

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

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 4809/21

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

DATE: 14 JUNE 2024
SIGNATURE OF JUDGE:

In the matter between:

DULI XOLILE ROLIAN

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

FLATELA J

[1] The Plaintiff instituted an action against the Road Accident Fund for injuries sustained by him in a motor vehicle accident that occurred on 09 March 2020.

[2] In terms of the amended particulars of claim dated 13 November 2023, on 9 March 2020 at approximately 06:36 at or near R-102, Southport, KwaZulu Natal Province, a collision occurred between a motor vehicle with registration numbers N[...] (the insured vehicle) and a motor vehicle with registration numbers N [...], driven by the Plaintiff. The cause of the accident was caused by the negligent driving of the insured driver.

[3] As a result of the accident, the Plaintiff sustained laceration and fracture left medial malleolus.

[4] As a direct consequence the Plaintiff, has suffered, continues to suffer and will in future suffer the following sequelaes:

- a. The Plaintiff was forced to undergo and will in future be forced to undergo hospital and medical treatment. The Plaintiff has experienced pain and suffering and will in future experience pain and suffering;

[5] I was informed by the Plaintiff's counsel that the merits were previously settled at 85% in favour of the Plaintiff. The Defendant had made an offer for general damages and loss of earnings, but the Plaintiff rejected it.

[6] The Plaintiff alleges that the Defendant is liable to pay him an amount R3 164 760 made up as follows:

- i. Past. loss of earnings; R280-4810.
- ii. Future loss of earnings; R 2 079 950
- iii. Loss of future earnings. R 2 364 760
- iv. General damages 800,000.
- v. Total amount. R3 164 760

[7] This Court was called to determine the General Damages, Loss of earnings and Future medical expenses.

[8] An application was made in terms of Rule 38 of the Uniform Rules to admit the expert evidence tendered without recourse to oral testimony. The order was granted.

[9] With regards to general damages, counsel on behalf of the Plaintiff has argued that an amount of R800 000 is an appropriate amount.

[10] I intend to deal first with the Plaintiff's injuries and their impact on the Plaintiff's earning capacity.

Background

[11] The Plaintiff is an unemployed major male born on 12 February 1974. He was 46 years old at the time of the collision and is now 50 years old. He was employed as a truck driver at the time of accident and was earning about R9 000 per month. The Plaintiff's highest scholastic achievement is grade 11. The Plaintiff was diagnosed with HIV and was on ARV. The Plaintiff was diagnosed with Pulmonary TB in 2012.

Plaintiff's injuries and impact to the Plaintiff's earning capacity

[12] The initial entry of the hospital records which describes the mode of arrival and condition on arrival amongst other information recorded that on 9 March 2020, at about 8H30, the Plaintiff came in a stretcher accompanied by paramedics from Med-Evac from the scene of the accident. It described the mechanism of injury as the frontal impact, as a result he sustained laceration on the forehead, neck laceration and he was vomiting blood. The Plaintiff complained about pain to the anterior chest/blunt chest trauma and painful left leg. His Global Coma Score (GCS) was 15/15 when he arrived at the hospital, meaning that he was conscious and fully alert. The clinical findings were as follows:

- a. Face- laceration on forehead-7cm
- b. Laceration on anterior throat
- c. He had no raccoon eyes.
- d. Blunt trauma chest- Abrasion on chest
- e. Swollen ankle
- f. No loss of consciousness

[13] The Plaintiff received the following treatment –, ATT injection, suturing of laceration, Neuro observation C-T Scan brain, chest and abdomen were taken. X-rays of the skull, C-spine and foot were taken. No fractures were found on the skull. C-spine cleared; the left ankle had lateral malleolus. Pelvis was examined and found inferior ramus. The X-Ray of the chest showed air under diaphragm bilateral infiltrates. The Plaintiff was treated with analgesics and antibiotic.

[14] During follow up visits, the Plaintiff complained of a pain in the left ankle. There was no mention of a back pain, the right foot, the left shoulder as it will be demonstrated hereinunder.

Experts Report and Opinion

[15] The Plaintiff was examined by the following experts:

- a. Dr Mafeelane – Orthopaedic surgeon
- b. Dr Mazwi – Neurosurgeon
- c. Dr J. F Mureriwa – clinical Psychologist
- d. Dr Selahle – plastic and reconstructive surgeon
- e. Dr Nhlapho -Ophthalmologist
- f. Ms N Ndzungu – occupational therapist – on 18 January 2023
- g. Talifhani Ntsieni – industrial psychologist
- h. Munro Forensic Actuaries

Dr. Mafeelane – Orthopaedic surgeon

[16] Dr Mafeelane examined the Plaintiff on 06 April 2021. He states that from the hospital notes and from the RAF form, the Plaintiff sustained mild head injury with facial laceration, pelvis injury, neck injury, back injury, chest contusion, left shoulder injury and left medial Malleolus fracture. At the time of examination, the Plaintiff complained of backache, dizziness, and painful left shoulder.

[17] On previous medical history, the Plaintiff enjoyed good health prior to the accident and had never had any operation or admission.

[18] Physical examination-Dr Mafeelane examined the Plaintiff and discovered tenderness on left ankle with swelling measuring 27 cm v 25 cm on the right. Regarding the shoulder the doctor noted severe tenderness with reduced range of motion due to pain. Regarding cervical spine and face, the doctor noted that there was a 5cm scar on the forehead and 2cm scar on the forehead.

[19] Radiological examination from Dr Mkhabele & Indunah Inc on 7 April 2021 revealed that there is a fracture of the distal fibula which is united with no displacement or angulation. There is irregularity of lateral ankle mortars with suggestion of an old fracture of the lateral talar dome.

[20] On pain and suffering, the doctor noted that the Plaintiff suffered severe pain after the accident and continues to suffer the inconvenience and discomfort of chronic pain from the injured areas. He has never been pain free since the accident.

[21] As a result, the Plaintiff has great difficulty with prolonged walking and standing. He has difficulty bending, he has difficulty carrying and lifting heavy objects and he has difficulty doing overhead activities. He is unemployed. The injury he sustained will make it difficult for him to compete fairly in the open Labour market. The doctor deferred to the occupational therapist to comment in more detail on the practical effect of his impairment and ability to work in the open labour market. The injuries sustained by the Plaintiff. Dr Mafeelane opined that the Plaintiff suffered a serious long-term impairment and has 12% WPI calculated as follows:

- a. Ankle -WPI 3%;
- b. Whiplash -WPI 2%

- c. Pelvis -3% WPI
- d. Shoulder -4% WPI

Dr Mazwi – Neurosurgeon

[22] According to Dr Mazwi the Plaintiff sustained mild head injury. The Plaintiff experienced head trauma and also had forehead lacerations, with the loss of awareness. The Plaintiff had brief loss of consciousness and amnesia with 15/15 GSC in keeping up with the mild head injury. The Plaintiff now presents severe difficulty with concentration, significant permanent memory disturbances, dizziness, recurrent headaches, difficulty with concentration, cervical neck pains, shoulder pains, forgetfulness, poor memory, and poor recall. The Plaintiff has combined WPI of 12%.

[23] Regarding future medical expenses, The doctor stated that the Plaintiff would need to consult an Orthopaedic surgeon and physiotherapist and he recommended an amount of R30,000. Furthermore, the Plaintiff will also need to purchase analgesics. And he recommended R10,000 and he recommended that provisions be made in final settlement for these future medical expenses.

[24] On retirement and employability. The doctor stated that the Plaintiff is unemployed and the injuries he sustained will make it difficult for him to compete fairly in an open labour market. He deferred to the occupational therapist to comment in more detail on the practical effect of this impairment and ability to work in an open market.

Dr Nhlapho: Ophthalmologist

[25] Dr Nhlapho examined the Plaintiff on 12 May 2022. He stated that the Plaintiff sustained direct trauma to the lower forehead between the eyebrows and that since the accident the Plaintiff complains of poor vision of the left eye. He complains that the eyes are painful, tearful and photophobic and they have a foreign body sensation. After clinical examination Dr Nhlapho stated that the plaintiff has no vision impairment and the scar on the left brow does not interfere with visual function. The

MMI has been reached and visual acuity is normal. Dr Nhlapho opined that the Plaintiff's future possibilities and loss of amenities are not affected. Regarding a 4cm horizontal scar between eyebrows, Dr Nhlapho stated that he could not find any damage to the external ocular adnexa, orbits and globes or visual pathways as consequences of accident.

[26] Dr Nhlapho opined that the Plaintiff is in Class 1 with WPI of 3% according to Table 11 -5 Criteria for Rating Impairment due to Facial Scars and Disfigurements. Dr Selahle used the same table regarding the scars, meaning that this WPI is duplicated as far as the scars and disfigurement.

Dr Selahle – Plastic and Reconstructive Surgeon

[27] On examination Dr. Selahle made these findings:

- a. Scar 1-6 cm scar on the forehead
- b. Scar 2-5 centimeters Scar on the anterior aspect of the neck.
- c. Scar 3-2cm scar on the left lateral aspect of the neck.
- d. Scar 4-Four cm abrasions scar on the anterior aspect of the leg.

[28] Dr Selahle concluded that the Plaintiff's scars have no features, but they are cosmetically unsightly and disfiguring, conspicuous and difficult to conceal, particularly the facial scar, permanent, with some prospects of scar improvement by scar revision techniques. The Plaintiff feels very uncomfortable with these scars. He has suffered some considerable physical pain, and he is still suffering some emotional pain due to his cosmetically disfigured scar. He has 7% WPI.

Dr JFL Mureriwa – Clinical Psychologist – Report dated 12 April 2019

[29] The Plaintiff reported to Dr Mureriwa that since the accident, he has the following challenges:

- a. The Plaintiff misplaces objects. He has low motivation and no longer enjoys previous enjoyed hobbies, struggles to come to terms with altered lifestyle, struggles with bending, kneeling and stopped doing

heavy duties. He has pain and discomfort when sitting or standing for a very long time, struggles to walk long distances or stand for longer periods, performance at work deteriorated and he could not cope. As a result, he resigned from his job.

- b. The Plaintiff is anxious about the future. He is concerned about poor future employment prospects. The Plaintiff's relationships are affected by his impatience and irritability. He is separated from his wife, he is socially withdrawn and prefers to be alone. He has poor sleep because of worrying about things, his sexual activity negatively impacted. He has low libido and pain.

[30] The Plaintiff has since been using ARVs for HIV.

[31] The Activities of Daily Living Summary; functional and community mobility, Sleep, and Sexual Activities are disrupted by persistent pain. Work capacity is affected by cognitive problems that is forgetfulness and easily distracted, pain and fatigue. Interpersonal relationships are impaired by irritability and social withdrawal. The Plaintiff requires more assistance when performing heavy task than he did before the accident.

[32] Overall clinical impression client presentation. The Plaintiff was cooperative but easily distracted, requires directions.

[33] Remote memory and recent memory summary. Recent memory summary appears to be severely impaired and remote memory appears intact. He appeared depressed and anxious.

[34] Overall, very low below average test performance. Scores were below average, low, average, and average. Visual memory. The average verbal memory was below average. Some tests of Speedway within normal limits, others are below average. Injuries sustained have given rise to significant slowing of motor and all cognitive responsive. Average estimated pre accident neurocognitive capacity the below average test performance is significantly lower than the estimated average pre

accident capacity. Consistent with the mild traumatic head injury sustained, no brain injury, factors which probably contributed to poor test performance.; persistence, pain, and discomfort. Reduced range of movement, fatigue, tiredness and stressful life events. The Plaintiff sustained mild traumatic head injury with mild, mild to moderate anxiety and severe depression.

[35] Qualitative EEG results summary: The Plaintiff's EEG profile suggest a slower than normal speed of information processing and chronic pain. These problems are consistent with the history that the plaintiff sustained a traumatic head injury. The slowness is consistent with the reported symptoms of forgetfulness and below average performance.

[36] Taking all these factors into account. Referred to Table 13.- 8, the alteration in MSCHIF, mental status, cognition, and highest integrative function., the clinical features summarized here, placed the Plaintiff in Class 2(20% WPI). The Plaintiff experiences persistent accident-related pain, discomfort, and emotional distress. The pain is reportedly severe enough to interfere with his ability to work and to perform household chores. He rates his stress level as high. And finds it more difficult than before the accident, to perform some activities of daily living.

[37] Dr Mureriwa concluded that the symptoms and accident consequences listed are potent sources of serious and long term physiological disorders, including depression, anxiety and cognitive fallouts. Familiar and educational history suggests that he was mostly likely to average neurocognitive capacity prior to the accident. His neurocognitive functioning appears to have dropped from average to below average. This means that he will probably not realize the professional, financial, and social potential he would have achieved had he not been involved in this accident.

Ms. Ncumisa Ndzungu – Occupational Therapist

[38] Ms. Ndzungu, an occupational therapist, assessed the Plaintiff on 18 January 2023 to determine the residual problems following the accident and their effects on

the Plaintiff's independent living; as well as his vocational potential before and after the accident, with estimations on potential loss of earnings. For purposes of this judgment, it is the vocational assessment report results and loss of earnings estimations that are relevant.

[39] The presence of cognitive and psychosocial limitations may further curtail his ability to be trained into sedentary or light work in the future. His injuries will make him a lesser competitor in the open labour market compared to his peers. He would thus require an understanding employer who will be willing to accommodate his physical limitations. Due to the accident-related challenge the Plaintiff's job options are likely to be curtailed as he will not be able to cope with physical demanding jobs. He does not retain enough physical vocational capacity to compete in the open labour market. His physical challenges preclude him from medium to heavy occupations or any work duties which require prolonged standing, walking, dynamic posturing, climbing, and driving.

Pre-morbid profile of the Plaintiff

Personal circumstances of the Plaintiff and family background

[40] The Plaintiff has Grade 11 level of education with Code 14 drivers' license and worked as truck driver at Sunrise Poultry Farming at the time of the accident. Post accident, he attempted to return to work in July 2020 and he was given light duty to drive, a small van. After a week he was expected to resume his pre-accident job demands but he struggled. He resigned from his job. At the time of the report, he was unemployed and without an income.

Post-morbid profile of the Plaintiff

[41] The Plaintiff Demonstrated a compromised ability in maintenance of some of postural positions on a frequent basis. He presented with significant limitation with crouching and repetitive knees squatting. He presented some limitations with climbing stairs, elevated work, standing and walking. His limitations were observed

by sitting forward, bending and kneeling. The limitations are attributed to the residual pain in the left ankle, left scapula and left ribs. Decreased weight bearing on the left lower limb was also noted. The Plaintiff worked from Monday to Saturday and his duties included truck driving, loading chicken feet, operating feed processing machine offloading chicken feet. The job physically required standing, walking, lifting, carrying heavy objects, forward bending and climbing stairs. The physical or psychological cognitive requirements were attention and concentration, problem solving, communication, and following instructions.

[42] The following occupational barriers are anticipated when considering the climate's residual challenges, residual left, ankle and left ribs pain, antalgic gait, left ankle swelling, decreased movements of the left ankle, headaches and dizziness, compromised ability in maintaining most of the postural position. On frequent basis, limited ability for weight handling, mild mood disturbances.

[43] The claimant further presented with a restricted ability to execute weight handling tasks following the accident. Decreased weight bearing was noted to the left leg, and he complained of left lower limb pain during weight handling. He was therefore concluded to have limited ability to execute tasks that required lifting and carrying heavy objects following the accident. According to the assessment of the post-accident, he retains the vocational capacity to cope with the physical demand characteristics of work of mid ranges of light, physical demand level, in respect of accident-related symptoms. It is noted that his pre- and post-accident occupation as a truck driver is classified as medium to occasional heavy work.

[44] Ms. Ndzungu is of the opinion that the Plaintiff has been regarded as an unfair competitor in an openly below market. His endurance, work, speed and performance has been affected following the accident.

Talifhani Ntsieni – Industrial Psychologist

[45] It was reported to Mr. Ntsieni that after the accident the Plaintiff stayed home recuperating for three months. He also reported that he received his full salary for March, April and part of his salary for the month of May, in June he was not paid. He also reported that he attempted to resume work in July 2020, but he struggled to climb onto the truck and to drive due to the pains, and he stopped working in less than a month. He is currently unemployed with no income.

[46] The Plaintiff has Grade 11 level of education and the Code 14 driver's license. Koch states that it is well established that for the purposes of the assessment of damages for loss of earning capacity, the test is likely earnings and not what the Plaintiff could possibly have earned in an optimal scenario (Quantum Year book. 2011/70. The best guide to likely earnings is often what the victim was earning at the time of the accident, Quantum Year Book 2012:106. The Plaintiff reported that he was employed as a truck driver, and he was reportedly earning R9500 per month.

[47] It is evident that in this capacity he relied on his physical health, strength and capabilities for gainful employment. It is the reality that people without Grade 12 qualification tend to work in the fields of high physical nature, which demands less administrative functions. They therefore rely on physical strength for obtaining and sustaining employment. Same was the case for the Plaintiff as he was working. As a bus driver, packet driver, driver, machine operator and truck driver. His reported earnings at the time of the accident were slightly above the lower quantile of 2020 truck drivers earning scale within the non-corporate sector.

[48] The 2022 suggested earnings assumption for truck drivers within the non-corporate sector are as follows, R72,100 to R191 000 to 404,000 per year.

[49] The Plaintiff resumed his work post-accident, however stopped due to accident challenges. He is currently unemployed. This is justified as noted by the occupational therapist. That he is pre- and post-accident occupation as a truck driver is classified as medium to occasional heavy work. This indicates that his residual vocational capacity does not match his post-accident job demands.

[50] It is noted by the occupational therapist that the residual pain and limitation has affected the Plaintiff's vocational and functional capacity. The accident under review has significantly curtailed the Plaintiff's occupational choices and placed him in a position of an applicability in an open labour market. Given the above writer is of the opinion that the Plaintiff is likely to experience difficulties securing employment and may be faced with an extended period of employment.

Munro Forensic Actuarial Report

[51] Munro Forensic Actuaries prepared loss of earnings calculations based on the bases that the Plaintiff received lower earnings during recuperation and has been unemployed and will only be able to find lower paying job in future and is not expected to reach his suggested pre-accident career potential. The calculation was based on a monthly income of R9500 and earning inflation until retirement.

[52] The capital value of loss of earnings is calculated as follows:

- | | |
|-----------|-------------|
| a. Past | R 299 800 |
| b. Future | R 2 447 000 |
| c. Total | R2 746 800 |

[53] The contingency deduction of 5% on the past loss of earnings and 15% on the future loss of earnings was applied. The loss of earnings totals R2 364 760.

[54] The Plaintiff submitted that an amount of R3 164 760 is fair and reasonable. It is made up of the following:

- i. Past. loss of earnings; 280-4810.
- ii. Future loss of earnings; R 2 079 950
- iii. Loss of future earnings. R 2 364 760
- iv. General damages R800,000.
- v. Total amount. R3 164 760

Legal principles – earning capacity.

[55] The legal principles applicable to loss of earnings and/or earning capacity are trite. Earning capacity refers to one's potential and prospects to generate future income using their skills, talents, abilities, and experiences. Where this potential has been diminished because of the injury, and the quantum value income that one could have generated to their estate is depreciated because of the injury, then there has been a loss of earning capacity.

[56] The legal principles applicable to restitution of loss of future earnings and/or earning capacity have been firmly established. In *Dippenaar v Shield Insurance Co Ltd*¹ where Rumpf JA said that:²

‘In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate. This was the approach in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where the following appears:

‘In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between the *universitas* as it was after the act of damage, and as it would have been if the act had not been committed (*Greuber* at 269)...’

Causation

[57] The Fund conceded merits 85% in favour of the Plaintiff proven damages. Concession of merits simply means that the Fund accepts the fault of the harm-causing conduct by the insured driver for the Plaintiff's proven damages. However, concession of merits does not rest the Plaintiff's case. He still must satisfy the Court

¹ *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A)

² *Ibid*, at 917 B – D.

that *but for* the accident he would not have suffered the harm and injuries complained of; conversely, injuries and damages arose from the accident.

[58] Corbett in *The Quantum of Damages in Bodily and Fatal Injury Cases: General Principles*, J. J. Gauntlett, 2008 at page 30 states that:

“Before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant’s wrongful act...”

[59] In the factual causation enquiry, the logical starting point is the RAF 1 form which deals with the general information regarding the accident the primary hospital records of the receiving facility, the police accident report the paramedics’ report if the patient was transported by ambulance. . These sets of documents constitute core primary records as it is from them that the Plaintiff expands his case to the experts.

Evaluation of evidence

[60] The Plaintiff’s injuries and sequelae can be categorised as orthopaedic injuries and head injuries . I will deal with the orthopaedic injuries first.

Orthopaedic injuries

[61] The Plaintiff’s injuries and the sequelae complained is comprehensively captured in the hospital report. The initial entry upon arrival is recorded as follows *“Patient came in casualty with a stretcher accompanied by Med-Evac paramedics, from the scene. Patient is an MVA. Mechanism of injury is frontal impact, collided with the other vehicle. Common injuries sustained, Forehead laceration and neck laceration patient. Also, c/o(complains) of pain on the anterior chest. Blunt chest trauma and painful left leg. GSC 15 / 15. Vital signs done and recorded. Hard cervical collar. applied. Primary and secondary survey done. Patient received by*

Doctor Ntlanti Currently is awaiting to be seen@ ECG done and was shown to Doctor Ntombela”

[62] Dr Ntombela recorded provisional diagnosis to be:

- a. Head injury.
- b. Chest trauma? cardiac contusion
- c. C-Spine injury
- d. Ankle injury
- e. Pubic ramus
- f. Lateral malleolus

[63] Dr Ntombela recorded that the Plaintiff suffered no loss of consciousness. Treatment plan was X-Rays and Neck collar, suture, and dressing, IV plus bloods and ECG.

[64] The X-Rays revealed that the Plaintiff suffered laceration on the forehead and anterior neck and the left ankle lateral malleolus fracture. The Pelvis and C-spine were cleared. Black slab was applied on the Plaintiff's left leg. It was noted that there was no faecal neurological fallout, left ankle swollen tender on sight, unable to flex or extend as the left foot painful.

[65] The final diagnosis was lacerations and lateral malleolus fracture.

Loss of Consciousness

[66] Dr Mazwi diagnosed the Plaintiff as suffered a mild head injury. It is recorded that the Plaintiff experienced head trauma, also had forehead laceration with loss of awareness. Dr Mazwi states that the Plaintiff had brief loss of consciousness and amnesia with 15 / 15 GSC in keeping up with mild head injury.

[67] The paramedics' patient Report form from the hospital records was illegible and nothing could be read from it. I was concerned that the hospital's trauma unit

medical records did not record the Plaintiff's purported loss of consciousness, that this information was not recorded in the hospital records, but the Plaintiff's GCS admission score was recorded as 15/15, I requested the original paramedics' report.

[68] On 15 May 2024, I issued a directive to the Plaintiff's attorneys to obtain the original copy of the Paramedics Patient Form Report from the Emergency Medical Services (EMS) that attended to the scene.

[69] The Plaintiff's attorneys filed a clearer EMS report, I found that Dr Mazwi's statements about the Plaintiff's loss of consciousness were not supported by the EMS report. The EMS report states that he was found lying on supine position alert and oriented. The hospital clinical records, as does the EMS report markedly differed with the Plaintiff's allegations that he lost consciousness.

[70] Regard being had to the contradiction in Dr Mazwi's report and the EMS and hospital records. I am not satisfied that the Plaintiff lost consciousness after the collision. The next question to be answered is whether the Plaintiff has suffered head injury, if yes, to what extent has the injury affected his ability to work.

[71] After Dr Mureriwa conducted certain tests, which showed neurocognitive and other psycho-behavioural and psychiatric impairments, I accept that the Plaintiff suffered mild traumatic brain injury without any loss of consciousness. Dr Mureriwa opined that the below average performance on the neuropsychological test is consistent with the mild traumatic injury.

[72] I am of the view that Dr Mazwi was told by the Plaintiff that he had loss of consciousness' and amnesia. I am saying this because it does not appear on the EMS Report and on hospital Records.

[73] Splig J also penned some valuable insights regarding the value of expert witness in ***Ndlovu v Road Accident Fund***³ where he held that:

³ *Ndlovu v Road Accident Fund* 2014(1) SA 415 (GSJ)

'If the patient is the source of the information regarding the injury and the facts, he or she supplies differ from those recorded by the hospital or doctors at the time of the accident or other primary source documents then this should be clearly stated.⁴

There remains a need for the expert's report to distinguish between the primary extrinsic data used and the patient's comments. This is necessary in order to maintain the requisite distinction between opinion evidence, which is receivable (and which may also include reasons as to why the patient's say-so is supportable based on the practitioner's field of expertise), and an untested version which amounts to an assumption. In the latter type of case, it should be clearly identified as such, and not masqueraded as factual evidence, particularly where the very purpose of obtaining expert testimony may have been to test the veracity of the Plaintiff's allegations.⁵

The need for medical experts to identify originating source data and at least identify or raise concerns regarding their effect on *quantum* if there are discrepancies is also apparent when considering how a failure to do so may result in prejudice, particularly for the plaintiff.⁶

The prejudicial consequences of a medico-legal report failing to comply with the basic requirement of identifying the underlying facts and their sources arises because in practice there can be a significant difference in the consequences where a court does the best it can with available evidence and cases where the court finds that the plaintiff has not been frank with it or with the experts.⁷

In the first mentioned situation a court will utilise a contingency factor to cater for the risk of a symptom or an event being causally related or eventuating in the future. In the latter case the court may reject the evidence because it was presented as a fact that was subsequently shown to be incorrect, and not as an opinion thereby precluding the court from adopting a contingency; in short,

⁴ Id, para 114.

⁵ Id. Para 115.

⁶ Id. Para 116.

⁷ Id. Para 117

a matter of irresolvable imponderables is converted by the expert into a factual issue of true or false.⁸

Accordingly, much will depend on how the experts distinguish between objective originating data on the one hand and the patient's say-so or unsubstantiated hearsay on the other. A court will readily be able to do the best it can and apply contingency factors in the first type of case. However, if it rejects the plaintiff's version or considers that available evidence has been suppressed it is entitled to reject the version and adopt an alternative conclusion with or without applying a contingency factor (compare *Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) at 494B-C).⁹

In order for a comprehensive medico legal report to continue being accepted as complying with Rule 36(9) in modern practice, and for the plaintiff not to be potentially prejudiced by a failure to distinguish assumptions from fact and opinion it appears that the following should also appear from its contents;¹⁰

- a. A clear distinction between the primary source data relied upon, secondary sources and the plaintiff's say-so.

The primary source would inevitably be the treating hospital's records from the time of the accident until discharge (including paramedics' records where relevant). While it may also include follow ups, subsequent surgical and medical intervention, scripts and other actual treatment, the originating source document upon which all else is likely to be tested is the records of the treating hospital from admission until discharge. The medico-legal reports should therefore clearly state whether the origins of the symptoms and other *sequelae* relied upon by the plaintiff self-evidently appear from the treating hospital's records. Obviously if the patient was not admitted to a hospital or otherwise received medical attention before admission then the treating doctor's records would also constitute the primary source records, similar to the paramedics' records if any.

⁸ Id, para 118.

⁹ Id, para 119.

¹⁰Id, para 121.

- b. The medico-legal report should also clearly indicate whether the patient's assertions are accepted or merely assumed. If the expert accepts the patient's contentions as to the injuries sustained and when, or their sequelae, or as to other relevant assertions in cases where they are not self-evident from the primary documents then such acceptance itself constitutes opinion evidence; as such the expert should qualify himself or herself as capable of providing such opinion and set out the process of reasoning, on medical grounds within the expert's field of expertise, upon which the conclusion to support the patient's assertions is made.

In this way a clear line can be drawn between opinion evidence on the one hand and the acceptance of the Plaintiff's mere say-so on the other. Unless the distinction is made between the Plaintiff's untested assertions and an expert opinion of whether they can be medically supported, and if so whether on primary source documents or not, the report will impermissibly encroach on the judicial function of determining fact.¹¹

[74] While some of the injuries are mentioned in the hospital record, they were provisional diagnosis not the final one. The Doctors that completed RAF 1 and RAF 4 clearly recorded the injuries suffered by the Plaintiff as gleaned from the hospital records. Unfortunately, Dr Mafeelane, Dr Mazwi and Dr Mureriwa's report did not distinguish between the information received from the Plaintiff and the information gleaned from the hospital records.

[75] And now for the contingencies.

[76] The Supreme Court of Appeal in the case of **Road Accident Fund v Guedes**¹² at paragraph 9 referred with approval to *The Quantum Yearbook*, by the learned author Dr R.J. Koch, under the heading '*General Contingencies*', where it states that:

¹¹ Id. Para 121.

¹² *RAF v Guedes 2006 (5) SA 583 (SCA)*

“...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...”¹³

[77] Nicholls AJA in **RAF v Kerridge**¹⁴ pointed to some general rules that have been developed over the years in contingency applications. He said that:

‘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 downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriads 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.’¹⁵

[78] Moosa AJ in **O v Road Accident Fund**¹⁶ endorsed Gauntlett’s principle and said that it is well established practice that where the plaintiff suffers a permanent impairment of earning capacity, the proper and effective method of assessing past and future loss of earnings is as follows:¹⁷

- a) To calculate the present value of the income which the plaintiff would have earned but for the injuries and consequent liability.
- b) To calculate the present value of the plaintiff’s estimated income, if any, having regard to the disability.
- c) To adjust the figures obtained in the light of all the relevant factors and evidence obtained and by applying contingencies;

¹³ Ibid, para 9.

¹⁴ *RAF v Kerridge* (1024/2017) [2018] ZASCA 151.

¹⁵ Ibid at para 44.

¹⁶ *O v Road Accident Fund* (20976/2014) [2018] ZAGPJHC 419 (31 May 2018).

¹⁷ *The Quantum of Damages*, vol 1, 4th edition by Gauntlett at page 68; *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A) at 113 F – 114E

- d) To subtract the figure contained under (b) from that obtained under (a)

[79] Robert J Koch¹⁸ has suggested that as a general guideline, a sliding scale of 0,5% per year over which the applicable income must be calculated, be applied. For example, 25% for a child, 20% for a youth and 10% in middle age.

Munro Forensic Actuarial Report

[80] Munro Forensic Actuaries calculated the capital value of loss of earnings without contingencies as follows:

a. Past loss of earnings	R299 800
b. Future	R2 447 000
c. Total	R2 746 800

[81] The Plaintiff's attorneys applied normal contingency deduction of 5% and 15% resulting in the amount of R2364 760 (Two Million three hundred and sixty four thousand and six hundred rand only).

[82] It is common cause that a number of issues are considered when an actuarial assessment is done, including considerations of early death, promotion prospects, and taxes. Having considered the Plaintiff's age, educational background, skills, employment history, medical history, the injuries suffered and all the expert opinions, I am of the view that 5% contingences must be applied to pre-morbid position and 25 % to the post morbid position. Therefore, the Capital value of loss of earnings will be calculated as follows:

a. Past	R 284 810
b. Future	R 1835 250
c. Total	R 2 120 060
Less 15%	R 1 802 051

¹⁸ Robert J Koch, The Quantum Yearbook, 2009, p.100

General Damages

[83] Moseneke DCJ in *Van der Merwe v Road Accident Fund and Another*¹⁹ stated that:

*“non-patrimonial damages, which also bear the name of general damages, are utilized to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual’s estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. **They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss.** In bodily injury claims, well-established variants of general damages include “pain and suffering”, “disfigurement”, and “loss of amenities of life.”²⁰ (my emphasis – and footnotes omitted)*

....

*it is important to recognize that a claim for non-patrimonial damages ultimately assumes the form of a monetary award. Guided by the facts of each case and what is just and equitable, courts regularly assess and award to claimants’ general damages sounding in money. In this sense, an award of general damages to redress a breach of a personality right also accrues to the successful claimant’s patrimony. **After all, the primary object of general damages too, in the non-patrimonial sense, is to make good the loss; to amend the injury.** (My emphasis – and footnotes omitted)²¹*

¹⁹ (CCT48/05) [2006] ZACC 4

²⁰ Ibid at para 39

²¹ Cf: *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 at 199 where the court held: “The amount to be awarded as 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”.

[84] I have considered the cases that the Plaintiff referred me to. I agree that an award of R800 000 (Eight Hundred Thousand Rand Only) is fair and reasonable.

[85] In the result I make the following order:

1. Amended order marked "X" annexed hereto is made an order of court

FLATELA LULEKA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 14 June 2024

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Instructed by

Sotshintshi Attorneys

Attorneys for the Defendant

Phokwane K.A

Date of the Hearing

14 November 2023

Date of the Judgement

14 June 2024