

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

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

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

23 November 2023

DATE

A handwritten signature in black ink, appearing to read 'S. M. G. G.', written over a horizontal line.

SIGNATURE

CASE NR: 85576/2012

In the matter between:

**ADV CAWOOD N.O (as *curator ad litem*) obo
SIBUKOMFO WELLINGTON VAROYI**

PLAINTIFF

and

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 23 November 2023.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] The plaintiff, Adv Claire Cawood, instituted action proceedings in her representative capacity on behalf of Mr Sibukomfo Wellington Varoyi against the defendant. Mr Varoyi is an adult male.

[2] The defendant duly conceded the merits in writing and admitted 100% liability for the harm suffered by Mr Varoyi because of the accident, the details of which are provided below. All the other heads of damages claimed against the defendant became settled. I am required to only determine the amount of general damages suffered as a result of the collision that should be paid in this matter.

B BACKGROUND

[3] On 4 April 2015, Mr Varoyi was involved in a motor vehicle accident at or near 43 Road Benguela Cove, Hermanus. A collision occurred between a Ford Ranger vehicle driven by Mr GJ van Vuuren and a Mazda vehicle driven by Mr Matikinca. Both these drivers are insured drivers. Mr Varoyi was a passenger at the time of the accident in the Mazda vehicle. The collision was caused by the sole negligence of Mr van Vureen, or alternatively that of Mr Matikinca, or alternatively joint negligence of both these two drivers. After the accident, Mr Varoyi was admitted at hospital.

[4] Before the accident, Mr Varoyi was employed as an operator at a cement company. He loaded cement onto a conveyor belt to be loaded in the back of a truck. He could no longer perform this duty after the accident. He was accommodated by his employer as a cleaner and only worked for three days a week after the accident. At the time of the accident, Mr Varoyi was 63 years old. The *curator ad litem* furnished her report to this court. Among others, she reported to this court that unfortunately, Mr Vayora passed away as a result of natural causes on 12 June 2023.

C INJURIES SUSTAINED AND EXPERT EVIDENCE

i) Overview

[5] It is alleged that Mr Varoyi sustained a moderate to severe closed head injury which is complicated by slowly evolving subdural hematoma resulting in left hemiplegia and neurocognitive and psychological sequelae. Further, he suffered a closed fracture right tibia and fibula involving the lateral tibia

plateau and proximal metaphysis. He also suffered from anxiety as well as mood disorder and had a laceration on his left upper eyelid.

[6] It was also submitted that it appears that Mr Varoyi suffered a significant brain injury, apparently a chronic subdural bleed. He had symptoms of major depression episodes and post-traumatic stress disorder. It was noted, however, that the Hospital records are incomplete regarding Mr Varoyi's level of consciousness and CT brain scan findings.

[7] The plaintiff requested this court to accept the evidence of various experts as contained in their report with a view to not calling them to tender oral evidence in court. I accepted these reports to be adduced as evidence in terms of Rule 38(2). The defendant did not file any opposing expert evidence.

[8] The reports by the following experts were filed by the plaintiff:

[8.1] Dr K Le Fevre: Psychiatrist (report dated 9 November 2017)

[8.2] Dr J Reid: Neurologist (report dated 18 June 2018)

[8.3] Dr JS Sagor: Orthopaedic Surgeon (report dated 15 September 2017)

[8.4] Ms Renee de Wit: Clinical Psychologist (report dated 29 September 2017)

[8.5] Ms Marleen Joubert: Occupational Therapist (report dated 11 April 2012)

[8.6] Kotze and de Bruyn: Industrial Psychologists (report dated 20 August 2018)

[8.7] Munro Forensic Actuaries: Actuaries (report dated 15 August 2019)

[8.8] Munro Forensic Actuaries: Actuaries (report dated 7 July 2020)

ii) Psychiatrist's Report

[9] The Psychiatrist used the American Medical Association Guides 6th edition and the Narrative Test to evaluate the seriousness of Mr Varoyi's impairment/disability following the motor vehicle accident. She indicated that, at the time of assessment, Mr Varoyi had no memory of the accident. Further, he was often not rational due to his cognitive loss and stress. He experienced considerable mental and physical discomfort and there was little he could do to enjoy himself. He needed care and supervision. In this report, it was found that Mr Varoyi suffered orthopaedic injuries and neurocognitive loss as well as left-sided hemiplegia. It was also found further that he suffered from anxiety and mood disorder.

iii) Neurologist's Report

[10] In this report, Mr Varoyi's neurocognitive change, poor short-term memory, short attention span, and limited reading, writing, and spelling skills were observed. It was pointed out that Mr Varoyi probably suffered a moderately severe closed-head injury which is complicated by a slowly evolving subdural hematoma that required evacuation. It was further noted that the right fibula

fracture appeared to have healed. Further, Mr Vayori's injuries were severe and classified as serious. It was noted further in this report that Mr Vayori was for practical purposes unemployable in the open market given his age.

iv) Orthopaedic Surgeon's Report

[11] It is stated in this report that Mr Vayori initially lost various amenities of life due to the accident. He was also disabled and functionally impaired after developing the left hemiplegia. However, this was mostly reversed to the extent that he had regained some amenities of life. It was noted, however, that Mr Vayori remained impaired because of the sub-dural bleed he suffered. Most importantly, it was observed that it appears unlikely that Mr Vayori would fully recover from the effects of the sub-dural bleed he suffered.

v) Clinical Psychologist's Report

[12] It is recorded in this report that Mr Vayori performed very poorly in the verbal memory test, the test of attention and working memory as well as fine motor speed and dexterity test. This report indicates that Mr Vayori was unemployable in the open labour market and that his employment after the accident was sympathetic.

vi) Occupational Therapist's Report

[13] It is stated in this report that Mr Varoyi was unable to perform the work he performed before the accident due to walking difficulties. He was presented with difficulty working in dynamic mobility positions such as forward bend

standing and couching. He did not meet the demands of his pre-accident work. He would not be able to meet the frequent walking and standing demands or the manual handling demands, particularly lifting and carrying 50kg cement bags. This report confirms that Mr Vayori sustained a head injury in the accident. It was noted that Mr Vayori was forgetful to the extent that he could not find the toilet on the day of the assessment despite having visited it earlier. Further, Mr Varoyi was presented with physical limitations that limited him to sedentary work, with light work executed occasionally.

vii) Industrial Psychologist's Report

[14] It was observed in this report that significant scarring was visible on the right side of Mr Varoyi's forehead. This is related to the accident. Following, Mr Vayori was unable to resume his pre-accident employment owing to the injuries sustained in the accident. Since then Mr Vayori had difficulties following instructions at work. It was noted further that he was extremely forgetful and worked at a very slow pace. This witness is of the view that despite being sympathetically employed, Mr Varoyi's career prospects and associated likely earnings were truncated by the sequelae of the injuries sustained in the accident.

[15] Most of these experts recommended the appointment of a *curator ad litem*, which was accordingly done. Some of them recommended the appointment of a *curator bonis*. During the hearing of this matter, not much was said about that. It appears that the plaintiff is in favour of the creation of a trust in this

matter. It was argued that it would be ideal for a trust to be created for the benefit of all of Mr Varoyi's beneficiaries.

D APPLICABLE LEGAL PRINCIPLES

i) Liability to Pay General Damages

[16] In terms of section 17(1)(a) of the Road Accident Fund Act,¹ where the identity of the driver who caused the accident that led to the injured person claiming compensation from the defendant has been established, the defendant shall be liable to compensate the injured person for any loss or damage which that person suffered as a result of bodily injury caused by or arising from the driving of a motor vehicle by the identified insured driver within South Africa.

[17] For the defendant to attract liability, the injury suffered by the injured person must have occurred due to negligence or other wrongful act of the identified insured driver. The defendant's obligation to compensate the injured person for non-pecuniary loss shall be limited to compensation for a serious injury.²

[18] In terms of section 17(1A)(a) of the Road Accident Fund:

'Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party'.

[19] Such an assessment shall be carried out by a registered medical practitioner.³

In *Madonsela v Road Accident Fund Appeal Tribunal and Others*, it was correctly held that:

¹ 56 of 1995.

² Section 17(1)(a) of the Road Accident Fund Act.

³ Section 17(1A)(a) of the Road Accident Fund.

' [t]he consideration of a "serious injury" in terms of the Regulations, involves a two tier process. The injury is first assessed in terms of what is called the AMA Guides which determines whether the injury is of such a nature that it constitutes a Whole Person Impairment of at least 30%. If the injury does not qualify as serious under the AMA Guides, it may nonetheless be assessed as serious in terms of what is called the "narrative test" which assesses whether the injury resulted in a serious long-term impairment or loss of a body function or constitutes permanent serious disfigurement'.⁴

[20] In terms of Regulation 3(3)(c) of the Road Accident Fund Regulations, 2008, the defendant will only be liable to pay general damages to the injured person if such a person's claim is supported by a serious injury assessment report to the extent that the defendant is satisfied that the injury suffered by the injured person has been correctly assessed as serious in terms of at least one of the prescribed methods referred to above.⁵ Mr Varoyi's injury was recorded as serious by the medical practitioners who assessed him, as demonstrated above. The defendant also accepted that his injury was serious.

ii) Comparable Cases

[21] In *Mashigo v Road Accident Fund*, it was held that:

'A claim for general or non-patrimonial damages requires an assessment of the plaintiff's pain and suffering, disfigurement, permanent disability and loss of amenities of life and attaching a monetary value thereto. The exercise is, by its very nature; both difficult and discretionary with wide-ranging permutations. As will be illustrated hereinlater, it is very difficult if not impossible to find a case on all four with the one to be decided'.⁶

⁴ (97059/16) [2020] ZAGPPHC 448 (10 July 2020) para 18

⁵ *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* [2013] 1 All SA 543 (SCA); 2013 (6) SA 9 (SCA) para 8.

⁶ (2120/2014) [2018] ZAGPPHC 539 (13 June 2018).

[22] Counsel for the plaintiff referred me to several cases which I found extremely useful. The first case to which I was referred is *Van Rooyen N.O v The Road Accident Fund*.⁷ In this case, the plaintiff suffered a severe head injury that resulted in severe brain damage with permanent physical, cognitive, neuropsychological, and psychological consequences.⁸ The plaintiff was severely physically disabled resulting in cognitive and behavioural impairments such as poor attention, working memory, processing speed, verbal and visual memory, visual organisation executive functioning.⁹ The court awarded general damages in the amount of R 2 200 000.00.

[23] I was also referred to *Seme v Road Accident Fund*.¹⁰ In this case, the plaintiff suffered a severe head and brain injury; fractures of the maxilla with multiple loss of teeth; bilateral pulmonary contusion; fracture of the right tibia and fibula; compound fracture of the left knee; multiple scalp and facial lacerations; abrasions with extensive swelling around the right elbow; and abrasions to the left thigh.¹¹ An amount of R1000 000,00 with the current value of R 1 784 000, was awarded in respect of general damages.

[24] In *Dlamini v Road Accident Fund*,¹² the plaintiff had a severe brain injury with intracranial bleeding and multiple contusions; a comminuted fracture of the mandible; and facial injuries. The court held that '*[t]here is no doubt that the plaintiff sustained fatal and irreversible injuries as a result of the accident*'.¹³

⁷ (82697/2015) [2017] ZAGPPHC 1279 (8 December 2017).

⁸ *Ibid* para 12.1.

⁹ *Ibid* para 12.4. I was also referred to *Nel v RAF* 2017 (7E4) QOD 26 (GP) and *Zabbabi v RAF* 2006 (5B4) 231 (T).

¹⁰ (13917/04) [2008] ZAKZHC 47 (11 July 2008).

¹¹ *Ibid* para 10.

¹² (59188/13) [2015] ZAGPPHC 646 (3 September 2015).

¹³ *Ibid* para 21.

An amount of R1, 350 000 with the current value of R 2 008 971.57, was awarded in respect of general damages.

[25] In *M v Road Accident*,¹⁴ because of the collision, Plaintiff sustained severe bodily injuries consisting of severe head injuries characterized by period of loss of consciousness, period of post-traumatic amnesia, resultant brain damage, resultant neuro-cognitive deficits involving and impaired memory and concentration. An amount of R 1 900 000, 00 with the current value of R 2 414 000.00, was awarded in respect of general damages.

E EVALUATION

[26] General damages, despite the difficulty associated with their quantification, must be determined to place Mr Varoyi as far as it is reasonably possible in the position, he would have been in had the accident not occurred. The defendant conceded the merits and the parties reached a settlement with respect to the payment of all other heads of damages except general damages. The defendant has, nonetheless, admitted that Mr Varoyi's injuries are serious. This concession was justified considering the contents of the reports of the medical experts on which the plaintiff relied. The defendant did not submit any evidence to contradict the findings of the experts on whose reports the plaintiff relies.

[27] It is clear from these reports that Mr Varoyi suffered a significant closed head injury which is complicated by slow-evolving subdural hematoma resulting in left-sided hemiplegia and neurocognitive and psychological sequelae. There is also no reason to doubt that Mr Varoyi suffered a closed fracture right tibia

¹⁴ (12601/2017) [2018] ZAGPJHC 438 (18 June 2018).

and fibula involving the lateral tibia plateau and proximal metaphysis. The injuries that resulted from the accident also clearly led him to suffer anxiety and mood disorder.

[28] The injury that he sustained on the head has clearly affected his memory rendering him forgetful. The challenge with his memory has been identified by not only the experts but also his wife and supervisor at work. There is no indication that he was prone to forgetfulness before the accident. I also accept that after the accident he became short-tempered and experienced symptoms of post-traumatic stress disorder.

[29] I also accept the orthopaedic surgeon's findings that Mr Varoyi initially lost various amenities of life and was functionally impaired after developing the left hemiplegia. Further, while he had regained some amenities of life, he remained impaired due to the effects of the subdural bleed he suffered, from which it is unlikely that he could fully recover.

[30] It is also clear from the reports of some of the experts that Mr Varoyi could not perform the functions he used to perform at work before the accident. His workload and working days have been reduced. In fact, he was sympathetically employed by his employer post the accident. The orthopaedic surgeon opined that he should have ideally discontinued employment in view of his residual cognitive symptoms.

[31] The expert reports as well as the views of Mr Varoyi's wife and supervisor at work clearly indicate that he sustained fatal and irreversible injuries because of the accident. Given his age at the time of both the accident and his death,

Mr Varoyi's condition was never going to be restored to its original position. He was never going to be able to pick up 50kg cement bags again.

F CONCLUSION

[32] The plaintiff is of the view that an amount of R 2 000 000.00 would be a fair and reasonable award for general damages in these circumstances. Based on what has been stated above, I agree.

ORDER

[33] In the result, I make the following order:

1. The Defendant is ordered to pay to the Plaintiff the amount of **R 2 573 720.20 (Two Million Five Hundred and Seventy-Three Thousand Seven Hundred and Twenty Rand and Twenty Cents only)** ("the capital"), by way of a lump sum payment within 180 (one hundred and eighty) calendar days of service of the order, by way of electronic transfer to the trust account, details of which are set out hereunder ("the capital payment"):
 - 1.1 **R 573 720.20 (Five Hundred and Seventy-Three Thousand Seven Hundred and Twenty Rand and Twenty Cents)** in respect of past loss of income; and
 - 1.2 **R 2 000 000.00 (Two Million Rand)** in respect of general damages.
- 2 Payment of the aforesaid sum must be made directly to the Plaintiff's Attorneys of Record, ADENDORFF INC by direct transfer into their trust account with the following details:

ACCOUNT HOLDER : [...]

BANK : [...]

BRANCH CODE : [...]

ACCOUNT NUMBER : [...]

REFERENCE NUMBER : [...]

3. The Defendant shall pay the reasonable costs of the establishment of the Trust and any other reasonable costs that may be incur in the administration the Trust, including fees which shall be recoverable in full in terms of the Section 17(4)(a) Undertaking, and which may also include and be subject to the following:

- 3.1 The reasonable costs of the furnishing of security in obtaining an annual bond, if required by the Master of the High Court.

- 3.2 The costs incurred in administering the undertaking in terms of Section 17(4)(a).

4. The net proceeds of the amount referred to in paragraph 1 above, after the deduction of Plaintiff's attorney's attorney and client costs ("the capital amount"), shall be payable to the SIBUKOMFO WELLINGTON VAROYI TRUST.

5. The Defendant shall indemnify the Plaintiff against any claims by suppliers in respect hereof, in so far as suppliers' claims have been lodged.

6. The Defendant shall pay the Plaintiff's taxed or agreed High Court Scale party and party costs, subject to the discretion of the Taxing Master, inclusive of the costs related to any motions and applications and including for the sake of clarity, but not limited, to the costs of the Plaintiff's instructing attorneys, Adendorff Incorporated in Cape Town and the correspondent attorneys in Pretoria, Savage Jooste and Adams Inc, as well as the other costs set out hereunder;

6.1 The costs of the experts employed as per case lines, inclusive of reports, consultations, joint minutes, and confirmatory affidavits, being:

6.1.1 Dr Jason Sagor (Orthopaedic Surgeon).

6.1.2 Dr Johan Reid (Neurologist).

6.1.3 Dr Keir Le Fevre (Psychiatrist).

6.1.4 Ms Renee de Wit (Neuropsychologist).

6.1.5 Ms Marleen Joubert (Occupational Therapist).

6.1.6 Ms Karen Kotze (Industrial Psychologist).

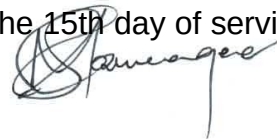
6.1.7 Messrs Munro Consulting (Actuaries).

6.2 The costs of Plaintiff's counsel, inclusive of preparation, day fees and Heads of Argument.

6.2.1 The costs of the *Curatrix ad Litem*, inclusive of day fees.

6.2.2 The application costs of appointing the *Curatrix ad Litem*.

7. The capital is to be paid within 180 days of service of this order, but interest shall accrue at the prescribed interest rate, from the 15th day of service of this order.



8. Costs are to be paid within 14 days of settlement or taxation, failing which interest shall accrue at the prescribed interest rate.

9. The above costs shall be paid into the Plaintiff's attorney's trust account as mentioned in paragraph 3 above.

10. The Plaintiff entered into a contingency fee agreement that complies with the Act.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

COUNSEL FOR THE PLAINTIFF:

ADV ISMA DELPORT

INSTRUCTED BY:

ADENDORFF ATTORNEYS INC

ATTORNEY FOR THE DEFENDANT: Ms B S KGOEBANE

INSTRUCTED BY: STATE ATTORNEY

DATE OF THE HEARING: 09 NOVEMBER 2023

DATE OF JUDGMENT: 23 NOVEMBER 2023