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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case Number: 2021/24199
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
12.05.23**

In the matter between:

SIBUSISO BRIAN DLAMINI obo MBHELE SIFUNDO **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

NEUTRAL CITATION: *Sibusiso Dlamini obo Mbhele Sifundo* (Case No: 24199/2021) [2023] ZAGP JHC 472 (12 May 2023)

This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 12 May 2023 at 10h00.

JUDGMENT

JORDAAN AJ

INTRODUCTION

[1] On the 7th of September 2019 at approximately 19h30 a motor vehicle with registration numbers and letters [...] (the insured vehicle) driven by Manana Alice, collided with the plaintiff, as a pedestrian, whilst he was crossing Grasmere Road, Weller's Farm, at

approximately 19h30. The plaintiff was transported by ambulance to the Chris Hani Baragwanath Hospital where he was admitted, treated and later transferred to Edenvale Hospital for rehabilitation.

[2] The Plaintiff instituted action for damages against the Road Accident Fund (RAF) in terms of s17(1)(a) of the Road Accident Act 56 of 1996, as amended, as the statutory insurer. In paragraph 9 of his particulars of claim, the plaintiff claims damages in respect of:

2.1 General damages for pain and suffering, loss of amenities of life, disability and damages R2 200 000.00

2.2 Future medical expenses Undertaking

2.3 Past and Future loss of earnings R2 401 145.50

[3] This matter served before me as a default trial pursuant an order by Victor J dated the 15th of March 2022, in terms of which the plaintiff was granted leave to approached the Registrar to seek a date for default judgment as the Defendant failed to enter an appearance to defend having been duly served with the combined summons by the Sheriff. The Plaintiff sought judgment against the defendant for general damages, future loss of earnings and an undertaking for future medical expenses of the plaintiff.

[4] The merits became settled on the basis of joint negligence as RAF conceded liability for 70% of the negligence vis-a-vie the occurrence of the collision and apportioned 30% negligence to the plaintiff, in terms of the agreed settlement of merits.

[5] A curator ad litem had been appointed for the plaintiff.

ISSUES FOR DETERMINATION

[6] The only heads of damages for determination by this court is the issue of the plaintiff's general damages, future loss of earnings and future medical expenses.

THE EVIDENCE OF THE EXPERTS

[7] In establishing that as a consequence of the accident the patient sustained injuries and the sequelae of same, evidence was presented through the reports of the expert witnesses who consulted with and examined the plaintiff by counsel for the plaintiff:

ORTHOPEADIC SURGEON

[8] **Dr NGOBENI** reports that the plaintiff suffered poly trauma as a result of a pedestrian vehicle accident on the 07th of September 2019 and was admitted to Chris Hani Baragwanath Hospital where he was treated for:

1. Head injury
 - He was admitted to intensive care unit with a Glasgow Coma Scale (GCS) of 6/15
 - He has an L-shape scar from his forehead stretching into his scalp
 - He has a global weakness on the right side of his body and walks with a hemiplegic gait
 - He was referred for neurologist or neurosurgeon assessment and further treatment
2. Bilateral pneumothorax
 - He was treated with a bilateral intercostal drain
 - He received chest physiotherapy
3. Grade III liver injury and retro peritoneal hematoma
 - A laparotomy was done and even though the abdomen is soft and non-tender the plaintiff complains of pains, defer to a general surgeon
4. Right knee soft tissue injury
 - An above the knee circular plaster of Paris was initially applied
 - No particular findings are treatment indicated

[9] The plaintiff suffered acute pain for three weeks and still reports right side body weakness. He was treated at Chris Hani Baragwanath Hospital and continued his rehabilitation at Edenvale Hospital. His leisure of watching television and his life expectancy was not affected by his orthopaedic injury. He passed grade 12 and was doing piece jobs at the butchery prior to the accident. He has right dominant side hemiplegia. He will have difficulty in securing employment or competing for employment with his peers and he will need assistance for daily living activities. The plaintiff has permanent impairment of the right upper and lower limb function-a post traumatic right hemiplegia. He has chronic abdominal pain and forgetfulness. Dr Ngobenj concluded that the plaintiff suffered 19% whole person impairment qualified the plaintiff for general damages under the narrative test.

SPECIALIST NEUROSURGEON

[10] **Dr SEGWAPA** reports that on a study of the hospital records the plaintiff sustained the following injuries:

1. Head injury
 - He had a GCS of 6/15
 - He had a cerebral oedema
 - He suffered a subarachnoid haemorrhage
 - He suffered a subdural hematoma
 - He suffered multiple brain contusions
2. Chest
 - Bilateral pneumothoracs
3. Abdomen
 - Grade 3 liver laceration
4. Musculoskeletal
 - Soft tissue injury to the right knee

[11] The plaintiff was healthy prior to the accident and it was the only accident that the plaintiff was involved in. It was reported that the plaintiff suffered immediate loss of consciousness from which he recovered after two weeks. His admission GCS was 6/15 and after a month it was 14/15 where it remained. The opined that these are features of a severe diffused brain injury with multifocal brain damage. The plaintiff has right upper and lower body weakness, neurocognitive impairments, suffered acute pains for two weeks post the accident and chronic pains for approximately six months. The injuries did not impact the longevity of the plaintiff's life. Dr Segwapa concluded that the plaintiff suffered significant persistent neurocognitive deficits and concluded that the plaintiff suffered 20% whole person impairment and qualified the plaintiff for general damages under the narrative test.

NEUROLOGIST

[12] **Dr MUDAU** found that the plaintiff suffered poly-trauma with head, chest and abdominal injuries. The plaintiff was admitted with a GCS of 6/15 and remained in a coma from admission until the 03rd of October 2019 when his GCS was 9/15. The plaintiff presented memory deficits, a change in personality and poor concentration. The injury has resulted in change in personality, moderate to severe cognitive difficulties and post-traumatic stress disorder (PTSD). The plaintiff walks with a hemiplegic gait. The plaintiff sustained a severe head injury which resulted in a change in personality, moderate neuro-cognitive impairment, post-traumatic headaches, moderate to severe physical limitations. Risk of developing epilepsy has increased by 12%. The plaintiff is not employable in the open labour market.

PLASTIC SURGEON

[13] **Dr BERKOWITZ** on examination found that the plaintiff had a right hemiparesis and further made the following findings on closer examination:

1. A small scar is noted overlying the occipital scalp.
2. There is a sinuous scar measuring 60 mm x5 mm overlying the left frontal scalp and extending onto the left side of the forehead.
3. There is a scar measuring 50 mm x25 mm on the lateral aspect of the left hemithorax.
4. Multiple small scars are noted on the lateral aspect of the left side of the abdomen.
5. There is a left paramedian laparotomy scar measuring 280 mm x 10 mm with cross hatching.
6. The proximal portion of scar number 5) measures 40 mm in diameter.
7. There are multiple post-abrasion scars noted on the upper abdomen and lower anterior chest.
8. There is a scar measuring 30 mm x8 mm with cross hatching lying horizontally in the left upper quadrant of the abdomen.
9. There is a scar measuring 25 mm x8 mm lying horizontally across the suprasternal notch.

[14] Dr Berkowitz concluded that the plaintiff has reached maximum medical improvement yet he remains with permanent disfigurements as a result of the accident which require surgical intervention.

SPECIALIST PHYSICIAN

[15] **Dr BOTHA** reported that the plaintiff sustained polytrauma in a PVA that occurred on 7 September 2019 of which a severe diffuse head injury was the most significant injury. He also sustained bilateral chest trauma, blunt abdominal trauma and an injury to the right knee. In terms of outcome there is clinical evidence of significant cognitive impairment, residual right-sided hemiparesis and extensive scarring on the anterior abdominal wall. The plaintiff has difficulties with cognitive functioning, behavioural issues, neuro-physical deficits, hemiplegic gait, residual speech and communication difficulties. It was the finding of Dr Botha that the plaintiff has no prospect of returning to the labour market in any capacity due to the organic brain syndrome which was caused by the severe focal and diffuse head injury with hemiplegia and severe memory deficit. Dr Botha opined that when the alteration in mental status evaluation and integrative functioning is combined with the hemiparesis and scarring, the 30% threshold will be reached and there are significant additional narrative issues in that he has permanent loss of enjoyment of life, loss of independent living and no prospects of future employment.

CLINICAL PSYCHOLOGIST

[16] **Mrs MATLOU** found that the plaintiff is depressed and his depression is linked to the changes that he has had to adapt to after the accident. Part of the changes is with regard to his partial paralysis, as he has general weakness of his right side of the body. He has a lot to adjust to, pertaining to the occurrence of the accident in his life. He would thus benefit from Psychotherapy, particularly to look at strategies of improved impulse control. His family would also need Family therapy, for assistance on how to manage with him. A total of 30 sessions are recommended in this regard. Furthermore, in light of the findings of the current assessment, his organic brain syndrome does mean that he is likely to suffer depletion in his previously enjoyed amenities and prospects. The combined effects of his neurocognitive deficits, his emotional difficulties and physical difficulties are expected to jeopardize his prospects of attaining employment in the open labour market, and his ability to maintain that employment once secured. The plaintiff displayed marked behavioural changes that have been reported since the accident, as he is now described as withdrawn and quite around the house, he is irritable, and shout tempered. His social and personal functioning is affected by these changes, as he is also very disinhibited since the accident. It is reported that he leaves the house and knocks at neighbours' houses and he is gets physically aggressive with others when there are disagreements. This means he poses a danger to himself and others. Recommendation is made to a Clinical Psychologist in order to assist with adjustment to the accident and coping skills.

OCCUPATIONAL THERAPIST

[17] **Mrs ZETHU NKOSI** found that the plaintiff ambulated with an ataxic gait with a consistent but slow pace. He does not have functional mobility and agility skills. He has spasticity in his right leg which affects his balance and coordination. His right upper limb is numb and he has reduced grip strength, poor pen grip and writing abilities. His cognitive test scores, indicated that the plaintiff has extremely low cognitive function. During the evaluation, he presented with significant memory deficits and he was not oriented to date, time and place. Although he did not display any mood disturbances, he was overly familiar with the writer and this confirmed poor social behaviour that his mother reported. This has led to the plaintiff losing his friends and the family often has to intervene in fights with neighbours. This clearly indicates that the plaintiff will not be able to behave in a socially acceptable manner in a place of work. When considering his residual physical capacity, cognitive fallout and poor interpersonal relations with others, the plaintiff is deemed not suited for any work in the open labour market. The writer notes that the physical symptoms which are a result of the motor vehicle sequelae will have a significant impact on his overall workability. He would not be able to execute tasks that require manual handling of material, bilateral hand function, mobility and postural tolerance. And given his educational level, it is reasonable to presume that his job required manual operations, he is now precluded from this. In addition, although he is young and could have been reskilled for administrative positions, his cognitive fallout precludes him from learning new skills. Given the time that has lapsed since the injury as well as the severity of his injuries, no further improvement is expected. The writer opines that the plaintiff is deemed a candidate for sheltered employment, this would improve his use of free time during the day, instead of his family having to worry about where he is. The plaintiff will benefit from occupational therapy to assist him with life skills, socialization and assertiveness.

INDUSTRIAL PSYCHOLOGIST

[18] **Mr PEET VORSTER** opines that the plaintiff will struggle to secure office-based/sedentary types of employment due to his lack of office-based work experience and level of education (i.e., Grade 12). Most sedentary type of work is clerical and administrative in nature, and roles are typically found in the formal sector. The plaintiff would have to compete with others that are more qualified and experienced than him in such roles. Additionally, the plaintiff's accident-related sequelae will negatively affect him if not adequately managed. Furthermore, most work in the informal sector requires individuals to rely on their physical strength. The writer opines that the plaintiff will struggle to secure light type of work as there are few positions in the informal sector that are of a light nature. The writer also opines that he will struggle to find an accommodative employer in the informal sector.

[19] The writer's research further suggests that it is unlikely that Mr Mbhele will be able to secure a place in sheltered employment. There are only 12 Sheltered Employment Factories (SAF) nationally (i.e., the factories are based in Bloemfontein, Cape Town, Durban, East London, Johannesburg, Kimberley, Pietermaritzburg, Port Elizabeth, Potchefstroom, and Pretoria). The factories manufacture furniture, textiles, metal work, leather work, book binding, and screen printing among other products. Prospective candidates are required to have some experience in a trade and, with Mr Mbhele's physical, functional, emotional, and

cognitive limitations (as outlined in all experts' reports), as well as the extensive waiting lists, it is unlikely that Mr Mbhele will be considered and his chances of being placed in such an environment is poor.

[20] Mr. Vorster therefore opines that the plaintiff will not be able to compete in the South African labour market, given the high South African unemployment rate, the competitive South African labour market, his limited vocational options, level of education, employment history, and accident-related sequelae. With regard to future loss of earnings (as per expert opinion), the writer opines that although the plaintiff is still relatively young, he has been deemed practically unemployable in the open labour market.

ACTUARY

[21] **Mr. WHITTAKER** performed calculations to determine the capitalised value of the plaintiff's loss of income. On the basis of payslips provided to Mr. Whittaker he calculated the basic salary of the plaintiff as R20 per hour with an average of 88.23 hours per fortnight. The plaintiff was a 25year old labourer at time of the accident and his retirement age was set at 62½. In light of Mr. Vorster's report that the plaintiff has been rendered unemployable and that plaintiff in fact did not take up any employment post the accident his post-accident earnings were taken as nil. An uninjured contingency deduction for past loss of income was provided for at 5% and a 19% contingency deduction for future loss of income, which calculation translated as following:

Past loss

Value of income uninjured:		R105,705
Less contingency deduction:	5.00%	<u>R 5,285</u>
		R100,420

Value of income injured:		R NIL
Less contingency deduction:	0.00%	<u>R NIL</u>
		R NIL

Net past loss' R100,420

Future loss

Value of income uninjured:		R2,840,401
Less contingency deduction:	19.00%.	<u>R 539,676</u>
		R2,300,725

Value of income injured:		R NIL
Less contingency deduction:	0.00%	<u>R NIL</u>
		R NIL

Net future loss: R 2,300,725

Total net loss:

R 2,401,145

LEGAL FRAMEWORK AND EVALUATION

[22] It was submitted by plaintiff's counsel that the plaintiff was a 23year old picker/packer at the time of the pedestrian vehicle collision on the 07th of September 2019.

[23] Counsel further submitted that the plaintiff suffered injuries in the collision and submitted that the sequelae can be linked to the accident if regard is had to the hospital records and expert reports and the fact that the plaintiff had never been in a collision before, enjoyed good health and was able to work as a meat picker/packer at Lynca Meats.

[24] It is trite that in order to succeed in a delictual claim, a claimant would have to prove the following requirements: causation, wrongfulness, fault and harm. A successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the plaintiff, on the other hand. This is in accordance with the 'but-for' test.¹ Legal causation must be established on a balance of probabilities. There can be no liability if it is not proved, on a balance of probabilities, that the conduct of the defendant caused the harm.²

[25] The merits were settled on the basis joint liability 70/30% apportionment in favour of the plaintiff. RAF hereby thus admitted 70% liability that the collision occurred as a result of the negligence of the insured driver. In terms of the case of Minister van Polisie v Ewels³ wrongfulness in RAF cases is inferred from the fact that the insured driver negligently caused the accident.

[26] Whether the plaintiff sustained injuries in the undisputed collision, is found in the undisputed expert reports that explain the direct injuries which were sustained by the plaintiff as recorded in the hospital records and their expert opinions as:

1. Head injury
 - He was admitted to intensive care unit with a Glasgow Coma Scale (GCS) of 6/15
 - He has an L-shape scar from his forehead stretching into his scalp
 - He has a global weakness on the right side of his body and walks with a hemiplegic gait
 - He was referred for neurologist or neurosurgeon assessment and further treatment
2. Bilateral pneumothorax

¹ International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) ([1989]ZASCA 138) at 700F-I; Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) at 915B - H

² Lee v Minister of Correctional Services 2013 (2) SA 144 (CC)

³ 1975 (3) SA 590 (A)

- He was treated with a bilateral intercostal drain
- He received chest physiotherapy
- 3. Grade III liver injury and retro peritoneal hematoma
 - A laparotomy was done and even though the abdomen is soft and non-tender the plaintiff complains of pains, defer to a general surgeon
- 4. Right knee soft tissue injury
 - An above the knee circular plaster of Paris was initially applied
 - No particular findings are treatment indicated

[27] On a review of the conspectus of evidence presented in the various expert reports, this court finds on a balance of probabilities that it was the pedestrian vehicular collision that caused the head injury, bilateral pneumothorax, the grade III liver injury and retro peritoneal hematoma and right knee soft tissue injury that the plaintiff sustained.

[28] The expert reports, which are uncontested evidence before court and accepted, indicate the sequelae of his head injury is that the plaintiff ambulated with an ataxic gait with a consistent but slow pace. He does not have functional mobility and agility skills. He has spasticity in his right leg which affects his balance and coordination. His right upper limb is numb and he has reduced grip strength, poor pen grip and writing abilities. His cognitive test score, indicate that plaintiff has extremely low cognitive function, he has significant memory deficits, he suffers from extreme irritability, lack of impulse control and he was not oriented to date, time and place. The plaintiff still suffers with chronic pain on his abdomen and severe scarring. The experts appraised the injuries as serious injuries on the narrative test.

[29] Having regard to the expert reports based on consultation with the plaintiff and the hospital records, this court finds on a balance of probabilities that the pedestrian vehicular collision that caused the injuries and the sequelae of those injuries was caused as a result of the injuries so caused by the collision.

[30] In this instance, I am satisfied that the plaintiff was able to proof on a balance of probabilities that his earning capacity has been compromised as a result of the injuries he sustained in the accident in question. Plaintiff succeeded in proving his claim for loss of earnings.

[31] I have considered that the plaintiff was 23years old at the time of the collision; that he is no longer fit for employment in the open labour market due to the sequelae of the injuries. I had regard to the actuarial calculations which are based on the expert reports, which this court had accepted. It is trite that the court has the discretion to determine the contingency deduction. [32] A 5% past contingency deduction, and, having regard to the *sequelae* of the injuries sustained in the accident, an increased 19% post-accident contingency deduction is just and fair having regard to the circumstances of the case. I accordingly find no reason to interfere with the actuarial calculations submitted less 30% apportionment.

[33] The plaintiff qualifies for compensation for general damages for serious injury in terms of the narrative test, in that he suffered long-term impairment or loss of a body function,

permanent serious disfigurement, right sided hemiplegia, severe long term mental or severe long-term behavioural disturbance, has cognitive deficits in multiple domains tested and mild symptoms of anxiety and depression, the risk of developing epilepsy is at 8% according to neurosurgeon and at 12% according to neurologist and further that his injuries disadvantage him and adversely affect his quality of life. He will have difficulty securing employment according to Orthopaedic surgeon and he is not employable on the open labour market according to neurologist.

[34] The plaintiff claimed an amount of R2 200 000,00 for general damages and referred the court to a number of comparable cases. General damages are often determined by comparing cases under scrutiny and those previously decided, it is generally accepted that previously decided cases are never similar and that their purpose stops at comparing them to the current.

[35] In *Protea Insurance Co v Lamb*⁴, the court held that:

"In assessing general damages for bodily injuries, the process of comparison with comparable cases does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation, nor should the process be allowed to dominate the inquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance in a general way

towards assisting the Court in arriving at such an award which is not substantially out of general accord with previous awards in broadly similar cases, regard had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration."

[36] This court had regard to the following cases:

In *M v Road Accident*⁵ the Plaintiff sustained severe head injuries, neurobehavioral deficits and multiple lacerations and abrasions. The Plaintiff was awarded R1,900,000.00 in 2018 for general damages, this will equate R2,125,600.00 in 2021 monetary terms.

In *Megalane N.O. v Road Accident Fund*⁶, the Plaintiff sustained severe brain injury with diffuse and focal brain damage in the form of a subdural hematoma resulting in cognitive impairment characterised by poor verbal and visual memory, poor concentration and distractibility, impaired executive function characterised by frontal lobe disinhibition causing inappropriate behaviour, speech difficulties characterized by dysarthria and word retrieval difficulties, bilateral hemiparesis with severe spasticity of all four limbs and facial paralysis as well as aphesis. Confined to a wheelchair. Intelligence level that of a young child. Although limited, he still had insight into his predicament. An above average scholar before the accident, who would probably have undergone tertiary education, left with permanent

⁴ 1971 (1) SA 530 (SCA).

⁵ (12601/2017) [2018] ZAGPJHC 438 (18 June 2018)

⁶ [2006] ZAGPHC 116

severe physical and mental disabilities rendering him unemployable. The Plaintiff was awarded R1,000,000.00 in 2006 for general damages. This will equate to R2.285,000.00 in 2021 monetary terms.

In the unreported case of *VW v RAF* by Mbhele J, heard on 29 October 2018 and delivered on the 1st February 2019, Justice Mbhele awarded an amount of R2,100,000.00 for general damages, 2022 value R2,372, 266.07. The Plaintiff's injuries were described by Dr Oelofse, the orthopaedic surgeon, as a traumatic brain injury with a base skull fracture, pons bleed, mandible fracture, and right-lower leg - tib/fib fracture. The Patient was in a coma and transferred to ICU, ventilated on a T-piece and had a GCS of 4/15. The Plaintiff's current symptoms were headaches and behavioural and emotional disorders.

[37] Having regard to the injuries suffered by the plaintiff *in casu*, the aforementioned comparable case law, which all find application, and inflation, this court finds that the amount of R2 200 000.00 for general damages would be fair and reasonable under the circumstances less the 30% apportionment.

[38] The plaintiff's experts have made a compelling case that the plaintiff will, in the future, be required to undergo medical treatments and/or surgical procedures. Consequently, the plaintiff has made out a proper case for an undertaking for future medical expenses in terms of section 17(4) of the RAF Act.

[39] I accordingly make the following order:

1. The Defendant shall pay the Plaintiff R 1 540 000.00 (One Million Five Hundred and Fourty Rand) after deduction of 30% apportionment from R2 200 000.00(Two Million Two Hundred Thousand Rand). This amount is in respect of General Damages suffered as the result of the motor vehicle accident that occurred on the 07th September 2019.
2. The Defendant shall pay the Plaintiff R1 680 801.00 (One Million Six Hundred and Eighty Thousand and Eight Hundred and One Rand) after deduction of 30% apportionment from R2 401 145.00 (Two Million Four Hundred and One Thousand One Hundred and Fourty Five Rand). This amount is in respect of Past and Future loss of earnings suffered as the result of the motor vehicle accident that occurred on the 07th September 2019.
3. Defendant shall pay the capital amount of R R3 220 801.00(Three Million Two Hundred and Twenty Thousand and Eight Hundred and One Rand) on or before the 03rd of June 2023.

4. The aforesaid capital sum of R R3 220 801.00(Three Million Two Hundred and Twenty Thousand and Eight Hundred and One Rand) shall be paid on or before 03rd of June 2023, directly into the Trust Account of the Plaintiff's attorneys of record NT MDLALOSE INCORPORATED, with the following account details:

Name of account holder : NT Mdlalose Incorporated

Account held : [...]

Branch code : [...]

Account No : [...]

5. The Defendant shall furnish the plaintiff and/or the trustee referred to below, with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the undertaking) limited to 70%, to reimburse the plaintiff and/or the trustee for the cost of the future accommodation of Mbhele Sifundu in a hospital or nursing home, or treatment of, or the rendering of a service, or the supplying of goods to him, arising out of the injuries he sustained, in the motor-vehicle accident that occurred on the 7th of September 2019, after such costs have been incurred and upon proof thereof. In addition, the undertaking shall include costs of the creation of the trust referred to below, the costs of annually obtaining a security bond as required and the cost of the trustee in respect of the administration of the trust.
6. The defendant and shall be liable for:
- 6.1 the reasonable cost of the creation of the Trust referred to infra and the appointment of the Trustees,
 - 6.2 the costs of the administration of such Trust on behalf of Mr. Mbhele Sifundo's estate, which liability shall not exceed the costs of a *curator bonis*,
 - 6.3 The reasonable costs for the furnishing of security by the trustees.
7. The Defendant shall pay the Plaintiffs taxed or agreed party and party high court costs of the action to date, which costs shall include Counsel's fees, on the applicable High Court scale as well as the qualifying fees of the experts and actuary (Algorithm Consultants and Actuaries). The Defendant shall pay the preparation and reservation fees and the costs of the plaintiff's experts, if any, and is allowed by the taxing master, subject to the following conditions: -
- 7.1 In the event that costs are not agreed, the plaintive shall serve the notice of taxation on the Defendant's attorney of record; and
 - 7.2 The Plaintiff shall allow the Defendant 14 Court days to make payment of the taxed costs.

8. The plaintiff's attorney of record NT MDLALOSE Incorporated, shall take the requisite steps to establish trust *inter vivos* in accordance with the Trust Property Control Act 57 of 1988, *inter alia* to administer and or manage the financial affairs of Mr. Mbhele ("the trust") and such a trust shall be formed within three (3) months of the payment of the capital amount, alternatively, within such a period extended by the Court. The said appointment shall be subject to the approval of the above Honourable Court.
9. The trust instrument contemplated in paragraph 6 above shall provide the following:
 - 9.1 That Mr. Mbhele is the sole beneficiary;
 - 9.2 That the number of trustees should be prescribed and in particular shall include Mr. Mbhele's aunt, Manyeli Nonkululeko Happiness, and the bank representative
 - 9.3 There should be a provision which prevents the remaining trustee from acting otherwise than to achieve the appointment of a replacement trustee, in the event of their number being reduced below that prescribed;
 - 9.4 The composition and the voting rights of the trustees should be such as to avoid deadlock;
 - 9.5 Unless it is undesirable, a guardian should participate as a co-trustee;
 - 9.6 That a nominated employee and manager in trust services of a financial or banking institution properly establish in terms of the banking laws of the Republic of South Africa, must declare him or herself as available and willing to act as a trustee of the trust (as a trustee), be appointed as a professional trustee of the trust with equal voting rights;
 - 9.6.1 The trustees to be appointed in this capacity is absent bank trusts represented by its nominee Mpho Pholosi, consent letter attached.
 - 9.6.2 The composition of the board of trustees and the structure of the voting right of the trustee should be such that the independent trustee(s) cannot be overruled or out-voted in relation to the management of the trust assets by any trustee who has a personal interest in the manner in which the trust is managed.
 - 9.6.3 The professional trustee of the trust to be formed to take all requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfilment of his/her obligations and to secure that the bond of security be submitted to the Master of the High

Court at the appropriate time as well as to all other interested parties.

- 9.6.4 The trust should be stated Johanne for the purpose of administering the funds in a manner which takes best account of the interest of Mbhele Sifundu.
- 9.6.5 The remuneration of the professional trustee shall be at a rate prescribed by the banking or financial institutions in the Republic of South Africa as determined by the Master of the High Court.
- 9.6.6 Proper provision should be made for the calling and holding of meetings and the taking of resolutions by the trustees.
- 9.6.7 All resolutions must be in writing.
- 9.6.8. Provision should be made for adequate procedure to resolve disputes between the parties.
- 9.6.9 No charges should be made by any trustee in relation to the receipt of the initial payment to the trust of the proceeds of the litigation.
- 9.6.10. The trust property should be excluded from any community of property
or
accrual in the event of the marriage of the beneficiary.
- 9.6.11 The exclusion of the contingent rights of the beneficiary in the event of session, attachment or insolvency of the beneficiary; prior to the distribution or payment thereof by the trustee to the beneficiary.
- 9.6.12 The termination of the trust shall take place with the leave of the Court, when Mr Mbhele recovers his memory, alternatively, upon the death of Mr. Mbhele and in such event, the trust property shall pass to the estate of Mr. Mbhele, which ever event occurs first;
- 9.6.13 The amendment of the trust instrument is subject to the leave of the Court
- 9.6.14 The trustees shall be entitled, if they deem it necessary, to utilize the income of the trust for the maintenance of Mr. Mbhele; and
- 9.6.15 The trust property and administration thereof is subject to annual reporting by an accountant

10. The provisions referred to in paragraph 9 above shall be in accordance with the provisions of the Trust Property Control Act 57 of 1988, be subject to the approval of the Master.

11. This Order shall be served by the Plaintiffs attorney on the Master of the High Court and the nominated Trustee within a reasonable time of the granting of this Order.

12. The professional trustee referred to in paragraph 9.6.3 shall be required to furnish security to the satisfaction of the Master in terms of section 6 (2)(a) of the Trust Property Control Act of 1988, as amended.
13. In terms of section 78(2)(a) of the Attorneys Act 1979 or the applicable provisions in the Legal Practice Act to the extent to which the provisions of the Attorneys Act have been replaced, NT Mdlalose Incorporated shall invest the capital amount mentioned in paragraph 3 above for the benefit of Mr. Mbhele, the relevant interest thereon likewise accruing for the benefit of Mr. Mbhele which investment shall be utilized for the benefit of Mr. Mbhele as may be directed by the Trustee of the Trust, when created, and shall upon receipt of the said capital amount, invest same within seven(7) business days.
14. The Plaintiff's attorney of record, NT MDLALOSE Incorporated shall render an attorney and client statement of account to the Trustee/s of the Trust to be formed in terms of the fees contract entered into with the Plaintiff and shall deduct all that is due to them for their fees and disbursements only once they have recovered all the costs due in the matter. The fees and the disbursements must be taxed and agreed with the bank trustee.
15. The party and party costs referred to above in respect of the Plaintiff's action, as taxed or agreed shall be paid by the Defendant directly into the trust account of NT Mdlalose Incorporated for the benefit of Mr. Mbhele. After the deduction of legal costs, consultants' fees for drawing of the bill and attending to its settlement or taxation, the balance shall be invested in terms of section 78(2)(a) of the Attorney's Act 53 of 1979 or the Legal Practice Act- as indicated in paragraph 13 above or the benefit of Mr. Mbhele, the interest thereon, likewise accruing for the benefit of Mr. Mbhele and shall be utilized as directed by the Trustee of the Trust when created.
16. The Plaintiff and his attorneys Order have entered into a Contingency Fee Agreement.

M.T. JORDAAN
ACTING JUDGE OF THE HIGH COURT
SOUTH GAUTENG LOCAL DIVISION

APPEARANCES:

Counsel for the Plaintiff:

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Instructed by:

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Counsel for the Defendant:

No Appearance

Instructed by:

Date of Hearing:

26 January 2023, 27 January 2023

Date of Judgment:

12 May 2023