February 2019 (equal to instructed R163 592,00 for the tax year ending 28 February 2018, adjusted in line with headline inflation from at mid-point of the 2019 tax year). Mr Whittaker valued nil post-accident earnings during the tax year ending 28 February 2019.

[36] But for the accident, Mr Whittaker took the plaintiff's earnings as at 1 August 2021 as €36 094,00 per annum (equalised to annualised earnings for the period from July 2019 to December 2019, inclusive as evidenced by a tax assessment for the year ending 31 December 2019). From 1 August 2021 the plaintiff's earnings have been capitalised at a net discount rate of 2.5% per annum compounded until a retirement age of 65.

[37] Having regard to the *sequelae* of the injuries sustained in the accident, Mr Whittaker was instructed to value the same level of income as for the pre-accident scenario until an early retirement age of 60. He was further instructed to apply a higher post-accident contingency deduction. In the absence of any further information Mr Whittaker prepared calculations on the basis of early retirement at age 60 without social security benefits/disability benefits.

[38] But for the accident, Mr Whittaker applied a 5% past and a 10% future contingency deduction, and, having regard to the *sequelae* of the injuries sustained in the accident, an increased 25% post-accident contingency deduction.¹

LEGAL FRAMEWORK AND EVALUATION

[39] It was submitted by plaintiff's counsel that the plaintiff was a 53year old business man at the time of the collision on the 30th of January 2018. The plaintiff was from Portugal where he worked as an unqualified welder and came back to South Africa where continued to work in that capacity, until he established his own company in 2013 in which he pipe fitting and welding. He ran it as a family business, but he was the centre of the business issueing quotes to clients and interacting with clients in order to garner contracts for the business.

[40] Counsel further submitted that the plaintiff suffered injuries in the collision and submitted that the *sequelae* can be linked to the accident if regard is had to the expert reports and the manner in which the plaintiff's company performed prior to the accident. The Industrial Psychologist reported that the plaintiff had to close his business after the accident. He submitted that his client nonetheless endeavoured to earn his own income and tried to take up employment in Rotterdam. He however could no longer earn an income as a pipe fitter due to the injuries he sustained in the collision. Dr Versfeld opined that the plaintiff is not fit for the work that he was doing due to the injuries sustained.

[41] Counsel submitted that plaintiff was due to use of drugs from a young age predisposed as thin skull victim, notwithstanding this the plaintiff ran a successful business. However, it is the post traumatic stress caused by the accident that impacted his brain and sent the plaintiff over the edge and this is confirmed by Mr. Ormond Brown's report.

[42] It is trite that in order to succeed in a delictual claim, a claimant would have to prove the following requirements: causation, wrongfulness, fault and harm. A successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the plaintiff, on the other hand. This is in accordance with the 'but-for' test.² Legal causation must be established on a balance of probabilities. There can be

¹ *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 AD; *Goodall v President Insurance Co LTD* 1978 (1) SA 389 (W) at 392-393 and *Robert Koch*, Quantum Year Book, 2021, p 118)

² *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) ([1989]ZASCA 138) at 700F-I; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 915B - H

no liability if it is not proved, on a balance of probabilities, that the conduct of the defendant caused the harm.³

[43] The merits was settled, RAF hereby thus admitted liability that the collision occurred as a result of the sole negligence of the insured driver. In terms of the case of Minister van Polisie v Ewels⁴ wrongfulness in RAF cases is inferred from the fact that the insured driver negligently caused the accident.

[44] Whether the plaintiff sustained injuries in the undisputed collision, is found in the undisputed expert reports that explain the direct injuries which were sustained by the plaintiff as recorded in the hospital records and their expert opinions as:

44.1 A fractured sternum

44.2 An injury to his left ankle

44.3 A right shoulder injury

44.4 A brain injury

[45] Dr Versfeld opined:

45.1 The plaintiff sustained a left ankle injury with symptoms remaining to the present time. These symptoms include a tremendous pain in his ankle if he drives in heavy traffic. The plaintiff's left ankle measured 0.5 cm more in circumference than the right. He has reduced range of plantarflexion of his left ankle with pain on plantarflexion. The ankle will deteriorate over time.

45.2 The plaintiff also sustained a right shoulder injury in the accident with continued symptoms. These symptoms include shoulder pain when he lies on the right, when he works above shoulder height, when he puts his hand behind his back, when he lifts his arm above shoulder height, when leaning on his right elbow and when he lifts heavy objects. Clinically, the plaintiff has a reduced range of movement of his right shoulder with pain on movement. There was also evidence of impingement of the right shoulder and evidence of a painful arc of the right shoulder between 60 and 90 degrees. These features suggest that he sustained a significant right shoulder injury as a result of the accident with a poor long-term prognosis.

45.3 The plaintiff sustained a fractured sternum and a fractured rib in the accident. The clinical

³ Lee v Minister of Correctional Services 2013 (2) SA 144 (CC)

⁴ 1975 (3) SA 590 (A)

noted record that the plaintiff's sternal fracture and pulmonary contusion. This injury remains symptomatic, and include a hot feeling on the plaintiff's sternum when he performs heavy work.

Dr Versfeld assessed the plaintiff's injuries as serious in terms of the narrative test.

[46] Mr. Ormond Brown opined that the plaintiff had a compromised brain at the time of the accident (thin skull victim) but because he was functioning in his routine in a familiar environment he was able to get by adequately from one day to the next and was able to successfully run his business. After the accident the plaintiff developed an acute PTSD in the immediate aftermath. The onset of PTSD is associated with massive neurochemical changes in the brain. When such exposed brain has been compromised by years of cannabis abuse, the capacity recover from the neurochemical barrage of PTSD is significantly reduced. Therefore, a pre-existing vulnerability was significantly magnified by the effects of PTSD, and while the emotional shock has worn off, the damage to the plaintiff's brain is permanent.

[47] The vital question is whether on a balance of probability, the sequelae can be linked to the collision. According to Dr Ormond-Brown the plaintiff was already compromised at the time of the accident, but because he was functioning in his routine familiar environment he was able to function and successfully run his business. In the immediate aftermath of the accident the plaintiff developed an acute PTSD, which according to Dr Ormond-Brown is not simply a psychological reaction but a neuropsychological response to acute psychological stress. The onset of PTSD is associated with massive neurochemical changes in the brain. When a compromised brain is exposed to the neurochemical barrage brought about by the PTSD the capacity of such a compromised brain so exposed to recover is significantly reduced. The thinning of the cortex of the brain then resulted, causing the suspicion of brain injury, thus the pre-existing vulnerability was significantly magnified by the effects PTSD and though the emotional shock has worn off the injury to the brain is permanent. Dr Ormond-Brown found that the plaintiff brain was able to compensate for the years of cannabis consumption, but it was overwhelmed by the emotional distress caused by the PTSD coupled with the physical stress because of the injuries sustained in the collision, which in effect pushed the plaintiff over the edge, whereafter the plaintiff completely decompensated. Thus from the evidence presented in the reports having regard to the number of years that cannabis was abused and the positive functioning and excelling in his business and life that the plaintiff displayed notwithstanding his compromised brain, it is clear that there was an intervening act, which triggered the harm complained of.

[48] On a review of the conspectus of evidence presented in the various expert reports, this court finds on a balance of probabilities that it was the collision that caused the fractured sternum, fractured rib, left ankle injury, right shoulder injury and the PTSD which immediately triggered the neurochemical barrage which impacted the plaintiff's compromised brain and resulted in what Dr Ormond-Brown diagnosed as permanent brain injury.

[49] The effects of the sternum injury, the pulmonary contusion and the right shoulder injury is that plaintiff a hot feeling on the plaintiff's sternum when he performs heavy work, an

abnormal feeling with certain movements of his shoulder, shortness of breath when he lies on his left side, pain in his shoulder when he sleeps on his right side, an inability to sleep and the injuries remain symptomatic. The left ankle is painful when driving in heavy traffic. The effects of the brain injury is loss of concentration, forgetfulness, limited attention span, inability to do correct calculations on quotations, behavioural deregulation and disturbance and temper flares.

[50] All the experts having confirmed that the sequelae outlined in their respective reports are due to the injuries sustained by the Plaintiff as a result of the collision, which caused the plaintiff to be unfit to perform his work and caused the plaintiff's business being compromised to the extent that it closed down. In this instance, I am satisfied that the plaintiff was able to establish that his earning capacity has been compromised as a result of the injuries he sustained in the accident in question. Plaintiff succeeded in proving his claim for loss of earnings / earning capacity.

[51] I have considered that the plaintiff was 53years old at the time of the collision; that he is no longer fit for employment in the open labour market due to the sequelaeof the injuries and the actuarial calculations are based on the expert reports, which this court had accepted. It is trite that the court has the discretion to determine the contingency deduction. A 5% past and a 10% future contingency deduction, and, having regard to the *sequelae* of the injuries sustained in the accident, an increased 25% post-accident contingency deduction with an adjustment in accordance with section 17(4) (c) of the Road Accident Fund Amendment Act is just and fair having regard to the circumstances of the case. I accordingly find no reason to interfere with the actuarial calculations submitted.

[52] The plaintiff claimed an amount of R800 000,00 for general damages and referred the court to a number of comparable cases. General damages is often determined by comparing cases under scrutiny and those previously decided, it is generally accepted that previously decided cases are never similar and that their purpose stops at comparing them to the current.

Dlamini v RAF 2012 (6A4) QOD 68 (GSJ) – R850 000,00 awarded in 2012 to a 37-year-old male Corporal in the Defence Force who sustained a brain injury as well as fractured mandible, loss of teeth, soft tissue injuries to his cervical and lumber spine. Hospitalised for approximately three months after the accident. Left with neuropsychological *sequelae* as a result of the brain injury with an increased risk of developing seizures. Personality changes. No longer suitable for employment in the open labour market (2023 value R1 471 951,22);

Van Zyl v RAF 2012 (6A4) QOD 138 (WCC) – R850 000,00 awarded to a 19-year-old male part-time law student who sustained a severe head injury with multiple cranio-facial impact. Also serious orthopaedic injuries including bilateral severe fractures of his tibia/fibula and multiple abrasions and bruises (2023 value R1 471 951,22);

Torres v RAF 2007 (6) QOD A4-1 (GSJ) – R600 000 awarded to a 20-year-old male who sustained a severe diffuse brain injury as well as a soft tissue injury to his neck and his face and chin. Significant neurocognitive and neuro-behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning. Depression and adjustment disorder (2023 value R1 445 701,36);

Vukeya v RAF 2014 (7B4) QOD 1 (KZP) – R568 000,00 awarded to a female with a mild moderate frontal brain injury as well as orthopaedic injuries, inclusive of a whiplash, a lower back injury, a fracture of her metacarpal bone in her left hand and a soft tissue injury to her leg. Her mathematical and short-term memory was affected and she suffered chronic headaches and depression (2023 value R820 192,00);

Modan v RAF 2012 (6A4) QOD 123 (GSJ) - R574 000,00 awarded to a girl who a concussive brain injury, a fractured nasal bone and a soft tissue injury to her forehead with scalp haematoma. Neurocognitive and neuro-psychological *sequelae* comprised of tension and concentration difficulties, headaches and behavioural and emotional difficulties. The child's academic performance was affected as was the child's future level of earnings. (2023 value R930 511,00);

Tshongolo v RAF Case No. 19958/2014 (Judgment 2 November 2021) GSJ – R500 000,00 awarded to a teenager who suffered a very mild brain injury not rendered unconscious after the accident, as well as abrasions to her face and fracture of her right clavicle. Hospitalised for approximately three days returning to follow up examinations which included a procedure draining excess fluids from a haematoma of her head. Experiencing occipital headaches almost on a daily basis as well as right shoulder pains induced by lifting heavy objects. Also lower back pain induced by inclement weather or prolonged sitting. Also a soft tissue injury to her thoracolumbar spine. Neurocognitive deficits including in respect of concentration, attention and working memory (2023 value R524 950, 00).

[52] I have perused the cases and have come to the conclusion that few cases are directly comparable, no two cases can be on all fours. The case that finds application to the current case is the case of *Tshongolo v RAF* Case No. 19958/2014 (Judgment 2 November 2021) GSJ in which the court awarded R500 000,00 to a teenager who suffered a very mild brain injury not rendered unconscious after the accident, as well as abrasions to her face and fracture of her right clavicle. Hospitalised for approximately three days returning to follow up examinations which included a procedure draining excess fluids from a haematoma of her head. Experiencing occipital headaches almost on a daily basis as well as right shoulder pains induced by lifting heavy objects. Also lower back pain induced by inclement weather or prolonged sitting. Also a soft tissue injury to her thoracolumbar spine. Neurocognitive deficits including in respect of concentration, attention and working memory. The award translate to R524 950, 00 currently.

[53] Consequently the amount of R524 950.00 is in my view a fair, just and reasonable award for general damages having regard to comparable cases.

[54] In the circumstances I make the following order:

54.1 The defendant is liable to the plaintiff for 100% of the plaintiff's proven damages.

54.2 The defendant shall pay to the plaintiff the capital amount of R2 256 016.00 made up as follows:

- 54.2.1 R 1 731 066.00 in respect of loss of earnings;
54.2.2 R 524 950.00 in respect of general damages.

54.3 The defendant is ordered to pay interest *a tempora mora* on the amount awarded calculated in accordance with the prescribed rate of interest, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996

54.4 Payment will be made directly into the trust account of the plaintiff's attorneys within 180(one hundred and eighty)days from the date of this order, details of their trust account

being the following:

Holder: Joseph's Incorporated
Account No: 50450103011
Bank: RMB Private Bank
Branch Code: 261251
Reference: J Calitz, M456

54.5 The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended for 100% of the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the motor vehicle collision which occurred on the 30th of January 2018.

54.6 The defendant is to pay the plaintiff's agreed or taxed High Court costs as between party and party, such costs to include, but not limited to the following:

54.6.1 The preparation and qualifying fees of the plaintiff's experts consequent upon obtaining the plaintiff's expert reports, costs of obtaining confirmatory affidavits, and preparation fees (if any) of -

54.6.1.1 Dr G A Versfeld (Organized Surgeon)

54.6.1.2. Dr Digby Ormond-Brown (Neuropsychologist)

54.6.1.3 Dr B. A. Longano (Psychiatrist)

54.6.1.4 Dr A.P.J. Botha (Specialist Physician)

54.6.1.5 Ms. S. Murcott (Occupational Therapist)

54.6.1.6 Ms. B.A. Donaldson (Industrial Psychologist)

54.6.1.7 Mr. G. Whittaker (Actuary)

54.5.2 The costs in respect of the employment of senior counsel.

54.7.1 The plaintiff shall, in the event that the costs are not agreed, serve a notice of taxation on the defendant's attorneys of record; and

54.7.2 The plaintiff shall allow the defendant 14 (fourteen) days to make payment of the taxed costs

54.8 The plaintiff and the plaintiff's attorneys concluded a contingency fees agreement.

M.T.JORDAAN

ACTING JUDGE OF THE HIGH COURT

SOUTH GAUTENG LOCAL DIVISION

APPEARANCES:

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Counsel for the Defendant:

No Appearance

Instructed by:

Date of Hearing:

25 January 2023

Date of Judgment:

24 April 2023