

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

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



(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED **NO**
DATE: 31 May 2023

CASE NUMBER: 22307/20

SIGNATURE:

DATE

SIGNATURE

In the matter between:

H K M

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

**KHWINANA AJ
INTRODUCTION**

- [1] The plaintiff, Mr H K M instituted action proceedings in his personal capacity against the defendant for damages in terms of the Road Accident Fund Act 56 of 1996, pursuant to a motor vehicle collision.
- [2] The plaintiff issued summons for Past hospital and medical expenses of R 56000.00, Future medical Expenses of R 200 000.00, Past loss of earnings of R 143 700.00, Future loss of earnings of R 4 657 000.00, and general damages of R 3 589 000. 00 which were served on the defendant. The defendant entered an appearance to defend and pleaded to the plaintiff's particulars of claim.
- [3] The plaintiff brought an application to compel the defendant and to strike out their defence. The court ordered that within fifteen days the defendant comply as per the request failing which the defence will be struck out and proceeded with by default. The matter was certified trial ready to proceed on the 28th of February 2023.
- [4] The matter is before me for both merits and quantum.

BACKGROUND

- [5] The Plaintiff is **H K M**, an adult male person born [...] residing at [...] Zone [...] M[...] Street Ga-Rankuwa, Gauteng Province.

- [6] The defendant is the Road Accident Fund, a schedule 3A public entity, established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996, with its service office situated at 38 Ida Street, Menlo Park, Pretoria, Gauteng Province.
- [7] The Plaintiff avers that on this the 26th day of July 2019 he was traveling along Brits road to Mothutlung in a motor vehicle with registration numbers and letters [...]. The plaintiff was a driver of a motor vehicle with registration numbers and letters [...] when he was involved in a motor vehicle accident with an unidentified vehicle, there and then driven by an insured driver.
- [8] He says the said insured driver of the unidentified motor vehicle drove into his lane of travel as he was approaching a curve. He tried to avoid a head-on collision by swerving to the right-hand side. He says his motor vehicle went off the road and hit a rock.
- [9] He says the insured driver was the sole cause of the accident in that he failed to keep a proper lookout, he travelled at an excessive speed in the circumstances, he failed to apply the brakes of the said motor vehicle timeously, adequately or at all, he failed to apply the brakes of the motor vehicle, adequately or at all, he failed to reduce speed when ought to and ought to and could have done so and he drove without consideration for the safety of other users, namely plaintiff.

LEGAL MATRIX

[10] The party who bears the onus of proof can only discharge it if he has adduced enough credible evidence to support the case of the party on whom the onus rests. "In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true."¹

[11] "Liability generally depends on the wrongfulness of the act or omission relied on by the plaintiff. Wrongfulness, in these cases, is inferred from the fact that the third party negligently caused the accident. The statutory nature of the liability is such that the RAF insures the third party "*for any loss or damage which the third party has suffered as a result of any bodily injury to himself ... if the injury ... is due to the negligence or other wrongful act of ... the insured driver*". Thus, once negligence of the third-party driver is proved, wrongfulness is generally assumed."²

[12] The evidence of the plaintiff has not been controverted. It is trite that the court will not just accept the evidence because the defendant did not show but will apply its mind to the facts as presented. It is evident that the accident took place. I have evenly balanced the probabilities and they favour the plaintiff's case more than they do the defendant. I have no reason to doubt the plaintiff's version. I am therefore satisfied with his evidence, and it is so that the defendant has no version. I therefore conclude for the reasons above that the insured driver was 100% negligent and the plaintiff must be compensated for his proven and determined damages.

INJURIES AND SEQUELAE:

[13] Counsel for the plaintiff brought an application in terms of Rule 38 (2) to use the medico-legal report, which application I granted.

DR PETER T. KUMBIRAI

ORTHORPAEDIC SURGEON

¹ National Employer's General Insurance v Jagers 1984 (4) SA 437 (E) at 440 D - G

² MS vs RAF

[14] According to the Netcare Milpark Hospital information the plaintiff sustained C3/C4 dislocation with quadriplegia. The plaintiff was evacuated to Brits Mediclinic and subsequently transferred to Netcare Milpark Hospital. He received treatment as follows:

- *Clinical and radiological examination

- * Anterior cervical decompression and interbody fusion

- * Pain and anti-sepsis management

- * Physiotherapy and rehabilitation

- * The claimant developed lung collapse which required bronchoscopy, tracheostomy, and ventilation for 3 weeks-opinion deferred to a pulmonologist.

- * Rehabilitation and physiotherapy.

[15] The plaintiff complains of total urinary incontinence using a catheter opinion deferred to a Urologist 30% WPI class 4. The mobility problems were deferred to an Orthotist 40% WPI. The plaintiff has no erections 12% WPI which fact was recommended to the Urologist, Clinical Psychologist, and Sexologist. The plaintiff has poor self-esteem due to dependency on other people. It was recommended that the plaintiff be seen by an Occupational Therapist to assess the needs in performing his activities of daily living.

- [16] The plaintiff suffered severe acute pain for about 4 weeks which subsided over the next 6 weeks. He continues to suffer the inconvenience and discomfort of quadriplegia no erections, no mobility, and total faecal and urinary incontinence. The plaintiff is quadriplegia with C5 neurologic level. He has increased risks for urinary tract infections, amyloid disease, kidney stones, and pyelonephritis (which can be fatal). The plaintiff's loss of sensation inactivity has made him prone to pressure sores which predispose to osteomyelitis of the underlying bone. The plaintiff's inactivity has got a higher incidence of disease osteoporosis, leading to pathological fractures.
- [17] The plaintiff is unable to engage in full sexual activities due to sexual dysfunction which led to relationship discord or breakdown. The plaintiff is prone to deep vein thrombosis and venous thrombo-embolic events which can be fatal. He cannot do any work which needs to use both upper and lower limbs. He will always not be able to compete fairly for a job in an open labour market. He deferred the matter to the Occupational Therapist/ Industrial Psychologist. He opines that WPI is 83 calculated as $(50 + 40 + 30 + 12 + 4)$.
- [18] The plaintiff's injuries will adversely influence the outcome of the insurance application. He opines that life expectancy would be shortened by 10 (ten) years in his present environment. The claimant will need to consult various medical practitioners intermittently including general practitioners, orthopaedic surgeons, and physiotherapists. He will have to purchase prescription analgesics and

non-steroidal anti-inflammatory drugs periodically for pain management. The doctor opines that future expenses are estimated at R 10 000.00 per annum as they will be required for a prolonged period of time probably the rest of his life.

[19] The claimant will need a midrange functional non-motorized wheelchair daily, the costs thereof estimated at R 6000.00. The doctor opines that the wheelchair will last for an average period of four years depending on the usage conditions. It will require servicing and the costs thereof are estimated at R 3000.00 yearly. The plaintiff will need Silicone Foleys catheters, urinary bags, and accessories. The estimated costs thereof are R 25 000.00 yearly. He will further need diapers, and stool softeners the costs are estimated at R 20 000.00 per annum. The plaintiff was on sick leave during the consultation getting 75% of his salary. He is no longer able to play soccer due to his medical condition. The doctor opines that the plaintiff's injuries resulted in serious long-term impairment/loss of body function and permanent serious disfigurement due to quadriplegia.

DR TSHEPO P. MOJA

SPECIALIST NEUROSURGEON

[20] As a result of this collision, Plaintiff sustained the following injuries that are neck fracture C3/C4, and paralysis of both arms and legs. The plaintiff was hospitalised at Brits Mediclinic Hospital. According to the hospital records he was hospitalised on 26th July 2019 at 04h00. His Glasgow Coma was recorded as 14/15. He was sedated,

hypnomidate, esmeron, intubated, and mechanically ventilated. He was airlifted to Milpark Hospital at 10h00 where he was admitted into the intensive care unit.

[21] He had a neck operation, anterior cervical decompression, fusion, and tracheostomy. On the 06th September 2019 he was transferred to Netcare Rehabilitation hospital. The diagnosis concluded that he was quadriplegia.

[22] His complains are headaches, memory loss, chronic neck pain, easily forgets recent information and conversation. He has paralysis on both arms and legs and urinary and faecal incontinence. He is unable to perform basic activities of living. He is being bath by his partner, he is unable to stand or walk. He is wheelchair ridden. He is unable to control his bladder. He has a suprapubic urinary catheter. He is able to have an erection but cannot ejaculate. He wears diapers.

[23] He has a small 5cm scar on the anterior aspect of his neck and a tracheostomy 6cm scar on his left shoulder and he also has a small scar on the back of his head. He has spasticity in both upper and lower limbs being slight movements in his shoulder and lower legs. He is unable to grasp objects with his hands. He has brisk tendon reflexes. He has no nystagmus. He has a limited range of motion in the cervical spine.

DR VILJOEN
CLINICAL PSYCHOLOGICAL AND SEXOLOGIST

[24] He opines that the plaintiff suffers detrimental effects after the accident. He will need a selective serotonin re-uptake inhibitor (SSRI). He needs treatment by a Psychiatrist on a regular basis for two years in order to facilitate the PTSD. He estimates costs at R 25000.00. He says the amount excludes medication. He opines the plaintiff will benefit from Pscho-Sexological therapy by a medical sexual health expert or sexologist on regular basis for two years costs being R 40 000.00, meds PDE-5 pharmacotherapy in form of tablets or intra-cavernosal injections with papaverine and R150.00 one injection. He will need two injections per month for the duration of his natural life. He will need 10 sessions to educate him on how his body can physically compensate for his sexual losses. He will need followed-up for a period of 24 months with 12 clinical and counselling sessions. The total amount for being plus minus R 18 000.00. The costs of Vacu-rect erection pump is R 25000.00 which the plaintiff will need to facilitate arousal disorder.

DR MOSELANE

UROLOGIST

[25] He opines that life expectancy will be shortened based on the following Risk of recurrent urinary tract infection, which can lead to septicaemia, renal dysfunction, due to poor bladder management, deep vein thrombosis, which can lead to pulmonary embolism, and bed sores due to lack of positional changes.

INDUSTRIAL PSYCHOLOGIST

RUWA Y. NTULI

[26] He opines that in theory, the plaintiff might still be employable in a highly accommodative and sheltered employment situation. However, in practice, his chances to secure employment in an open market and retain the job seem close to zero. He says his medical, functional, and psychological prognosis is probably beyond any prospective employer's understanding and therefore unrealistic. He says his capacity to compete for positions in the unskilled /low semiskilled jobs often demanding in open competitive labour market has been curtailed. He opines that the plaintiff has been rendered functionally unemployable with a total loss of future earnings until the end of his work life at 65 years of age. The accident has negatively impacted his entire life in terms of career and likelihood for earnings. He should be compensated adequately for what seems to be a career that has been disadvantaged due to accident limitations.

ACTURIAL REPORT

MUNRO FORENSIC ACTUARIES

[27] The plaintiff was unable to return to work and the employer terminated his employment in March 2020. His salary was reduced until March 2020. He opines that he will remain unemployed in the future, benefiting from the disability insurance he is currently receiving. The capital value of loss of earnings

	Uninjured Earnings	Injured Earnings	Loss of Earnings
PAST	R 1 076 000	471 300	604 700
FUTURE	R 6 858 500	1 929 400	4 929 100
TOTAL LOSS OF EARNINGS 5 533 800			

THE LAW

[28] It is trite that the question that follows is whether the injuries and the sequelae sustained is as a result of the accident.(sine qua non). The causation principle as discussed in *Lee v Minister of Correctional Services* (per Nkabinde J for the majority) recognised that the ‘but for’ (or *sine qua non*) test as stated in *International Shipping Co (Pty) Ltd v Bentley* was the most frequently employed theory of causation but found that it was not always satisfactory when determining whether a specific omission caused a certain consequence. In finding that there was a need for flexibility in the causation assessment she had the following to say:

“Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case”³.

[29] It is trite that in cases of claims for personal injury, the plaintiff must show that the injuries were sustained in the accident and that these injuries have had certain effects on the person of the claimant. Once these effects are established, the court can move to determine how such effects translate into loss. The assessment as to quantum does not require proof of facts. Instead it is based on an acceptance of the facts proved in the causation inquiry.⁴

[30] In casu it is evident that the plaintiff sustained injuries pursuant to a motor collision. The injuries sustained according to the medical practitioners are consistent with the sequelae of a motor collision. I am inclined to agree with

³ Ibid

⁴ Ibid

counsel for the plaintiff that the onus has been discharged and the plaintiff must be compensated for the injuries sustained at 100% by the defendant.

[31] It is trite law that the defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 OF 1996⁵, in respect of future accommodation of the plaintiff in a hospital or nursing home or treatment of or treatment of or the rendering of a service or supplying of goods to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of injuries sustained in the collision which occurred on the 26th day of July 2019.

[32] In ***Rudman v Road Accident Fund 2003 (2) SA 234 (SCA)*** a para [11], the Court said:

“There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.”

In casu it is evident that the plaintiff will not be able to compete in an open market. The industrial psychologist and the actuary are ad idem that he is unemployable. The calculations for the loss of past earnings claimed on the summons differ from the amount that has been quoted by Munro Forensic Actuaries. I do not know the reason for the difference, and I cannot, therefore, consider the amount that has not been claimed. This is despite that the plaintiff's attorney has filed amended particulars of claim.

⁵ Road Accident Fund

- [33] In the matter of *Sibanda v RAF*⁶ the plaintiff suffered a fracture of C6 and C7 vertebrae and was rendered quadriplegia. He also suffered a mild brain injury. An anterior craniotomy and decompression were done and a fusion was performed. He spent three months in hospital. He has headaches, can't use his upper limbs and his hands are non-functional. He cannot help himself out of a wheelchair as his wrist is poor. He has to be bed washed. He is at risk of bladder infection, he uses diapers, he is permanently on a catheter and he is unable to work. He was compensated R 2 800 000.00 for general damages which the current value is R 3 175 200.00.
- [34] In the matter of *Morake v RAF*⁷ the injuries and sequelae were almost similar to the *Sibanda* matter except in this matter there was contusion of right hand and lungs, degloving of injuries over occipital skull and the loss of right front teeth. He stayed for eight months in hospital. He was rendered unemployable. He was awarded R 2 500 000.00 which the current value is R 3 085 000.00 for general damages.
- [35] I am inclined to agree with counsel for the plaintiff that the matter of *Sibanda v RAF* is the most relevant. I have taken into account the calculation presented and the medico-legal reports submitted herein. The WPI of the plaintiff is 83%. The plaintiff suffered C3 and C4 fractures, quadriplegia, spent two months in hospital, uses diapers, is susceptible to urinary infections, suffered a mild brain injury, relies on help from family, has no erection and is unemployable. His life expectancy has been reduced. The accident has negatively affected his career.

⁶ 2019 (7A2) QOD 13 (GP)

⁷ 2017 ZAGPPHC 761

[36] In **SOUTHERN INSURANCE ASSOCIATION LIMITED V BAILEY N.O. 1984(1) at 99H** the following was stated:

*“The AD has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached. The accepted approach is the flexible one described in Sandler v Wholesale Coal Suppliers Ltd **1941 AD 194** AT 199, namely: “The amount to be awarded as a compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending upon the Judge’s view of what is fair in all the circumstances of the case”.*

[37] Nicholas AJ said

“Where the method of actuarial computation is adopted in assessing damages for the loss of earning capacity, it does not mean that the trial Judge is “tied” down by inexorable actuarial calculations”. He has a large discretion to award what he considers right. The amount of any discount may vary, depending upon the circumstances of the case”

[38] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than accepting them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[39] There are no hard and fast rules in so far as contingencies are concerned. Koch in The Quantum Yearbook (2011) at

104 said:

“General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies.”⁸

[40] Counsel submits that 15% pre-morbid contingency and 25% post-morbid is suggested. He bases this on Dr Moja's report that says WPI is 83% whereas DR Moselane says 95%. The plaintiff is functionally unemployable, the possibility of employment is zero, inability to work in pre-accident and will not survive to see his 60th birthday.

[41] I have considered the evidence presented before me and I have considered the caselaw. I am inclined to agree with counsel that the plaintiff must be compensated accordingly. I, therefore, order as follows:

- a. Section 17(4) undertaking
- b. Past loss of earnings of R 143 700.00,
- c. Future loss of earnings of R 4 657 000.00,
- d. General damages of R 3 200 000. 00 and Costs.

[42] I have considered the draft order and have amended it and marked it X.

⁸ Gwaxula v Road Accident Fund (09/41896) [2013] ZAGPJHC 240 (25 September 2013)

ENB KHWINANA
ACTING JUDGE OF NORTH
GAUTENG HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Plaintiff : **Adv. C. Mosala**

Instructed by : Mothate Attorneys

Counsel for Defendant : None

Date of Hearing : 02 March 2023

Date of Judgment : 31 May 2023