

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 DIVISION, PRETORIA**

- | | |
|-----|-------------------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER
JUDGES: NO |
| (3) | REVISED: N |

Signature:

A handwritten signature in black ink, appearing to be 'S. Hoffmann'.

Date: 1/12/2022

CASE NO: 2711/2020

In the matter between:

CONRAAD JOSEPH HOFFMAN

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

NICHOLS AJ

Introduction

[1] The plaintiff, Conraad Joseph Hoffman, has instituted action against the Road Accident Fund (RAF), for damages arising from injuries sustained by him in a collision,

which occurred on 10 September 2016. The plaintiff was the driver of a Toyota Fortuner motor vehicle (the Fortuner), which collided with an Audi motor vehicle (the insured vehicle), driven at the time by Mr C Nelson (the insured driver).

[2] The issues of liability and quantum remain in dispute. I am therefore required to determine whether the insured driver's negligence was the sole cause of the collision and whether the plaintiff sustained injuries as a result of the collision. In the event of a finding in the plaintiff's favour in this regard, I am then required to determine the quantum pertaining to the plaintiff's general damages, past medical expenses and past and future loss of earnings / earning capacity.

The pleadings

[3] The plaintiff's pleadings allege that the collision between the Fortuner and the insured vehicle occurred along Broederstroom, Hekpoort Road in Krugersdorp at approximately 19h00. In addition to the usual allegations of negligence, the insured driver is alleged to be the sole cause of the collision in that he drove directly in the lane of oncoming traffic at a dangerous and inopportune time.

[4] As a result of the collision, the plaintiff suffered the following injuries: concussive brain injury; fracture left distal fibula and disruption of the ankle joint; comminuted fracture right calcaneus; right distal radius fracture (comminuted) with dislocation; fracture head of the left 5th metacarpal; and emotional shock and trauma. The plaintiff was hospitalized, received medical treatment for his injuries and will in future require additional medical treatment. He is alleged to have suffered a loss of earnings and earning capacity and his injuries are alleged to be serious such that he qualifies for general damages.

[5] In consequence, the plaintiff contends that he suffered a total loss comprising past medical and hospital expenses; future medical expenses; past loss of earnings and/or earning capacity and future loss of earnings and/or earning capacity; and general damages. The amount sought is specified as an estimation, which is subject to further clarification.

[6] During the trial, Ms Lingenfelder, who represented the plaintiff, clarified that the total amount now claimed is R3 561 352.27, which is made up of the following heads of damages:

- (a) Past medical and hospital expenses in the amount of R721 878.27;
- (b) Past and future loss of earnings and/or earning capacity in the amount of R1 939 474; and
- (c) General damages in the amount of R 900 000.

The merits

Evidence

[7] Ms Lingenfelder indicated that the plaintiff would lead the evidence of his wife, Mrs Leana Hoffman (Mrs Hoffman), regarding the factual circumstances surrounding the motor collision and an expert witness, Mr Barry Grobbelaar, in support of the liability aspect of his claim. The plaintiff would not adduce evidence in support of the merits of his claim because he has no recollection of the manner in which the collision occurred. This amnesia is an aspect of the sequelae of his concussive brain injury.

[8] By consent between the parties, the application for Mrs Hoffman's evidence to be tendered in the form of an affidavit in terms of rule 38(2) was granted. Mrs Hoffman currently resides in Cape Town and recently underwent surgery, which has affected her ability to travel. The Court was referred to a letter by Mrs Hoffman's orthopaedic surgeon in this regard.

[9] Mr Mukasi, who represented the RAF, confirmed that although he had no instructions to settle any aspect of the matter, the RAF's legal representatives consented to Mrs Hoffman's evidence and the expert witness' evidence being tendered to court in the form of an affidavit. The parties further informed the Court that Mrs Hoffman and her daughter lodged claims against the RAF arising from this collision and both those claims have been finalised.

Mrs Hoffman

[10] Mrs Hoffman's affidavit was accepted, marked as exhibit 'A' and read into the record. The relevant aspects of her affidavit are the following. She was seated in the front passenger seat of the Fortuner and the plaintiff was the driver when the collision occurred.

They were travelling home to Krugersdorp along the Hekpoort / Broederstroom Road when the collision occurred at about 17h45.

[11] She recalls that they were travelling at about 100 km/h, which is the speed limit along that road. The road was in good condition and it was a long straight road with one lane for each direction of travel. The weather was clear.

[12] She noticed the insured vehicle approaching from the opposite direction. Without warning, it moved over into their lane of travel and collided head on with the Fortuner. This happened over such a short distance that the plaintiff had no time to avoid the collision with the insured vehicle.

Mr B Grobbelaar

[13] The plaintiff delivered notice in terms of rule 36(9)(a) and (b) of his intention to lead the expert evidence of Mr Barry Grobbelaar, an accident reconstruction expert. Mr Grobbelaar's report is premised upon the documentation that was made available to him and his inspection of the accident site. He was provided with copies of the accident report; photos taken at the scene of the collision; photos of the damaged vehicles; affidavits by various parties and the assessors report completed by the plaintiff's insurer.

[14] The salient aspects of his report are the following:

- (a) He took account of the available relevant documentation, visited the accident site, and consulted telephonically with Mrs Hoffman in order to prepare his opinion and report.
- (b) During his visit to the accident site, photographs and measurements were taken and these are indicated in the report.
- (c) He concluded that the road in the vicinity of accident scene was a tarred road with a good surface. He accepted that the road was dry at the time of the collision and the road markings and road sign visibility was good.
- (d) The speed limit at the accident site was 100km/h.
- (e) He established the approximate locations where the vehicles came to rest after the collision, as well as the area of the collision.
- (f) The environmental conditions were that it was nighttime and the accident scene was unlit. He accepted that visibility was clear.
- (g) The Fortuner shows severe impact damage to the front of the vehicle with this damage appearing to be slightly more severe to the left front than the right front when

considering the buckling of the left A-pillar of the vehicle. The left front wheel appears to have been forced rearwards. There is overall damage to the right front, left mid-front, left mid-back, left front, front centre and bonnet.

(h) The damage to the insured vehicle is depicted by a single photograph taken at the accident scene on the night of the collision and it depicts the body of the insured vehicle to have been severely distorted. The overall damage is to the right front, left mid-front, left front, front centre, bonnet and roof.

(i) Upon a consideration of the impact damage sustained by the two vehicles, he opined that the impact was probably a full frontal impact between the vehicles.

[15] He considered Mrs Hoffman's version of the manner in which the motor collision occurred. She clarified to him that she saw the plaintiff set the speed control and they were travelling at 100km/h. The Fortuner was in its correct lane when she saw the approaching vehicle coming into their lane. She could not estimate a distance at which this occurred but indicated to him that it was so close that the plaintiff could not do anything to avoid the accident. It was still relatively light at the time of the accident but the sun was not shining in their eyes.

[16] Photographs taken of the accident scene on the night of the accident and shortly thereafter depict scrape/gouge marks and fluid deposits on the road surface. The rest position of the Fortuner was at an angle astride the edge of the tarred road with the front of the vehicle facing the road. The rest position of the insured vehicle was on a grassy surface next to the road. Notably the vehicles came to rest on and off the road on the same side of the road for traffic travelling in a southwesterly direction (towards Krugersdorp). This is the direction in which the Fortuner was travelling and its lane of travel.

[17] Having considered the severe nature of the impact damage to the front of the Fortuner, and the severely distorted nature of the body of the insured vehicle, he opined that it is probable that damaged engine, gearbox, suspension and/or chassis components from one or both of the vehicles would have been forced towards the road surface to cause and leave gouge and/or scrape marks in the road surface during the collision and possibly thereafter. For an impact of this severity, he opined that it is also probable that the

most severe marks would be deposited below the vehicles where the collision occurred due to this being where the greatest forces between the vehicles occurred.

[18] He noted that such gouge marks are evident from this collision and were still evident when he conducted his inspection of the accident site. A large gouge mark was measured to be approximately 2.1m from the barrier line in the centre of the plaintiff's lane of travel. Notably, there were no gouge marks found nearer the centre line or on the side of travel in which the insured vehicle was travelling.

[19] Having considered the rest positions of the motor vehicles and the gouge marks depicted, he opined that the collision probably occurred on the plaintiff's lane of travel for the vehicles to have separated from one another after the collision and for them both to still have ended up on the plaintiff's side of the road.

[20] He opined that it is therefore probable that the collision occurred in the plaintiff's lane of travel near the large gouge mark, with the further implication that the Fortuner was probably wholly on its correct side of the road when the collision occurred. Further, when considering the impact damage to the Fortuner, it is therefore probable that the insured vehicle was wholly on its incorrect side of the road when the collision occurred.

[21] Ms Lingenfelder contended that Mrs Hoffman and Mr Grobbelaar's evidence made it clear that the collision occurred in the plaintiff's lane of travel and he had no time or opportunity to avoid the collision. She contended that the collision was caused solely by the negligence of the insured driver and the plaintiff could not avoid it. As a result, the RAF should be declared 100% liable for the plaintiff's proven damages.

[22] Mr Mukasi indicated that the insured driver died because of the injuries sustained in this collision. He accepted as an unassailable conclusion that the collision occurred in the plaintiff's lane of travel and that the insured driver's negligence was the sole cause of the collision. The RAF had no witness evidence to counter that tendered by the plaintiff or suggest that the plaintiff may have been contributorily negligent. Mrs Hoffman's version that the plaintiff had no time to avoid the collision was accepted without demur and there was therefore no opposition to an order that the RAF be declared 100% liable for the plaintiff's proven damages.

[23] Notwithstanding these concessions, Mr Mukasi noted that the RAFs legal representatives had no formal instructions to settle any aspect of the plaintiff's claim or to make any tenders in respect of the plaintiff's action and claim.

[24] In view of the fact that the plaintiff is required to establish and prove liability and quantum in this matter, it is apposite to refer to the four stage inquiry postulated in *MS v Road Accident Fund*.¹ In the first phase, which is the merits inquiry, the court is required to determine whether the negligence of the insured driver was the cause of the collision.² In the second phase, the first causation inquiry, the court is required to determine whether the plaintiff sustained the pleaded injuries in the motor collision.³ In the third phase, the second causation inquiry, the court is required to determine how these proven injuries have affected the plaintiff.⁴ The fourth phase, the quantum determination phase, requires a court to determine how a plaintiff should be remunerated for the effects of such injuries.⁵

[25] Before Court, there is only one version regarding the manner in which the collision occurred. This version has been accepted, by the RAF, as the only unassailable manner in which the collision occurred. The RAF proffered no factual or expert evidence to suggest any negligence on the plaintiff's part.

[26] I therefore accept that the collision occurred, as a head on collision, on the incorrect side of the road for the insured driver. Further, the negligent driving of the insured driver caused the collision. The evidence of both the expert witness and Mrs Hoffman supports this finding.

[27] I am therefore of the view and conclude that the plaintiff has, on balance of probabilities, established that the negligence of the insured driver was the sole cause of the collision when the insured vehicle collided head on with the Fortuner in the plaintiff's correct lane travel. As a result of this collision, the plaintiff suffered various injuries and the RAF is 100% liable to compensate the plaintiff for his damages in this regard.

¹ *MS v Road Accident Fund* (10133/2018) [2019] ZAGPJHC 84; [2019] 3 ALL SA 626 (GJ) (25 March 2019).

² *MS* *ibid* para 12.

³ *MS* fn1 above para 12.

⁴ *MS* fn1 above para 12.

⁵ *MS* fn1 above para 12.

Quantum

Plaintiff's evidence

[28] The plaintiff gave evidence in support of the quantum aspect of his claim. The salient aspects of his evidence are the following. He was born in February 1969 and was 47 years old when the collision occurred. He obtained a government certificate of competence (GCC) in engineering in 2010, which qualifies him as an engineer in charge of machinery at a mine or works. He is employed by Sibanye Gold as the Unit Manager at one of its plants. His job entails ensuring that employees and individuals comply at all times with various legal and related requirements.

[29] He was the driver of the Fortuner on 10 September 2016, when his vehicle was involved in the head-on collision with the insured vehicle. He was on his way home with his wife and daughter at the time and he does not recall how the collision occurred. He recalls what happened just before the collision. The Fortuner was new and he recalled setting the speed control to 100 km/h. He also recalls that he was travelling in his lane of travel. Thereafter his memories relate to post the impact and collision.

[30] He recalls seeing dust in the car and blood on the windscreen. He tried to climb out of the Fortuner but fell out instead because he did not realise that both his ankles were broken. All the occupants of the Fortuner were taken and admitted to Krugersdorp Private Hospital. He was admitted to the intensive care unit and operated upon a few times. His wife and daughter also sustained serious injuries. He was discharged from hospital after about two weeks.

[31] He suffered numerous injuries. He broke both ankles and to date his left ankle has not healed properly. His right wrist was completely shattered. The knucklebone on his left hand was damaged but not treated. He sustained a head injury and various cuts and abrasions on his eyebrow.

[32] He returned to work approximately five months after the collision. He also took additional time off work when he underwent further surgical intervention. He was not properly mobile after his release from hospital and he was released in a wheelchair, which required him to have a nurse to assist him to get in and out of the wheelchair.

[33] He experienced severe pain in his ankles and he has now developed arthritis in his ankles. His right foot was placed in an external fixator for three months whilst he was required to simultaneously use a moonboot on his left leg and foot. He was bedridden during this period and effectively immobile for approximately six months. He had an ankle arthrodesis in June 2017 and wore a moonboot thereafter for 12 weeks.

[34] Although he is now mobile, he complained that if he exceeds 3000 steps during the day, he experiences pain. The limitation of movement he now experiences with his right foot is challenging for him at work. The pain he experiences with his right wrist is also challenging for him at work. He takes anti-inflammatory and pain tables almost daily. Although his duties at work have not changed, he finds it more difficult to accomplish. It is difficult for him to walk on uneven areas and to maintain his daily tasks if they require him to walk a lot. He bought cushions and extra soles for his shoes to support his feet.

[35] He cannot walk barefoot and feels strongly that his daily life has been affected by his injuries. He can no longer play golf, or garden or perform maintenance around his home. He is currently 53 years old. Retirement age at his employer is 60 years with the option to extend until 63 years. There is a shortage of GCC engineers in the country and he always intended to work until he was 63 years and there is no reason why he would not have been able to do so. Currently, he does not intend to work beyond 60 years. He also does not think that he would pass the required medical examinations he would be required to pass in order to continue working beyond 60 years.

[36] The various medico legal reports delivered by the plaintiff, pursuant to the provisions of rule 36(9)(b) have been verified in affidavits filed by the respective experts as correctly reflecting their assessment of the plaintiff and the correctness of their findings and opinions as expressed therein. The RAF did not deliver any medico legal reports to counter the opinions and views expressed by the plaintiff's experts. A salient summary of the plaintiff's experts' reports and affidavits is set out hereinafter.

Dr A Van Den Bout, Orthopaedic Surgeon

[37] Dr Van den Bout examined the plaintiff in July 2019. At the time of the assessment, he noted the plaintiff's complaints. He complained about his concentration and short-term memory. He is right-handed and complained that his right wrist could still not move freely.

He experienced pain in this joint and had a weakened grip. The left ankle with the arthrodesis was still painful at times. He had a numb sensation over the dorsum of his foot. He could not stand long or walk far and his right leg sometimes swelled up. His right foot could not move properly after the fracture of the calcaneus, and he complained of pain with walking or standing. He had difficulty with his balance, climbing stairs and he could no longer run. He experienced low back pain because both his legs are affected and he uses pain medication twice daily.

[38] On clinical examination, the plaintiff presented with various scars due to operative treatment and the ex-fix applicators; he has reduced dorsi-flexion; a weakened grip; wasted muscles on the right forearm; malunion of the 5th metacarpal; he remains in pain in the left and right SI-joints; no movement of his subtalar joint whatsoever; tarsal-metatarsal movements are probably only about 50% of the normal movement; and sensation of the big toe is diminished.

[39] X-rays revealed damage to the right wrist joint, a malunion in the left hand and post-traumatic degenerative osteoarthritis. The calcaneus shows the loss of anterior height with irregular trabecular pattern and loose bony fragments and post-traumatic subtalar arthrosis, with malunion of the anterior aspect of the calcaneus.

[40] Dr Van den Bout opined that the plaintiff has a serious loss of enjoyment of life due to his injuries. He liked to play golf, go hunting, and do angling and camping out. He is unable to participate in any of these activities due to his pain and discomfort. The plaintiff is still doing the same work as pre-accident but suffers with the physical aspect of his work and clearly has a loss of earning capacity.

[41] He opined that the plaintiff would most likely require a triple arthrodesis of the right foot, and a wrist arthrodesis. The plaintiff also needs to have the internal fixatives removed from his left wrist. He also opined that the plaintiff would have a shortened working life of about 5 years, although he based this off a pre-accident retirement age of 65 years. He recommended special adapted shoes with a rocker bottom for the left foot, as well as a special shoe for the flattened calcaneus of his right foot.

Dr Marus, Neurosurgeon

[42] Dr Marus concluded that the plaintiff sustained direct trauma to the cranium. The plaintiff's hospital records confirmed this. He noted the plaintiff's loss of consciousness and amnesia and opined that the plaintiff sustained a mild uncomplicated concussive brain injury without any anticipated long-term cognitive impairment.

Dr J Pienaar, Plastic and Reconstructive Surgeon

[43] Dr Pienaar recorded that the plaintiff retained significant scarring from his surgery. These appear on his wrists and legs. He noted that the scarring causes the plaintiff embarrassment and social anxiety. The plaintiff also testified that he is embarrassed to wear short pants or short sleeve shirts. He cannot walk barefoot or on the beach and he cannot go into the waves at the beachfront. He confirmed that he feels social anxiety and embarrassment because of his scars.

Mr K Truter, Clinical Psychologist

[44] Mr Truter noted that the plaintiff's injuries have had a devastating impact on his life. His pain has negative consequences and impacts on his interpersonal relationships and his mood. The marital conflict in his home escalated after the collision and the plaintiff and his wife have since divorced. The plaintiff displays minor symptoms of depression and anxiety. He is in constant pain and discomfort and this translates into fatigue. The plaintiff's inability to perform his duties at work, in the manner he did previously, has forced him to rely on others for feedback and reports. This does not sit well with the plaintiff's perfectionist tendencies and his own inability to double check reports or feedback because of his physical constraints has increased his irritability and moodiness with his colleagues at work. Mr Truter opined that the plaintiff would benefit from psychotherapeutic treatment.

Ms I Janse Van Rensburg, Occupational Therapist

[45] Ms Van Rensburg noted that the plaintiff's injuries and the sequelae and their effect on the plaintiff in his domestic and employment capacities. He has returned to mostly normal duty at his workplace. However, he has trouble with accessing all areas required of him due to his orthopaedic injuries. He completes tasks at a slower pace and he presented with severe impairment of the left lower extremity.

[46] Ms Van Rensburg opined that the plaintiff's suitability for his current position would diminish. Although he was performing his duties adequately, this is detrimental to his

pathology and experience of pain. The exertion required to complete his daily tasks results in fatigue after work. As a result, he is not meeting his life roles outside of work. If the plaintiff is not accommodated in a position where lower limb dynamics including walking is limited to no more than occasionally, then he should be regarded as a vulnerable and compromised individual. In the event that he undergoes the recommended triple arthrodesis, the plaintiff will need to be accommodated to employment that is limited to sedentary physical strength with no more than occasional lower limb dynamics, in an accommodating environment.

[47] She recommended specific therapeutic intervention, occupational therapy intervention and specialized adaptive equipment to assist the plaintiff.

Ms H T Kraehmer, Industrial Psychologist

[48] Ms Kraehmer assessed the plaintiff and considered his employment history together with information and documentation provided in this regard. She noted the plaintiff's qualification as a GCC engineer and his employment as a Unit Manager at Sibanye Gold.

[49] She established that the final compulsory retirement age for Sibanye employees is 63 years, should they choose to continue working after 60 years. She noted that the plaintiff's skills are considered as very scarce and key to the performance of the business. The plaintiff was awarded ex gratia payments to compensate for his extended absence from work after the accident, and he received a default performance rating for this period.

[50] She noted that the plaintiff's employer confirmed that there are no sedentary positions available in a mining environment without a significant reduction in salary. The plaintiff may, however be considered for further promotion within the business because he forms part of the 'talent pool'. It is not clear what such promotion would entail or whether the plaintiff could physically meet the requirements for the promotion.

[51] Pre-morbid, she accepted that the plaintiff would have continued working until age 63 on a steady career trajectory. Post-morbidly, she opined that the plaintiff has to exert a significant level of effort to maintain his performance. His constant pain and discomfort translates into fatigue, which affects his mood. From a physical perspective, the accident

has had a restrictive impact on his functioning and will continue to do so. Accordingly, he is at risk for early retirement.

Ms M Barnard, Actuary

[52] The actuary calculated the plaintiff's past and future loss of income, having regard to the report and scenarios postulated by the plaintiff's industrial psychologist. The plaintiff suffered a past loss of income for the periods that he was off work when he used his unpaid leave and normal vacation leave. His past loss of income was calculated at R361 981 for these periods.

[53] The plaintiff's future loss of income was calculated on two alternative basis and scenarios. Ms Lingenfelder contended that the assumptions and calculations under scenario 1 was appropriate. The calculation for scenario 1 is premised on the basis that the plaintiff's pre- and post-morbid income remains the same but a higher contingency is applied to the post-morbid income. A contingency deduction of 10% is applied to his pre-morbid income, and 20% contingency on the post- morbid income. A retirement age of 63 years is applied. On this scenario, the nett value of the plaintiffs past and future loss of income/earning capacity is calculated as R1 939 474.

Past and future loss of earnings and/or earning capacity

[54] Mr Mukasi elected not to cross-examine the plaintiff regarding his injuries and their effect on his employment. He concurred with Ms Lingenfelder's contentions that the actuary's calculations reflected as scenario 1 were the most apposite calculations for the plaintiff's past and future loss of earnings. He contended that the contingencies should be considered and revised because the plaintiff was already provided the benefit of these calculations applying a retirement age of 63 years.

[55] It is trite that the plaintiff bears the onus to prove his case on a balance of probabilities. In a claim for loss of earnings or earning capacity, the plaintiff is required to prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss.⁶

⁶ *Rudman v Road Accident Fund* 2003(SA 234) (SCA).

[56] Actuarial reports and calculations are tools intended to assist the court in the determination of the quantum of the plaintiff's claim. These are premised upon the assumptions and/or scenarios posited by the industrial psychologist. The application of contingencies, to any amount calculated is a task, which falls within the court's discretion.⁷ However, I am satisfied that the postulations emanating from scenario 1 are reasonable and fair having regard to the plaintiff's factual circumstances. I take note of the fact that plaintiff's qualifications and skills are such that he would have continued working until age 63 pre-accident. I am further satisfied that the contingencies which have been applied to scenario 1 are appropriate in the circumstances and that the plaintiff should be awarded a nett amount of R1 939 474 for his past and future loss of income / earning capacity.

Past medical expenses

[57] The plaintiff furnished the RAF with vouchers in support of his claim for past hospital and medical expenses in the total amount of R 721 878,27. The RAF did not concede this head of damages. However, it is apparent from the vouchers that the services were rendered for the plaintiff's treatment for the injuries he sustained in the collision. There is no duplication of invoices for these services rendered to the plaintiff and there is no overlap of services with those, which were rendered to the plaintiff's wife or daughter. These are clearly delineated. In the circumstances, the plaintiff is entitled to an order for payment of past medical expenses in the amount of R721 878.27.

General damages

[58] The plaintiff sustained severe injuries as a result of the collision. He was hospitalised for just over two weeks. He underwent various surgical procedures, which have left him with certain physical limitations that will endure for the remainder of his life. He has suffered a loss of amenities of life and he will require future medical treatment and surgical procedures as the degenerative changes progress.

[59] I accept that the injuries and their sequelae have had a devastating impact on the plaintiff's life as testified to by him and as discussed and set out in the reports by the various experts. The plaintiff experiences pain on a daily basis and this affects his mood, demeanour and social network. He no longer enjoys leisure activities because he cannot physically perform these and he is too fatigued to participate in them.

⁷ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) para 9.

[60] In *Pitt v Economic Insurance Company Ltd*,⁸ Holmes J noted that an award for general damages '*must be fair to both sides. It must give just compensation to the plaintiff but must not pour out largesse from the horn of plenty at the defendant's expense*'. Although there is a modern tendency to increase awards for general damages, the assessment of the quantum of general damages primarily remains within the discretion of the trial court.

[61] Ms Lingenfelder contended that the matter of *Phasha v Road Accident Fund*⁹ was a comparable matter in respect of general damages. The plaintiff in that matter was a 49 year old male who sustained the following injuries: head injuries with loss of consciousness and amnesia, lacerations of the head, abrasions on both hands, compound fractures of the left tibia and fibula and scars, deformities and disfigurement. He developed non-union of fibula fracture with displacement of bone fragments, which resulted in a 2 cm shortening of the left lower leg. The result thereof was that the plaintiff could not walk or stand for a lengthy period and could not lift heavy objects without experiencing pain in his left ankle joint. The plaintiff became dependent on painkillers. He was awarded R400 000 for general damages in 2013. This amount is equivalent to R623 000 in 2022.

[62] She argued that the plaintiff sustained similar injuries to the claimant in *Phasha* and he sustained additional injuries, some of which were more severe. He sustained a fractured calcaneus, and a fracture of the left ankle. He has already undergone an arthrodesis of his left ankle, which limits his movement in the left lower limb. She therefore contended that an award of R900 000 for general damages would be fair in the circumstances.

[63] Mr Mukasi acknowledged firstly that the RAF accepted that the plaintiff's injuries were serious such that he qualified for general damages. He contended that an appropriate amount for the plaintiff's general damages was between R700 000 and R750 000.

⁸ *Pitt v Economic Insurance Company Ltd* 1957 (3) SA 284 (D) 287 E-F.

⁹ *Phasha v Road Accident Fund* 2013 (6E4) QOD21 (GNP).

[64] In support of this contention, he referred to the matter of *Tobias v RAF*¹⁰ in which the plaintiff, a fitter and turner, suffered a moderate diffuse axonal brain injury; fracture of the left tibia; a compound fracture of the right tibia and anterior wedge compression fractures of the 8th and 9th dorsal vertebrae. His injuries resulted in neurocognitive and neuropsychological deficits. The plaintiff was awarded an amount of R450 000 for general damages in 2010. The equivalent amount in 2022 is R849 000.

[65] Mr Mukasi also referred to *Yimba v RAF*¹¹ in which the plaintiff sustained a mild to moderate diffuse brain injury, with skull fractures, and a fractured lumbar vertebra. She also suffered emotional issues like bereavement and grief because her 14 month old son was killed in the same collision. She was awarded an amount of R700 000 for general damages in 2019, which equates to R849 000 in 2022.

[66] He contended that the plaintiff's matter differs from the comparable authorities referred to by him on the issue of the head injury. He contended that the plaintiff sustained only a minor head injury and this is clear from the experts' reports. Accordingly an amount of R700 000 to R750 000 would be appropriate for an award of general damages.

[67] It is trite that previous awards in comparable matters are intended to serve only as a guide. Each case should be determined based upon a consideration of its own facts. Having considered the facts of this matter and the authorities that have been referred to, I am of the view that a fair and reasonable amount of compensation for the plaintiff's general damages is the amount of R700 000.

Future medical expenses

[68] Mr Mukasi confirmed that the RAF would provide the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the plaintiff's future medical, hospital and allied expenses.

Costs

[69] The general rule in matters of costs is that the successful party is entitled to be awarded costs, and this rule should not be departed from except where there are good grounds for doing so.

¹⁰ *Tobias v RAF* (4934/2009) [2010] ZAGPPHC 537 (15 April 2010).

¹¹ *Yimba v RAF* (44866/2017) [2019] ZAGPPHC 485 (19 September 2019).

[70] Ms Lingenfelder also requested the plaintiff's costs for 13 October 2021. The matter was set down for trial on this day and stood down for the settlement discussions. The matter was then crowded out and the resultant settlement offer only followed 6 months later and was rejected out of by the plaintiff.

[71] There is no reason for the plaintiff not to be awarded his costs of trial and for such costs to include the wasted costs of trial when the matter was set down for trial on 13 October 2021.

Order

[72] In the circumstances, I make the following order:

(a) The defendant is 100% liable for the plaintiff's injuries sustained in the collision that occurred on 10 September 2016.

(b) The defendant is ordered to make payment to the plaintiff in the total amount of **R3 361 352.27(Three Million Three Hundred and Sixty One Thousand Three Hundred and Fifty Two Rand and Twenty Seven Cents)**, in full and final settlement of the delictual damages, in the above action, which results from the collision which occurred on 10 September 2016. The payment is to be made within 180 days from date of service of this Order on the defendant.

(c) The amount referred to in (b) above is made up as follows:

- | | | |
|-------|----------------------------------|-----------------|
| (i) | Past Medical Expenses | : R721 878.27 |
| (ii) | Past and Future Loss of Earnings | : R1 939 474.00 |
| (iii) | General Damages | : R700 000.00 |

(d) In the event of the aforesaid amount not being paid timeously, the defendant shall be liable for interest on this amount at the rate of 7% per annum, calculated from the 15th calendar day after the date of this Order to date of payment.

(e) The defendant is directed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996, for payment of the rendering of a service or supplying of

goods to the plaintiff resulting from the injuries sustained by him in the collision that occurred on 10 September 2016, to compensate the plaintiff in respect of the said costs, after the said costs have been incurred and upon proof thereof.

(f) The defendant shall pay the plaintiff's taxed or agreed party and party costs on the high court scale.

(g) In the event that the plaintiff's costs are not agreed:

(i) the plaintiff shall serve a notice of taxation on the defendant's attorney of record;

(ii) the plaintiff shall allow the defendant 30 (thirty) Court days from date of *allocator* to make payment of the taxed costs;

(iii) should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 7% per annum on the taxed or agreed costs from date of *allocator* to date of final payment.

(h) The plaintiff's costs shall include, but not be limited to and subject to the discretion of the Taxing Master:

(i) the costs incurred in obtaining payment of the amounts mentioned in paragraphs 72 (b),(c),(d) and (f) above;

(ii) the costs of senior counsel, including counsel's charges in respect of her day fee for 13 October 2021 and 3 November 2022, as well as reasonable preparation, drafting of heads of argument, and costs to obtain the offer to settle and making the draft order an order of Court;

(iii) all the costs to date of this order, which costs shall further include the cost of the attorney, preparation for trial and attendance at Court in person and/or online which shall also include all costs previously reserved (if any);

(iv) the costs of all medico-legal, addendum reports, actuarial calculations and updated calculations and the reconstruction expert report obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or to the knowledge of the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles, irrespective of the time elapsed between any reports by an expert. The experts are listed below:

Dr DA Ramagole (RAF4 Form)
 Dr AH van den Bout (Orthopaedic Surgeon)
 Dr G Marus (Neurosurgeon)
 Dr Pienaar (Plastic and Reconstructive Surgeon)
 Kobus Truter (Clinical Psychologist)
 Anneke Greeff (Occupational Therapist)
 HT Kraehmer (PC Diedericks Industrial Psychologist)
 Michelle Barnard (Actuary)
 Barry Grobbelaar (Accident Reconstruction Expert)

- (v) The reasonable and taxable preparation, qualifying and reservation fees in such amount as allowed by the Taxing Master, of Barry Grobbelaar and Ms HT Kraehmer; and the attendance to R38(2) affidavits of all the experts as mentioned above;
- (vi) the reasonable costs incurred by and on behalf of the plaintiff in, as well as the costs consequent to attending the medico-legal examinations by the plaintiff;
- (vii) the costs consequent to the plaintiff's trial bundles and witness bundles, including the costs of uploading same on Case Lines;
- (viii) the costs of holding all pre-trial conferences, judicial case management meetings, interlocutory applications and round table meetings between the legal representatives for both the plaintiff and the defendant, and online irrespective of the time elapsed between pre-trials;
- (ix) the costs of and consequent to compiling all minutes in respect of pre-trial conferences, the costs of preparing the plaintiff's heads of damages and practise notes including counsel's charges, if any;
- (x) the traveling, and relating costs of the plaintiff to attend trial and testify;
- (xi) the costs of making this draft order an Order of Court.

(i) The amounts referred to in the abovementioned paragraphs will be paid to the plaintiff's attorneys, Johan van de Vyver Attorneys, by direct transfer into their trust account, details of which are the following:

JOHAN VAN DE VYVER ATTORNEY

FIRST NATIONAL BANK

MENLYN MAINE

ACCOUNT NUMBER: [...]

BRANCH CODE: 252-445

REF:K Mortimer/js/H0359

(j) It is recorded that the plaintiff has concluded a valid contingency fees agreement.



T NICHOLS

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 1 December 2022.

HEARD ON:	3 November 2022
JUDGEMENT DATE:	1 December 2022
FOR THE PLAINTIFF:	Adv I Lingenfelder SC
INSTRUCTED BY:	Johan Van De Vyver Attorneys Ref: Karin Mortimer/js/H0359 Email: karin@vandevyver.co.za
FOR THE DEFENDANT:	Mr T Mukasi
INSTRUCTED BY:	The State Attorney, Pretoria Ref: RAFPP03288/2021/HOFFMAN CJ/Z12/Terrence Mukasi Claims No: 560/12617469/1084/0 Link No: 4307810 Email: terrencem@raf.co.za