

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED. <u>05 APRIL 2024</u>
DATE	SIGNATURE

CASE NO: 48441/19

In the matter between:

M [REDACTED] N [REDACTED]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

CEYLON AJ

A. INTRODUCTION:

[1] This is a claim for delictual damages suffered by the Plaintiff as a result of injuries sustained in a motor vehicle accident which occurred on 04 September 2018 at or near R61 Road, Lukhlo Location, Bizana, Eastern Cape Province.

[2] According to the Particulars of claim, the Plaintiff sustained the said injuries when in a motor vehicle with registration number GDG [REDACTED] G (hereinafter referred to as the "insured vehicle") knocked down the Plaintiff who was a pedestrian at the time of the accident.

[3] The Plaintiff alleged that the said accident was caused as a result of the exclusive negligence on the part of the driver of the insured vehicle who was negligent in one or more of the respects mentioned in paragraph 5 of the said particulars of claim, and as a result of said negligence and accident the Plaintiff sustained the following injuries: fractures of the 6th rib, left tibia and comminuted left tibia plateau fracture. The Plaintiff was forced to undergo and will in future undergo hospital and/or medical treatment as a result of the injuries sustained and the sequelae thereof.

[4] The Plaintiff, in light of the above, claims a total amount of R4 200 000-00 (four million two hundred thousand rand), it being the damages suffered by the Plaintiff for the injuries sustained. The said total is constituted as follows, as per his amended Particulars of claim:

4.1 future medical expenses (estimated):	R200 000-00
4.2 past loss of earnings:	R500 000-00
4.3 future loss of earnings:	R2 500 000-00
4.4 general damages:	R1 000 00-00

[5] In terms of the Practice Note, only signed by the Plaintiff's attorneys, it is indicated both the merits and quantum are in dispute. The Plaintiff contended in his Heads of Argument that merits should be awarded fully (100%) in his favour and he should be entitled to 100% of his proven or agreed damages.

[6] At the date of the trial (03 November 2023) the Defendant and its legal representatives was absent from Court and the Plaintiff proceeded on a default basis in terms of the Uniform Rules of Court.

[7] The Plaintiff proceeded to lead evidence by way of his experts reports, which was admitted after his Rule 38(2) application was granted, as well as by way of case authority.

[8] The Defendant filed no expert reports and none of the parties called any witnesses to testify at the proceedings.

B. THE PLAINTIFF:

[9] The Plaintiff is M [REDACTED] N [REDACTED] and adult male self-employed labourer/tiler, with ID-number [REDACTED] and resident at L [REDACTED] Location, Bizana, Eastern Cape Province. He sues herein in his personal capacity. He was 29 years old at the time of the accident.

[10] According to the report of the Orthopaedic surgeon (Dr SK Mafeelane), the Plaintiff enjoyed good health prior to the accident and has never had any operation or admission to hospital.

[11] The Plaintiff resides with his mother, niece and nephews. He is single and has two minor children, aged 13 (son) and 2 (daughter) respectively. He studied up to grade 10 at school. He did not complete any formal or work-related training. He was a self-employed general labourer and tiler prior to the accident but now is unemployed since the accident due to accident-related pain and limitations he experienced.

[12] According to the report of the Industrial Psychologist, the Plaintiff reported that he earned about R4500-00 per month, depending on the type of work and amount of work he received.

[13] According to the said Orthopaedic surgeon, the Plaintiff sustained injuries to the 6th rib fracture, right elbow, left tibia plateau fracture and head injury. The Plaintiff complained about the following: chest and left knee pain. He received treatment as follows: X-rays, analgesic and antibiotics, neuro-observation, ATT injection, left above knee plaster of Paris, physiotherapy and crutches. He experiences swelling of the left knee, left proximal tibia posterior angulation and tenderness of the left knee, scars to right arm and elbow, scar to the head and severe pain and suffering due to the injuries.

[14] According to the experts, the injuries the Plaintiff sustained which resulted in serious long-term impairment. He is only suitable for sedentary work and will struggle to re-entre the work arena. He is thus an unequal competitor in the open labour market.

C. THE INJURIES AND ITS SEQUELAE:

[15] As indicated above, the Plaintiff suffered various injuries in the accident. Said injuries and their sequelae will be discussed by way of the expert reports filed by the Plaintiff.

(a) the Orthopaedic surgeon (Dr SK Mafeelane):

The main findings of this experts' report have been outlined above and will not be repeated here.

(b) the Radiologist (Dr Mkhabele & Indunah):

(i) These experts examined the left knee and lower left leg of the Plaintiff and confirmed the following: old depressed tibial plateau and proximal fractures with posterior displacement of 1cm; old fracture of the proximal fibular shaft with acceptable alignment and articulation; old fracture of the lateral femoral condyle; narrowing of the lateral joint space of the knee; patella-femoral joint is normal and there are no radio-opaque intra-articular bodies.

(ii) They also examined the right elbow by way of X-rays and reported the following: there are no fractures, dislocation or subluxation noted; elbow joint spaces are within normal limits; no displacement of both the anterior and posterior the fat pads; no loose radio-opaque intra-articular bodies and no abnormal calcifications in the surrounding soft tissues seen. They commented that there is no bony injury or pathology.

(c) the Neurosurgeon (Dr AB Mazwi):

(i) Following the examination of the Plaintiff, this expert concluded that he suffered the following injuries from the accident: mild head injury; post injury recurrent headaches; significant long term mental disturbance; multiple scars; chest rib fracture; right elbow injury and left tibia fibula fracture; reduced employability; the Plaintiff qualifies under the following (narrative tests): permanent serious disfigurement; significant long term mental disturbance and the expert recommend that the Plaintiff qualifies for compensation for general damages on the narrative test.

(ii) The expert also concluded that: the head injury is a direct result of the accident; the memory disturbances and poor concentration are due to the head injury and that the Plaintiff has significant loss of amenities of life and has reached maximal medical improvement and the Plaintiff has significant mental disturbance, and it is fair to compensate the Plaintiff. The expert also proposed compensation for general damages, future treatment and loss of earning capacity.

(d) the Clinical Psychologist (V Guqa & L Maye, Leenut Assement Centre):

(i) After this experts examined the Plaintiff and taken into account the input of other experts they reported the following:

- pre-accident (socially): the Plaintiff was a sociable and outgoing person with stable and positive family relationships, good interpersonal relations with other individuals, and he engaged in moderate entertainment and leisure activities such as going out to watch soccer with his friends, hunting and active in helping community members.

- physically: no physical difficulties or limitations were reported prior to the accident, he kept physically fit and jogging with friends and assisted with home gardening activities. He was never involved in any previous accident nor has any injuries before.

- cognitively: the Plaintiff left school in the middle of grade 10. No cognitive difficulties were reported, and he did well scholastically with a reported overall educational aptitude of being of average function.

- psychologically: no family related psychiatric history was reported and no psychological conditions nor any treatment sought prior to the accident.

- academically/occupationally: Plaintiff left school to seek employment and begin his working life in 2020 as a tiler and ceiling installer assistant and from 2011 to the time of the accident he did these same jobs in a self-employed capacity.

- post-accident (socially): the Plaintiff were less socially engaged and preferred not to be around people after the accident.

- physically: he has headaches, can no longer do running and jogging and struggled with garden activities and required assistance with same. He experienced knee pain, especially in inclement weather conditions, suffers back pains, nose bleeding, poor balance, muscle pool spasms and swollen knee. He also has difficulties with kneeling, standing and sitting for prolonged periods as a result of the knee pain, and physical head scaring.

- cognitively: he suffered both short- and long-term memory disturbances and concertation problems, slowed mental processing and feeling clouded mentally.

- psychological: he experienced moderate depressive symptoms, anxiety, anger and irritability and PTSD symptoms, hopelessness when considering his bleak future prospects. He is socially withdrawn and get depressed when realising his changed lifestyle and the impact the accident had on his emotional function and interpersonal relationships.

- academically/occupationally: he is currently unemployed and has reduced occupational function due to the knee pain after the accident. He has difficulties with standing, sitting and kneeling for prolonged periods which caused discomfort and pain difficult to endure.

(ii) According to this expert, the Plaintiff's head injury sustained in the accident has had a contributory role to his current neuropsychological and neurocognitive impairments and has led to persistent headaches, alterations in MSCHIF with disturbances with memory and concentration abilities, personality and mood changes which impacted negatively on his interpersonal relations and psychological functioning.

(iii) The expert also reported the following: disturbances in the verbal memory, mild impairments with working memory capacity, complex attention and mental tracking ability and language formation and fluency, psychological distress and moderate anxiety-depressive disorder, emotional difficulties of feeling helplessness, socially disengaged and has not been able to maintain his friendships he had prior to the accident, or his healthy lifestyle such as jogging and running with friends or leisure activities such as hunting. He still experiences intrinsic post traumatic stress related symptoms including irritability, and hypervigilance and becomes distressed at being exposed to triggers associated with the accident, which he tries to avoid all the time. He suffers from chronic pain and has a phobic reaction in traffic situations and when travelling in a vehicle. He has distressing emotional difficulties that endures suicidal ideations but remained asuicidal with no intention or plan thereto at the time of the assessment. The expert recommends psychological interventions to help him to cope with the current reactive psychological problems.

(iv) The expert further reported that due to the injuries sustained by the Plaintiff, he could not continue with his work prospects, and he has a reduced work function due to physical limitations due to the accident. He has difficulties with coping with tasks that require physical exertion and is only suited for sedentary work. He will not cope with work that increased the pain in his left knee and lower leg. This will deteriorate his mobility and general agility. The expert considers him to be an unequal competitor in the open labour market as his work options have been compromised significantly.

(v) According to these experts, the quality and enjoyment of life of the Plaintiff has been negatively affected by the accident and the injuries sustained. He now has limited career options and diminished future financial security. He still suffers memory and concentration problems, became socially disengaged and has neurocognitive deficits, reduced neuropsychological and physical functioning.

(vi) In the view of these experts, the Plaintiff will benefit from individual psychotherapy to assist him with the difficulties in his physical and psychological adjustment after the accident.

(e) the Plastic surgeon (Dr SS Selahle):

This expert reported scars to the scalp, right upper limb and left lower limb of the Plaintiff, also chest pains and painful left lower limb. He found that the Plaintiff suffered serious injury in that he suffered permanent serious disfigurement due to the accident and the injuries sustained.

(f) the Occupational therapist (T Caga):

(i) This expert confirmed the injuries sustained in the accident as indicated, for instance, by the Orthopaedic surgeon and the input of the other experts such as the Radiologist.

(ii) After the occupational therapy assessment, this expert reported that the Plaintiff was physically only suited for sedentary and light occupations. However, his ability to find the latter type of work is severely limited due to his level of education and past work experience. Due to the injuries, he will not be able to do the work (tiler/general labourer) he did prior to the accident. The expert recommended occupational therapy interventions of six (6) hours to address provision of ergonomic adaptations and adaption of activities of daily living and leisure activities, education on pain management, joint protection and spinal hygiene principles and the teaching of alternative methods of task execution. The costs of such intervention approximately R650-00 to R850-00 per hour.

(iii) Other interventions recommended are physiotherapy for pain management and biokinetic intervention for muscle strengthening. They also recommend the following assistive devices: pain-relieving heat packs (R150-00), orthopaedic mattress (R10 000-00), small bench (laundry) (R800-00), bucket on wheels (R400-00), etc. He would also require garden and transport assistance.

(g) the Industrial psychologist (T Ntsieni):

(i) This expert also confirmed the accident and injuries sustained by the Plaintiff and taking into account the input of the Orthopaedic surgeon, Plastic surgeon, Neurosurgeon and the Clinical psychologist, and after assessment of the Plaintiff, reported that the Plaintiff did not work and therefore not generated any income during his hospitalisation period and did not resume work since the accident. He is unemployed with no income. Thus, past loss of earnings is noted from time of the accident to date of accident.

(ii) The expert is of the opinion that the Plaintiff suffered significant injuries which diminishes his prospects of resuming pre-accident gainful employment and thus likely to suffer future loss of earnings.

(iii) The expert reported that the injuries and their sequelae are debilitating factors that limit and will limit the Plaintiff's employability, future career choices and income potential. The nature of the injuries sustained have compromised his health and affected his psychological, neurological, psychological, cognitive and occupational abilities. The expert is therefore of the view that the Plaintiff is an unequal competitor in the open labour market and will not be able to complete functions effectively and efficiently as compared to his counterparts.

(h) the Actuaries (Munro Forensic Actuaries):

The actuaries calculated the loss of earnings/earning capacity of the Plaintiff and the basis of these calculations. These are reported in their report provided to this Court in these proceedings and to assist in determining the Plaintiff's loss of earnings claimed for.

D. MERITS:

[16] The merits appear to be in dispute between the parties. In the Defendant's special Plea, the issue of the seriousness of the Plaintiff's injuries seems to be disputed by the Defendant where the Defendant pleaded that in terms of the provisions of section 17(1) of the RAF Act 56 of 1996, an amended, it is not obliged to compensate a third party for non-pecuniary loss unless there is "serious injury" sustained and compliance with Regulation 3 of the Regulations to the said Act is shown.

[17] In his Replication to the said Special Plea, the Plaintiff indicated that he submitted himself for the serious injury assessment by his specialist and attached the RAF 4 Form, completed by Dr SK Mafeelane, who indicated that in his opinion, the injuries sustained is serious. The Plaintiff is therefore of the view that there was compliance with the Regulations to the Act and prayed that the Defendant's Special Plea be dismissed with costs.

[18] The Defendant pleaded further that it denies any negligence as alleged or at all on the part of the driver of the insured vehicle and, alternatively, joint and/or contributory negligence of the Plaintiff.

[19] In the view of this Court, the Defendant did not rebut the Plaintiff's claim that its insured driver was negligent in the respects referred to in the Particulars of claim, particularly in light thereof that the Plaintiff was a pedestrian, just finishing to cross the street when he got knocked down by the insured vehicle who drove at a very high speed. Further, the Defendant, in the opinion of this Court, did not establish contributory negligence as envisaged in the decision of Solomon and Another v Musset and Bright Ltd 1926 AD 427 at 435.

[20] The Defendant did not lead evidence in this regard or rebut any evidence provided by the Plaintiff on this issue. Accordingly, this Court views the evidence of the Plaintiff as uncontested on this issue. Therefore, this Court is of the opinion that the Plaintiff is entitled to his full (100%) compensation of the proven or agreed damages and the Defendant is liable to compensate 100% of these damages.

E. QUANTUM:

(i) general damages:

[21] It appears from pleadings that this head of damages is definitely in dispute. Further, it is not clear if the Defendant decided if it is going to accept or reject the Plaintiff's serious

injury assessment as provided in the completed RAF Form 4. In view of the latter, this Court is of the view that it is not competent to adjudicate on this head of damages and therefore intend to postpone it *sine die*.

(ii) future medical, hospital and related expenses:

[22] It is apparent from the Plaintiff's expert reports that the injuries he sustained will attract future medical, hospital and related expenses. Accordingly, this issue will be dealt with according to section 17(4)(a) of the RAF Act and this Court intend to make an appropriate award to this effect.

(iii) past and future loss of earnings/earning capacity:

[23] The details of the Plaintiff's past and future loss of earnings/earning capacity is set out in the actuary report provided to Court. The report dealt with and have taken into account the reports and recommendations of certain medical experts consulted by the Plaintiff.

[24] For a Plaintiff to succeed in a claim for loss of earnings, he must prove on a balance of probabilities that he suffered a significant impairment giving rise to a reduction in earning capacity. There must be proof that the reduction in earning capacity gives rise to pecuniary loss [*Rudman v RAF* 2003(2) SA 234 (SCA)]. In *De Jongh v Du Pisani* 2004(5) QOD J2-103 (SCA) it was held that contingency factors cannot be determined with mathematical precision and that contingency deductions are discretionary. This principle was also acknowledge in *Zondi v RAF* [(2565/2015)[2021] ZAGPPHC 707 (26 October 2021) at para 14].

[25] In *Herman v Shapiro & Co* [1926 PD 367 AT 379] it was held that:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damage."

[26] It is trite that the trial court has a wide discretion to award what it in the particular circumstances order to be fair and adequate compensation to the injured party for bodily injuries and their sequelae [*AA Mutual Association Ltd v Magula* 1978(1) SA 805 (A) at 809]. There are no hard and fast rules to be applied in deciding what a fair and adequate compensation to an injured party should be. Arbitrary considerations must inevitably play a part. An enquiry into future loss of income is by nature speculative because it involves prediction of the future [*Moeketsi v RAF* (5651/2016)[2021] ZAFSHC 214 (30 July 2021) at para 21; *Southern Insurance Association v Baily NO* 1984(1) SA 98 (AD)].

[27] In connection with actuarial calculations, in *Baily NO*, *supra*, it was stated that:

"... while the result of an actuarial computation may be no more than "informed guess" it has the advantage of an attempt to ascertain the value of what was lost on a logical basis." [at 114E; Moeketsi, *supra*, at para 22].

[28] In this matter, the actuaries calculated the past loss of earnings at R335 500-00 and future loss at R2 105 200-00. No contingency deductions were included to the calculations. The total loss of earnings were calculated at R2 440 700-00.

[29] According to the Plaintiff's HOA, the contingencies of 5% on past loss and 20% on uninjured loss was applied, therefore R16 775-00 and R421 040-00 respectively. Therefore, past loss would be R318 725-00 and future loss R1 684 160-00 after such contingency deductions. The total loss of earnings would therefore be R2 002 885-00.

F. CONCLUSION:

[30] Having considered the evidence and circumstances in this matter cumulatively, this Court is of the opinion that the injuries sustained by the Plaintiff is serious and there is no doubt that the Plaintiff will derive benefit from the treatment and interventions recommended by the experts in their reports. These will afford the Plaintiff some assistance and relief. Most of the damages caused by the injuries will have a serious and lasting impact on the Plaintiff's health, general well-being and amenities of life.

[31] Taking into account the relevant facts, legal principles, decrease in the value of money, the nature of the injuries sustained by the Plaintiff and the resultant sequelae thereof, the Court is inclined to award, as just, fair and adequate compensation, the following in favour of the Plaintiff:

(a) past medical and hospital expenses	not applicable
(b) past loss of earnings	R318 725-00
(c) future loss of earnings	R1 684 160-00
(d) future medical and hospital expenses	undertaking in terms of section 17(4)(a)
(e) general damages	postponed <i>sine die</i>

G. COSTS:


[32] In the view of this Court, there is no factors or good grounds to suggest that costs should not follow the result.

H. ORDER:

[33] In the result, the following order is made:

- (1) The Defendant is 100% liable for the Plaintiff's proven or agreed damages;
- (2) The Defendant shall pay an amount of R2 002 885-00 to the Plaintiff;
- (3) All amounts in terms of this order shall be paid to the Plaintiff's attorneys, Sotshintshi Attorneys, within 180 days of date of this order, into their trust account with details as follows:

(a) account holder:	Sotshintshi Attorneys
(b) bank and branch:	First National Bank, Hatfield (Pretoria) branch
(c) account number:	6285 4666 115
(d) branch code:	252 145
(e) account type:	Trust account
- (4) The Defendant is ordered to furnish the Plaintiff with an undertaking certificate in terms of section 17(4)(a) of Act 56 of 1996, for the payment of the costs of future accommodation of the Plaintiff in a hospital or nursing home for treatment or for rendering a service or supplying of goods to Plaintiff arising from the injuries sustained in the motor vehicle accident which occurred on 04 September 2018;
- (5) In the event of default of payment of the above amounts, interest shall accrue on such outstanding amount at the prescribed rate per annum, calculated from the date of default until date of payment, both days included;
- (6) The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, including the qualifying costs of all experts whose notices have been served on the Defendant and costs of counsel;
- (7) In the event that costs are not agreed between the parties, the Plaintiff will be entitled to serve a notice of taxation on the Defendant. The taxed costs will be payable within fourteen (14) days of the date of taxation and shall likewise be paid into the said trust account of the Plaintiff's attorneys set out above;
- (8) The issue of general damages is postponed *sine die*.



B CEYLON
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA

Hearing date: 03 November 2023

Judgment date: 05 April 2024

APPEARANCES:

For the Applicant:

Instructed by: Sotshintshi Attorneys
Arcadia, Pretoria

For the Defendant: No appearance

Instructed by: Not applicable