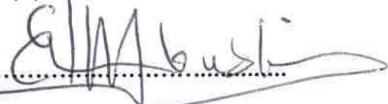




IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

Case Number: 4541/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	DATE: 28 FEBRUARY 2024

**SELLO THABANG MOREBA**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

***Delivered:*** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 28 February 2024.

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**JUDGMENT**

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**KUBUSHI, J**

## *Introduction*

[1] This matter was set down for hearing on the Civil Trial Roll of 6 February 2024. Both parties were represented. The matter turned on a claim for damages sustained by the Plaintiff consequent upon injuries sustained in a motor vehicle accident. The merits had previously been conceded 100% by the Defendant. On 6 February 2024, the matter proceeded on the quantum aspect of two heads of damages, namely, Loss of Earnings or Earning Capacity and General Damages.

[2] The Plaintiff had filed an application in terms of Rule 38(2) intending to argue on the basis of the experts' reports and their respective evidence affidavits filed off record. The Defendant had filed no experts' reports, thus, the Plaintiff's evidence in that regard was uncontested. It was argued on behalf of the Defendant that the Plaintiff's evidence was uncontested in terms of the evidence itself but not necessarily in terms of the quantification of the damages, which remained a matter of submission, argument and the discretion of the Court.

[3] Counsel for the Defendant informed the Court that he was appearing without formal instructions from his client, the Defendant. He, however, appeared having had informal discussion with an officer from his client's office, who gave him an indication of the mandate or the Defendant's assessment of the matter. He, however, did not have a value that he could convey to the Court or his opponent regarding the Defendant's assessment of the claim. His contention was that, as an officer of the Court, he was obliged to consider the evidence and make submissions even though he was to do so without an umbrella of a mandate from his client. Having conceded that he does not have instructions on the Rule 38(2) application, he, in the same breath agreed that the matter can proceed on the papers as applied for by his opponent, hence no objection to the Rule 38(2) application, was made. The application was, as a result, granted.

[4] After having heard Counsel for the parties, in respect of argument and submissions made for the resolution of quantum, judgment was reserved and Counsel were requested to provide brief heads of argument and case authority on the issue that arose during argument, as to whether disability grants, received by the Plaintiff, arising from injuries sustained in the collision, are deductible. The



heads of argument were promptly furnished by the respective Counsel. Thanks to both Counsel for the detailed heads of argument and for having gone an extra mile to research on the authorities applicable, though it was on such a short space of time.

*Injuries and Sequelae suffered by the Plaintiff*

[5] Before the two heads of damages are discussed, it is prudent that the injuries sustained by the Plaintiff be set out in detail in order to give substance to the value of the quantum sought by the Plaintiff. From the reports submitted by the Plaintiff's experts the injuries are serious and can be seen mainly in terms of a head injury and the spinal cord injury. The injuries were sustained on 13 September 2016, when the bakkie without a canopy, on which the Plaintiff was travelling, as one of the four rear passengers, was involved in a collision. He was 22 years old at the time of the accident, and is presently aged 30.

[6] The Plaintiff relies on the evidence of the following experts in order to prove his damages, namely, the neurosurgeon, the neurologist, two orthopaedic surgeons, a urologist, a clinical psychologist, an occupational therapist, an industrial psychologist and an actuary. The reports of these experts, which set out the injuries and resultant sequelae, and upon which reliance is placed in this judgment, are succinctly summarised in the Plaintiff's heads of argument as follows:

[7] Dr Ngqandu, a specialist neurosurgeon, assessed the Plaintiff on two occasions, on 23 November 2020, and then again on 8 November 2023. He provided two reports, the first report dated 9 February 2021, and the addendum report dated 6 December 2023. In the addendum report he states that the content of his original report remains the same. In his report, Dr Ngqandu describes the Plaintiff's accident-related injuries as a moderate traumatic brain injury (managed), intracranial haemorrhage (managed), a C5 vertebral body fracture (managed surgically); paraplegia (managed with rehabilitation and partially improved), scalp lacerations (cleaned, sutured and dressed), abrasions of the face and knees (cleaned and dressed), a laceration on the right ear pinna (sutured); and epistaxis [nasal bleeding] (managed conservatively). Dr Ngqandu

concluded that the Plaintiff sustained a moderate traumatic brain injury, and isolated episodes of seizures. He describes the Plaintiff's physical impairment as being limited movement of the shoulders and lower limbs, disfiguring scars, some of which are prominent, poor balance and a hemiplegic (paralysis affecting only one side of the body) gait and deterioration of vision.

[8] Dr Mokgomme, the neurologist, interviewed the Plaintiff on 24 August 2022, the date of his report. According to Dr Mokgomme, the wound of the Plaintiff's right earlobe was degloving with cartilage exposed. He also reported present complaints, *inter alia*, of frontally located headaches occurring almost daily, difficulty using the left hand due to weakness, difficulty walking due to stiffness, seizures on an average about three to four episodes *per* month (according to the mother as a collateral), and anger problems. The general examination revealed a deformity in the form of a clawing of the left hand, and the finger-nose test for coordination proved difficult to assess due to spasticity and weakness on the left, as well as, a heel-shin test due to spasticity. He revealed a spastic gait and was unable to walk tandem. He also had a reduced range of motion of the neck.

[9] Dr Modisane, the orthopaedic surgeon, assessed the Plaintiff on 23 November 2020 and his report is dated 29 January 2021. He diagnosed the fusion of the cervical spine, and quadriparesis.

[10] Dr Bila, the orthopaedic surgeon, assessed the Plaintiff on 9 November 2023 and his report is dated 7 December 2023. According to him, the Plaintiff suffered a head injury with left hemiplegia, and a C-spine fracture, for which surgery was performed. He reports that the Plaintiff complains of poor bladder control, an awkward gait, he cannot use his left side, constipation and epilepsy. Dr Bila also performed a physical examination, and found that the Plaintiff walks with a hemiplegic gait on the left side, and observed the scars on his forehead, head and neck. In Dr Bila's opinion, the issue of bladder control and constipation could be attributed to the spinal cord damage, and that the injuries are compatible with the mechanism of the injuries described. Regarding the Plaintiff's pain



experience, he opines that the Plaintiff has never been pain free since the accident.

[11] The Plaintiff was assessed by the urologist, Dr Qubu, on 15 February 2021 and reassessed on 9 November 2023. His reports are dated 17 March 2021 and 10 December 2023. According to Dr Qubu, the Plaintiff complained of lower urinary tract symptoms ("LUTS"), in that he is unable to feel his bladder and sometimes he wets himself (overflow incontinence). He has difficulty passing urine, has a weak stream, a feeling of incomplete voiding, and experiences an increased frequency to urinate. He has nocturnal incontinence - on the international prostate symptom score, his low score of 24/35, is an indication of severe symptoms. He was fitted with an indwelling urinary catheter for approximately six months. The catheter was extremely uncomfortable and painful, and had to be removed. At the assessments the Plaintiff complained of a blurry vision, headaches, neck pain, lower back pain, spasms of the lower limbs, dizziness, drowsiness with fainting spells and a weak left side of the body that is not working. During both assessments the Plaintiff complained of a neurogenic bladder with severe storage and voiding LUTS with associated day time and night time incontinence, a neurogenic bowel with constipation, a neurogenic sexual dysfunction and a retrograde ejaculation which will eventually affect fertility. He has reached maximum medical improvement ("MMI").

[12] The clinical psychologist, Ms Itumeleng Faku ("Ms Faku"), assessed the Plaintiff on 29 July 2021 and her first report is undated, but the follow-up report is dated 8 November 2023. Ms Faku performed a range of neuropsychological tests which cater for a wide spectrum of cognitive functions. It was found that the Plaintiff demonstrated significant difficulties with his ability to mentally track, process, and scan information, meaning that his attention and concentration skills were negatively impacted. He was also observed to have mental fatigue, and at times irritable on noticing the extreme change in things that he would previously have managed. Ms Faku concluded that the Plaintiff demonstrated poor attention, mental tracking, visual surge, as well as sequencing and mental flexibility. He has difficulties with short- and long-term memory of visual and auditory stimuli. He has significant mood indicators or internal conflicts. He also

has anxiety-related symptoms. According to Ms Faku, the Plaintiff's primary difficulties are that of his physical and psychological traumas, that is consistent with the opinion of the neurosurgeon that the Plaintiff sustained a moderate traumatic brain injury.

[13] The Plaintiff was, furthermore, assessed by Ms Thandiwe Motsepe ("Ms Motsepe"), the occupational therapist, on two occasions, and the reports are dated November 2020 and 9 December 2023. The reports contain full descriptions of all the testing and descriptions of the Plaintiff's impairments. The reports set out a brief summary of the Plaintiff's functional deficits and his serious mobility impairment, as quadriparesis (muscle weakness in all four limbs), following both upper and lower motor neuron injuries. Ms Motsepe found that although Dr Bila reported that the Plaintiff presents with left hemiparesis, his right lower limb remains affected as he presents with right adductor spasticity which causes the right limb to scissor when walking as he drags the left lower limb. She opines that the muscle atrophy in the left arm and the use of the tenodesis action to gain movement, and the neurogenic bladder and poor bowel control are typical of spinal-, and not brain injury. The Plaintiff complained of sharp and recurrent headaches, almost on a daily basis, and associated epistaxis, triggered by the headaches. According to Ms Motsepe, the scaled scores indicate that the Plaintiff is within the non-rehabilitative level of performance, and confirm that his condition is deteriorating and not improving.

[14] The report, also, noted that on initial admission to hospital, the Plaintiff was unable to move both lower limbs with zero power, and he was diagnosed with paraplegia. The power improved in his lower limbs, but his left lower limb remains weaker than the right limb. Muscle strength of his left lower limb remains weak and severely compromised by the severe muscle spasms, increased extensor muscle tone, and tremors. He has poor hip knee joint movement, and has a drop foot and mainly steps on the ball of his toes (plantar flexion contracture with the left ankle fixed in plantar flexion). There is also muscle atrophy in the left hand, and his upper limb movement continues to show mixed patterns of the brain- and neck injury. He is reliant on his mother with daily household activities. Regarding his mobility, the Plaintiff still holds on to surfaces when sitting on a chair with no



support; he still walks with support and uses one crutch, and he still walks with a severe limp even when using a crutch as he walks with a scissoring gait pattern. His very weak left lower limb is also severely compromised by muscle spasms which affect his gait when walking. The limb is rigid and lacks actively controlled motor patterns. He basically drags the limb when walking

[15] Ms Caro Cilliers, the industrial psychologist, assessed the Plaintiff on 23 November 2020, and her reports are dated 23 May 2022 and 9 January 2024. She also consulted with the Plaintiff's previous employer, Mr Lucas Jordaan ("Mr Jordaan"), owner of Extreme Fencing, who was the Plaintiff's employer at the time of the accident. During the assessment she observed how the Plaintiff battled to stand up from his seat in the consultation and waiting rooms, and that he walked very slowly.

#### *General damages*

[16] The Plaintiff has undoubtedly, sustained serious injuries. The Defendant has, as well, accepted the seriousness of the Plaintiff's injuries. The Whole Person Impairment ("WPI") is estimated in the region of 60% by the experts. Dr Bila calculated the combined WPI as 46%. The calculated WPI for urological impairment comes to 28%. That should be with WPI calculations for the other impairments in order to arrive at the final WPI. Dr Modisane calculated the WPI at 64%. This can be compared to the WPI calculated by Dr Ngqandu of 32% purely from a neurosurgical point of view, and Dr Mokgomme of 65% as a combined calculation.

[17] This estimated WPI of 60% can readily be gleaned from the original report of Dr Ngqandu where he reported on the history of the accident, the injuries and the notes by Casualty and the neurosurgeon, which reporting can be summarised as follows: immediately after the accident the Plaintiff could not move his lower limbs, and was fitted with a neck collar. He was then transferred to the hospital where he remained admitted for about a month, during that period he underwent a Posterior Spinal Fusion, performed on 19 September 2016. Following his discharge from hospital after one month, he was transferred to the Rehabilitation Centre where he received treatment for approximately three months. At that stage

he could still not move his lower limbs and still had some weakness of the right upper limb. On discharge from the Rehabilitation Centre, the Plaintiff had a catheter *in situ*, and he was using two crutches to mobilise. He then received treatment at the Voortrekker Hospital in the form of physiotherapy sessions for over a year. He used two crutches for more than a year and is currently using one crutch. He was admitted to the Voortrekker Hospital on several occasions for urethral infections and blackouts. Although the urinary catheter was removed after three months, the Plaintiff received catheter insertions from time to time at the hospital, due to his ongoing urinary incontinence. Since the accident, the Plaintiff continued experiencing daily severe headaches, improved by ongoing oral analgesia. He experiences persisting headaches approximately three times *per week*, and reports initial dizziness and sometimes blackouts.

[18] Dr Ngqandu opined further that the notes of the neurosurgeon indicate that he had no power in both lower limbs with no sensation from level T4, and no anal tone. The CT scan of the cervical spine revealed a C5 vertebral body fracture with compression into C6, and the CT scan of the brain revealed a subgaleal hematoma on the left and intracranial haemorrhage. After approximately five years the notes from Voortrekker Hospital indicated that the Plaintiff has a history of an ability to walk, and reduced power of the lower limbs. He was assessed as having neuropathy and paresis, and in or about April 2019 the power of his lower limbs improved to 2/5 on the right, but remained at 1/5 on the left; and the Plaintiff's mother reported that he has experienced several episodes of generalised seizures about three times a month, with postictal disorientation.

[19] Regarding the Plaintiff's neuropsychological deficits, Dr Ngqandu describes it as follows: the Plaintiff experience post-concussion headaches which have remained constant in all aspects over the years since the accident. He still experiences moderate and frequent headaches, controlled with constant use of analgesia. The headaches have reached stability, and the Plaintiff is, therefore, unlikely to improve, but will most probably remain the same in regard to his headaches. He was negatively affected in regard to his memory, his personality and mood, his libido (in the form of impotence); and he is still experiencing pain. In his addendum report Dr Ngqandu added that the Plaintiff still finds it difficult to



mobilise, that he has a hemiplegic gait with a dropped foot on the left, and that he has left-sided imbalance. He also reported that the scars remain the same; prominent and disfiguring, and that the Plaintiff has developed a pressure sore on the occipital part of the head. He, also, points out that the Plaintiff has not been employed since the accident.

[20] The sequelae of the injuries sustained, are described in Dr Mokgomme's report as a cervical myelopathy – weakness, spastic tone, urinary incontinence, and constipation, C4 sensory level. The symptoms lead to difficulty with walking and with using the left upper limb. Post-traumatic headaches which he described as episodic, occurring almost every day, no aura, frontally located, aggravating factors unknown, relieved little by disprin, has photophobia and it is throbbing in character. Graded 9/10 at its peak. Post-traumatic epilepsy in the form of seizures which are generalised tonic clonic, no aura, associated with foaming and urinary incontinence, with postictal confusion and sometimes postictal psychosis. This occurs about three to four times per month on average.

[21] On reassessment, Dr Qubu found the LUTS symptoms to be the same as with the first assessment, except that the Plaintiff does not suffer with increased frequency to pass urine during the day like before, which is a slight improvement. According to Dr Qubu, patients with spinal injury and a neurogenic bladder are prone to develop recurrent urinary tract infections and eventually the upper tract will deteriorate and cause renal failure. The Plaintiff has severe LUTS, both storage and voiding, and probably has an upper motor neuron neurogenic bladder, characterised by detrusor- sphincter dyssynergia. Dr Qubu is of the view that there is a high risk for bladder stones due to the indwelling catheter; and for kidney and ureteric stone. He also has a high risk of urinary tract infection, including resistant infections

### Quantum

[22] On the basis of the undisputed evidence tendered, the Plaintiff argues for compensation in the amount of R2 500 000, which his Counsel contended was fair and reasonable under the circumstances of this matter. To reinforce his

argument in favour of the award as contended for, Counsel referred to a number of judgments with similar injuries to those suffered by the Plaintiff. Some of the judgments involves the sequelae relating to the brain injury others relate to the sequelae of the spinal cord injury. In particular, the Plaintiff's Counsel relied in two main judgments, namely *Adv M Van Rooyen NO v Road Accident Fund* ("*Van Rooyen*"),<sup>1</sup> and *M v Road Accident Fund* ("*M*").<sup>2</sup>

[23] In *Van Rooyen*, the plaintiff was a young male farmer who sustained a severe brain injury and left hemiplegia. He was awarded general damages in the sum of R2 200 000. If updated this award would amount to a sum of approximately R2 934 201, as at November 2023.

[24] In the matter of *M*, the plaintiff suffered a severe head injury with resultant brain damage and neurocognitive deficits involving impaired memory and concentration, consistent headaches, and deficits involving a changing of personality, aggressive behaviour, short temperedness, and irritability. The plaintiff also has partial paralysis on the right side, and a probability of epilepsy in future was anticipated. Plaintiff was awarded an amount of R1 900 000 for general damages, which is worth approximately R2 450 000 if updated for inflation, as at November 2023.

[25] To the contrary, the Defendant's Counsel accepted, on behalf of the Defendant, the evidence tendered by the Plaintiff in support of the general damages and agreed that the Defendant does not have any evidence to contradict that of the Plaintiff. Whilst conceding that he acts without a full mandate, Counsel argued for an amount of R1 800 000 as loss for general damages as being reasonable and conservative under the circumstances. In reinforcement of this proposition, Counsel referred to the judgments in *Kgomo v Road Accident Fund* ("*Kgomo*"),<sup>3</sup> and *Webb v Road Accident Fund* ("*Webb*").<sup>4</sup>

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<sup>1</sup> Gauteng Division, Pretoria: Case No 82697/ 2015 delivered in December 2017.

<sup>2</sup> (12601/2017) [2018] ZAEPJHC 438 (18 June 2018).

<sup>3</sup> 2011 (SA4) QOD 62 (GSJ).

<sup>4</sup> 2016 (7A3) QOD 24 (GNP).



[26] In *Kgomo* general damages in the sum of R800 000 was awarded to a 14- year old boy who suffered a severe head injury with progressive extra-dural haemorrhage resulting in compression of the brain. The sequelae of the injuries include neurocognital deficits and neuropsychological difficulties, manifesting in attention deficits both verbally and visually, an inability to plan and organize and difficulty inhibiting unwanted responses. His memory had deteriorated both visually and verbally. The award would be worth approximately R1 497 674 if updated for inflation, as at November 2023.

[27] The matter of *Webb* is a case that illustrates the effect of the spinal cord injury or more specifically hemiplegia. Counsel's contention is that if this case has to be applied or compared to the injuries and sequelae sustained by the Plaintiff it will illustrate an upper parameter in terms of the injuries and sequelae of the Plaintiff. The award of R1 500 000 as general damages would be approximately R2 185 502 if updated for inflation.

[28] It is trite that the principles relevant to the assessment of damages are the following: what would constitute fair compensation in a particular matter, taking into account, *inter alia*, the circumstances of the case, amounts previously awarded in broadly comparable cases and the decrease in the value of money since those previous cases were decided. However, awards made in previous cases afford broad and general guidelines in view of the differences that inevitably arise in each case.<sup>5</sup> The court is, nevertheless, vested with a wide discretion in awarding a fair and reasonable award.

[29] Consequently, having considered the injuries the Plaintiff sustained and their sequelae, which are very serious, a fair and reasonable amount to be awarded as general damages, is the amount of R2 500 000.

#### *Loss of Earnings/Earning Capacity*

[30] With regard to the Plaintiff's occupation and future employability, Dr Mokgomme reported that the Plaintiff's weakness and spasticity which affects the limbs, leading to gait difficulty and difficulty using his left hand, and the

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<sup>5</sup> *Mahlangu v RAF* (2013/46374) [2015] ZAGP JHC 342 (9 June 2015) para 20.

seizures, may pose difficulties in his future occupation. Dr Modisane, on the other hand, refers to the pain of the lower limbs and the spasticity that may limit his choice of occupation. The opinion of the occupational therapist is that the Plaintiff has reached MMI. As he does not have matric and relies on physical strength to be able to work as an unskilled worker, he is unemployable. He remains quadriparetic, complicated by epilepsy and psychosis.

[31] According to the industrial psychologist, Grade 8 is the Plaintiff's highest level of education, and he was raised by his mother. He is single and has one child. He remains unemployed since the accident. The Plaintiff was employed as a general worker at "Die Oog", and from mid-2014 to the date of the accident, he worked for Extreme Fencing as a general labourer. The Plaintiff reported earnings of R3100 *per* month, but in his affidavit he reported earnings of R3600 *per* month. His employer informed that he was earning R3360 on average *per* month. According to Mr Jordaan, by 2022 the Plaintiff could have been earning R4350 *per* month, and at the end of September 2016 he paid the Plaintiff the sum of R1440. Mr Jordaan reported the Plaintiff as a good worker.

[32] The industrial psychologist's view is that earnings of R4350 *per* month (R52 200 *per* year) by 2022 fall between the median (R43 700 *per* annum) and upper (R97 000 *per* annum) earning quartiles of the unskilled scale suggested by *Koch 2020*. As the Plaintiff was very young at the time of the accident, she is of the view that in time and with experience and training, the Plaintiff should have been able to reach his career plateau at age 45 and to earn closer to the upper (R97 000) earning quartile on the unskilled scale. She also suggests straightline increases before inflation increases after the age of 45. She expresses the opinion that the Plaintiff's current physical residual skills are not marketable in the open labour or sheltered form of employment as he remains physically disabled. From a psychological and neurocognitive perspective, the Plaintiff is noted to present with significant psychological and neurocognitive changes which could prove him to be an undesirable candidate for employment even within a sympathetic or sheltered employment scenario. She, therefore, suggests considering the information at hand, that he has been rendered functionally unemployable within the open labour market and is most unlikely to be able to



secure and maintain gainful employment in future. According to Ms Cilliers, she considered the new expert opinions, and remain of the opinion that the Plaintiff has been rendered functionally unemployable within the open labour market and is most unlikely to be able to secure and maintain gainful employment in future.

#### Quantification and Calculation

[33] As regards the quantification of loss of earnings, the actuary based his calculations on the undisputed evidence of the industrial psychologist. In respect of the applicable contingencies, the Plaintiff relied on the judgement of the Supreme Court of Appeal in *RAF v Kerridge*,<sup>6</sup> wherein that Court remarked as follows:

"Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, *inter alia*, a down turn in the economy leading to reduction in salary, retrenchment, unemployment, ill-health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of a claimant. This Court, in *Quedes*, relying on *Koch's Quantum Year Book 2004*, found that the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but it is a convenient starting point."

[34] On the basis of the above remarks and in accordance with *Koch* in *The Quantum Year Book 2019*, Counsel for the Plaintiff argued for what is normally referred to as normal contingency deductions of 5% on past and 15% on future pre-morbid earnings. According to Counsel, *Koch's* sliding scale contingency comes to 17% but Counsel argued for a 15% which according to him seems reasonable in the present circumstances. This, Counsel submitted is when the very conservative future anticipated career path of a general (unskilled) worker, is considered.

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<sup>6</sup> 2019 (2) SA 233 (SCA) at para 44.

[35] When the said contingencies are applied to earnings as extrapolated by the industrial psychologist, the amount for loss of earnings amounts to R2 168 443, which Counsel is of the view, is reasonable and should be awarded to the Plaintiff for his loss. The calculations are as follows:

Net Past Loss	R 403 324
Net Future Loss	R1 765 119
Net Total Loss	R2 168 443

[36] The Defendant's Counsel conceded that the Defendant does not have any evidence to contradict the evidence provided by the Plaintiff's set of experts in relation to the loss of earnings suffered by the Plaintiff, nor against the application of the contingencies contended for by the Plaintiff in the calculations. Due to the fact that he had, as already stated, no formal instructions in regard to the contingencies, he accepted the evidence pertaining to the issue of contingencies as argued by the Plaintiff for application in terms of the calculations, based on his own consideration thereof and personal experience. He submitted that his assessment of the evidence is that the contingencies applied are appropriate under the circumstances.

#### Deductibility of Disability Grant when calculating Loss of Earnings

[37] Counsel, however, made the Court aware that it was brought to the attention of the Plaintiff's experts and was recorded in the reports that the Plaintiff is a recipient of a disability grant emanating from the injuries he sustained in the accident in question. His contention was that the cumulative effect of the disability grant which was said to be R143 000, calculated from date of accident until the date of hearing, should be deducted from the loss of his earnings. In reply to this argument, Counsel for the Plaintiff indicated that the issue was raised for the first time that morning before the hearing commenced and therefore, he was not prepared to argue the issue, he was also not certain about the actual amount the Plaintiff had received as disability grant. It was on that basis that the Court reserved judgment and requested the parties to provide short heads of argument relating to this issue.



[38] It is for this Court to determine firstly, whether the amount for the disability grant received by the Plaintiff is deductible from the loss of earnings he suffered, and, secondly, whether the Defendant should be mulcted with costs on an attorney and client scale of costs for having raised the issue at this late stage of the proceedings.

[39] It is common cause that the issue of the deductibility of the disability grant from the Plaintiff's loss was raised for the first time on the day of the hearing of the matter. It appears that Counsel for the parties had discussed it before the commencement of the hearing but could not come to an agreement on the issue, hence it was raised in argument from the bar by the Defendant's Counsel in Court. During argument in Court, Counsel for the Defendant in support of his contention that the disability grant is deductible, referred the Court to two conflicting decided cases, as Counsel submitted, with no sufficient gravitas as to whether or not the disability grant should be deducted. The cases referred to are *Moroane v Road Accident Fund (GP)* ("*Moroane*"),<sup>7</sup> where that Court was against deducting the disability grant and the other where the Court was in favour of deducting, namely *Mullins v Road Accident Fund (ECP)*.<sup>8</sup> In the heads of argument that were later furnished, Counsel relied on a further case of *Kapa v Road Accident Fund (LP)* ("*Kapa*"),<sup>9</sup> where Muller J answered the question in the affirmative on the basis that such deduction amounts to double compensation.

[40] To the contrary, Counsel for the Plaintiff in opposition to the contention by Counsel for the Defendant that the disability grant is deductible, argued that the case of *Kapa* relied on by the Defendant, has been authoritatively overruled by this Court in *Advocate Nico Horn (obo Lephethisang Alphios Mokoena) v The Road Accident Fund (GP)* ("*Horn*").<sup>10</sup> The Plaintiff relied on this judgment for its

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<sup>7</sup> Unreported judgment Case No 39680/2012, 27-8-2018.

<sup>8</sup> Unreported judgment by Beshe J Case No 3650/2014, 4-8-2016.

<sup>9</sup> Unreported judgment Case No 1414/2013, 7-12-2018.

<sup>10</sup> Unreported judgement by Makhuvele J Case No 915/2017 4 July 2019.

proposition that the disability grant is not deductible from the loss suffered by the Plaintiff in respect of his earnings.

[41] The facts in *Horn* are comparable to the facts of this matter in that, firstly, both matters turn on the issue of the deductibility of the disability grant from the loss of earnings. Secondly, the issue was, in both matters, raised on the day of the hearing of the matter. The only difference being that in *Horn*, the issue was raised for the first time during argument in court and the matter that was initially allocated a hearing for only two hours, resulted in a full blown hearing that lasted for one and a half days. In this instance, although the issue was raised on the hearing day, the Defendant's Counsel had raised it with the Plaintiff's Counsel prior to the commencement of the hearing, and the hearing thereof did not last as long as that in *Horn*.

[42] *Horn*, which is in support of the Plaintiff's proposition that disability grants are not deductible from damages for loss of earnings, appears more persuasive than *Kapa* that is in support of the Defendant's submission that they are deductible. Moreover, this Court is bound by *Horn* which is a judgment of this Court rather than *Kapa* which is that of the Limpopo Division.

[43] Makhuvele J in *Horn*, dealt with *Kapa* in light of *Kapa's* criticism of the judgment of Mavundla J in *Moroane* with which she (Makhuvele J) relied on in reinforcing her reasoning in support of her finding that the disability grant is not deductible from damages for loss of earnings. In this regard Makhuvele J remarked as follows:

[23] As I was preparing this judgment I came across the judgment of Muller J in the matter of *Kapa v RAF* at the Polokwane High Court in which he disagreed with Mavundla J in the matter that I have referred to above. . .”

Thereafter, the judge went on to quote the analysis of Muller J in regard to the Constitutional Court judgment in *Coughlan NO v Road Accident Fund* (“*Coughlan*”),<sup>11</sup> which Mavundla J also analysed in *Moroane*, and Muller J in *Kapa* disagreed with the decision of Mavundla J that found that ‘*the disability grant paid*

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<sup>11</sup> (CCT160/14) [2015] ZACC 10.



*by the state should be ignored and not be deducted*. In *Coughlan*, the Constitutional Court was dealing specifically with the issue of whether foster care grants are deductible when calculating future loss of support for children. That Court held, with reference to the nature and purpose of foster care grants, that those grants which arose from the constitutional obligation of the state to provide for children in need of care are different from compensation. And that, the foster care grants are paid on the basis of need of care and are not predicated on the death of a parent. The result being that the grants are not deductible.<sup>12</sup>

[44] In response to Muller J's criticism as aforesaid, Makhuvele J expressed the following view:

"[24] I do not think that the criticism or disagreement expressed by Muller J with Mavundla J's judgment is justified because he (Mavundla) relied on the one exception in the RAF Act that the Constitutional Court [in *Coughlan*] pointed out as justifying a deduction from claimant's award on the basis of double compensation. The Constitutional Court was alive to the fact that the RAF was silent on whether foster grants should be deducted or not.

[25] It is common cause that foster care grants, old age pensions, disability grants and other social assistance grants in South Africa are administered in terms of the Social Assistance Act,<sup>13</sup> as indicated in the judgment of Masipa J in the *Johannes Mabunda* matter<sup>14</sup>. The Constitutional Court would have addressed this issue if it felt that it required separate mentioning. In my view, the purpose of the enabling Act and the constitutional imperatives are the same."

[45] Undoubtedly so, Makhuvele J was correct in stating that *'the purpose of these written reasons is to restate the legal position with regard to the question of deductibility of Social Assistance grants from damages awarded to claimants in Road Accident claims'*. The position has still not changed, and remains, as stated by the Constitutional Court in *Coughlan* - the purpose and nature of social assistance grants are different from compensation. These grants emanate from the constitutional obligation of the state, like foster care grants, as the

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<sup>12</sup> *Coughlan* para 58.

<sup>13</sup> Act 13 of 2014.

<sup>14</sup> *Mabunda Johannes v Road Accident Fund* Unreported judgment by Masipa J Case No. 29668/05 26/03/2008.

Constitutional Court found, they have no link to the accident. Disability grants fall within the same category of grants. They are also administered in terms of the Social Assistance Act. Section 9 (b) of the Social Assistance Act provides that a person is, subject to section 5, eligible for a disability grant, if he or she is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

[46] The Court has this to say in *Coughlan*:

"[59] . . . The RAF Act expressly provides that<sup>15</sup> double compensation for persons who are entitled to claim under the Compensation for Occupational Injuries and Disease Act,<sup>16</sup> should be deducted from compensation by the RAF but there is no equivalent reference to social grants."

As Makhuvele J in *Horn* held, the Constitutional Court was well aware that the Defendant provided only for this eventuality, and would have addressed the issue of disability grants if it felt that it required separate mentioning. Thus, the purpose of the enabling Act and the constitutional imperatives, for all the grants administered in terms of the Social Assistance Act, are the same.

[47] The Plaintiff is successful on this issue and entitled to the costs thereof as well. The quantification of the damages as calculated by the Plaintiff are not disputed and should be granted as prayed for in the amount of R2 168 443.

#### *Costs*

[48] The issue of costs was not specifically argued in Court. The Plaintiff in his heads of argument had prayed for costs on a party and party scale if it succeeds in its claims. This, as it is known, was before the issue of the disability grant was raised by the Defendant. In his subsequent heads of argument, Counsel for the Plaintiff relying in *Horn*, whereat the Defendant was mulcted with a punitive cost order for raising the issue at that late stage, wants this Court to do the same with the Defendant herein.

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<sup>15</sup> Section 18(2) of the Road Accident Fund Act 56 of 1996.

<sup>16</sup> Act No. 130 of 1993.



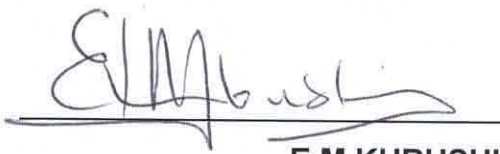
[49] As already stated earlier in the judgment, the two matters, that is *Horn* and the current matter, are distinguishable when it comes to the issue of costs. In *Horn* the matter was raised by the Defendant's Counsel on his feet in Court and the hearing which was allocated for only two hours endured for one and a half days. In this instance, by the time the issue was raised in Court both Counsel had already discussed it, and the hearing thereof did not endure as long as that in *Horn*.

[50] Costs are always within the discretion of the Court hearing the matter. The view is that the award of costs should be separated between that of the costs of suit and that of the trial itself. The Defendant should be mulcted with a punitive cost order only as far as the wasted costs of the day of hearing are concerned but that all the other costs be on a party and party scale.

*Order*

[51] In the premises the following order is made:

1. The Rule 38(2) Application is granted.
2. The Amended Draft Order marked "X" is made an order of Court.

  
E M KUBUSHI  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

Date of hearing: 06 February 2024

Date of judgment: 28 February 2024

**APPEARANCES:**

For the Applicants: Adv Botha instructed by Rasekgala Alfred Inc Attorneys

For the Third Respondent: Mr. Thomas Bell instructed by State Attorney