



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

CASE NO: 2021/52640

NOT REPORTABLE

NOT OF NTEREST TO OTHER JUDGES

REVISED

In the matter between:

**FISHER, MA N.O OBO
MOSADI, JERRY**

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

(This judgment was handed down electronically by circulation to the parties' representatives via email.)

JUDGMENT

SHANGISA AJ

Introduction

[1] The present trial proceedings served before me as an action for default judgement on 19 April 2023. The action for damages arose from a motor vehicle accident which occurred on 24 May 2019 at approximately 20h00, on Luipaard Street in Krugersdorp, between an insured motor vehicle and the plaintiff who was a pedestrian. As a result of the collision, the plaintiff sustained various serious bodily injuries. I deal with the nature and sequelae of the plaintiff's injuries later in this judgment.

[2] The plaintiff, represented by the curator *ad litem*, seeks the following damages:

(a) Estimated future medical expenses undertaking in terms of section 17 (4) of the Road Accident Fund Act, 56 of 1966.

(b) Past and Future Loss of Earnings: R2 474 465- 00

(c) General Damages: R1000 000. 00

Total: R3 474 465- 00

[3] On 9 November 2021 summons was served on the defendant. As appears later in the judgment, the defendant did not file an appearance to defend the action. Instead, on 10 December 2020 the parties formally entered into a settlement agreement which apportioned the issue of liability 70% in favour of the plaintiff. The trial court was therefore only seized with the issue of quantum of damages. The defendant did not file the notice of appearance to defend. This was despite several attempts by the plaintiff, including several

interlocutory court orders, compelling the defendant to either settle the issue of damages or enter the appearance to defend and its plea.

[4] Although the defendant had failed to file a notice of appearance to defend or a plea, it was nonetheless represented on the day of the trial. The circumstances were as follows. On the morning of the trial, I was informed by counsel for the plaintiff that few minutes before the commencement of the court proceedings, the defendant had sent a cryptic email message in which it purported to seek a postponement of the matter. However, when the court started, there was no appearance on behalf of the defendant. Mindful of the fact that the defendant is a public entity which relies on the public purse, I stood down the proceedings and made an order calling upon the plaintiff's counsel and attorneys to arrange for the attendance of the representatives of the defendant.

[5] When the representative of the defendant eventually came to court, he sought a postponement of the trial. This request was made from the bar. I then ordered the defendant to file a substantive written application. When the matter resumed, I heard full argument on the application for postponement and dismissed the application with costs. In the main, the defendant's basis for seeking a postponement was that it needed to investigate "certain information" before deciding on its further options, if any. Despite the invitation to counsel for the defendant to indicate whether it sought to belatedly enter the appearance to defend, counsel for the defendant declined to indicate and stated that the Fund had not yet taken any such decision. After hearing argument and submissions made on behalf of the parties, I formed the view

that the application for postponement was entirely without merit and dismissed it with an appropriate costs order to mark the court's displeasure at the defendant's patent abuse of the process.¹

[6] What follows are my reasons for the dismissal of the application for postponement order that I made.

[7] The principles underlying postponements are trite and do not warrant any detailed rehashing. It is trite that a postponement is an indulgence² sought by one party to a suit and must be made timeously, that is, as soon as the circumstances which give rise to the application are known to the party seeking it. In that regard, it has been held that postponement is not merely for the taking³.

[8] Factors that need to be taken into account in an application for a postponement were set out by the Constitutional Court in ***National Police Service Union and Others v Minister of Safety and Security and Others***⁴ where Makgoro J said:

“The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant

¹ The same reason appears to have been advanced by the RAF, when it sought a postponement in exactly the same and identical terms as in the present matter, in *Madzivhanana v Road Accident Fund* (22319/2021) [2023] ZAGPJHC 321 (11 April 2023). At paras 9 -12, Mkhabela AJ refused the application for a postponement.

² See *Isaacs and Others v University of the Western Cape* 1974 (2) SA 409 (C) at 411 H; Also *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 76 C-D;

³ See *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC)

⁴ *Ibid* at para 4

must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.”⁵

- [9] Postponements in the High Court are regulated by Rule 41 of the Rules of Superior Courts Practice (the Rules) and any postponement is always at the discretion of the Court. The Court has a discretion to grant or refuse a postponement. The guiding principle is only that in granting or refusing a postponement the court should exercise its discretion judicially and after considering what is fair and just to both parties and balancing the interests of justice⁶. The discretion must not be exercised capriciously or upon any wrong

⁵ The above principles were restated by the Court in *Lekolwane and Another v Minister of Justice and Constitutional Development* [2006] ZACC 19; 2007 (3) BCLR 280 (CC) at para. 17

⁶ See cases cited in foot note 1, above, also *Ketwa v Agricultural Bank of Transkei* [2006] 4 All SA 262 Tk at 271f

principle but for substantial reasons⁷. In ***Psychological Society of South Africa v Qwelane and others***⁸ the Constitutional Court held:

“In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.”

[10] From the foregoing, it is trite that the party seeking postponement must proffer good and strong reasons therefor and that the applicant must give full and satisfactory explanation of the circumstances that give rise to the application⁹. The application itself must be bona fide and must not be used as a tactical endeavour to obtain an advantage to which the applicant is not entitled.

[11] In the present matter, the defendant failed to explain why it agreed to settle liability three years earlier and only to belatedly claim it requires to investigate the claim on the day of the trial. There was no reason advanced explaining the defendant's failure to timeously apply for a postponement. The defendant's

⁷ See *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC) at 14A-C; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (Nms)

⁸ 2017 (8) BCLR 1039 (CC) at para 31

⁹ See *National Police Service Union* (note 2 above) at 1112 C-F; *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amicus Curiae)* [2007] ZACC 14; 2007 (5) SA 620 (CC) at 624B-C;

failure to timeously seek a postponement is all the more egregious given that it had multiple opportunities to file a notice to defend, or at the very least, file an application for postponement. After conceding liability apportioned as 70% in favour of the plaintiff, the defendant had ample opportunity to file an appearance to defend, as illustrated by common cause facts that emerged, in the following instances:

- 1.1 at date of service of summons on 9 November 2021;
- 1.2 after being advised via email correspondence, dated the 17th of November 2021, by the plaintiff's attorney of record to file a notice of intention to defend;
- 1.3 after the plaintiff provided the defendant with the indulgence for 1 month to file its notice to defend on 24 November 2021;
- 1.4 on being advised that the indulgence period had lapsed, and that the plaintiff would compel the defendant to file a notice to defend on 18 January 2022;
- 1.5 on service of the application to compel on 21 January 2022;
- 1.6 on service of the court order on 1 March 2022;
- 1.7 on all further correspondence addressed by the plaintiff advising of the court order and requesting the defendant to comply therewith, as well as during the period when further correspondence was addressed to the defendant in which the plaintiff provided all documents and proposals for purposes of settlement of the issue of quantum between 1 March 2022 and 4 April 2022;
- 1.8 on service of the default judgment application on 24 August 2022;
- 1.9 and all further correspondence addressed to the defendant

thereafter up to and including 18 April 2022.

- [12] The above-mentioned instances illustrate the supine attitude of the defendant towards the claim and the processes relating to the conduct of the pre-trial proceedings.
- [13] When seeking a postponement, the defendant also belatedly contended that the hospital records make reference to “two versions” concerning the cause the injuries sustained by the plaintiff. In that regard, the defendant submitted that there was an entry on the clinical records which indicated that the plaintiff had been assaulted. This, so it was argued, was at odds with the pedestrian vehicle accident (“PVA”). Accordingly, the defendant submitted that this single entry warranted a further investigation.
- [14] In my view, there is no merit in the defendant's contention. Firstly, it is not correct that the hospital and clinical records reflected “two versions”, as suggested by the defendant. This ground does not suffice as *good cause for the postponement* for the further reasons that I set out in what follows.
- [15] The issue of liability/merits was settled between the parties 70/30% in favour of the Plaintiff on 10 December 2020. It is worth noting that the accident report was completed and signed by the police officer at the scene of the accident on the date of accident namely, 24 April 2019 at 20:41. The accident report contains the details of the insured driver, patient and a description of how the accident occurred as advised by the insured driver. The ambulance report also unequivocally sets out that the patient was involved in a motor vehicle accident, and gives a description, make and registration number of the Toyota Yaris vehicle.

- [16] The voluminous and bulky hospital records, including but not limited to the registration form, admission report, casualty examination report and nursing notes, are all consistent in recording that the patient (plaintiff) was involved in a motor vehicle accident.
- [17] The single cryptic entry in the hospital records relied on by the defendant that the patient was assaulted appeared to have been made later after the casualty notes and all other clinical entries made by different medical doctors and professional nurses indicated that the patient (plaintiff) was involved in a motor vehicle accident and was treated for injuries he sustained as a result thereof. The recording that the patient was "assaulted" was only made on 24 April 2019 at 23:50. Upon the proper consideration of all the entries made in hospital records from the date of admission of the plaintiff to the hospital, including the police report, it is clear that this single entry on assault information could not have been obtained from the patient as all clinical notes and records indicated that he was unconscious or semi-conscious at this time. In any event, the defendant must have also come to the same ineluctable conclusion that the belated single entry which mentioned assault was erroneously made long after the plaintiff had been admitted to hospital and when he was in an unconscious state.
- [18] Accordingly, I am satisfied that on a balance of probabilities that the injuries sustained by the Patient were as a result of a motor vehicle accident.
- [19] What is more, there was a clear prejudice to the plaintiff if the postponement were granted on account of a single cryptic entry that was belatedly made on his hospital notes. I am fortified in my view because the defendant was, in any

event, at all relevant times in possession of the accident report and the hospital records which all indicated that the serious injuries sustained by the plaintiff were as a result of a motor vehicle accident. The defendant had sufficient opportunity to investigate any concern it might have harboured prior to the default judgment trial date.

[20] The defendant also failed to proffer any substantive method or practical manner in which it intended to investigate the matter further. In this regard it should be noted that the defendant had been in possession of all of the voluminous hospital records, police report, and other relevant documents concerning the plaintiff's vehicle accident and subsequent admission to hospital. Despite this, the defendant made an offer of settlement in which it admitted 70% liability. Worse still, it is unclear how the defendant intends to track down the unnamed nurse who made what appears to have been a belated erroneous entry in the single hospital note, a good four years after the event. Accordingly, it seems to me that this would amount to no more than a futile exercise.

[21] As stated above, the defendant has already made an offer, which was accepted by the plaintiff. Such an offer amounts to an admission of the facts relating to the issue of liability, on a 70/30 % basis. In *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another* 2010 (4) SA 122 (SCA)¹⁰ the court that a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference, in the absence of any special circumstances. By parity of reasoning, the same should hold true in the present matter since the defendant failed to give any special circumstances warranting it to resile from the settlement of the issue of liability/merits or seeking a postponement

¹⁰ At para 6.

of the default judgment application on the strength of information it always had in its possession when it conceded liability. The defendant has been in possession of all documentation relating to this matter, and no new evidence or documentation has been provided by either party which would change the facts which existed at the time when the issue of liability was settled.

[22] For the reasons I have set out above, I dismissed the application for a postponement with costs on an attorney and client scale.

[23] I have already indicated that the merits became settled on the basis of joint negligence as the defendant conceded liability for 70% of the negligence in respect of the vehicle accident and apportioned 30% negligence to the plaintiff in terms of the agreed settlement between the parties. Consequently, a *curator ad litem* had been appointed for the plaintiff.

Evidence on the Plaintiff's Damages Claim

[24] At the commencement of the trial, counsel for the plaintiff made application in terms of Rule 38(2) of the Uniform Rules of Court that this court accepts evidence on oath. Having regard to the nature of the claim and the nature of the proceedings which concerned the quantum of damages, together with the fact that the affidavits of the various experts and their reports are filed on record, in the exercise of my discretion, I accepted the submission of evidence on oath.

[25] The patient was examined by the following experts:

1.10 Dr Mutyaba (neurosurgeon) on 21 January 2021;

1.11 Mr. Ormond-Brown (clinical psychologist) on 16 March

2021;

1.12 Dr Condie (dental surgeon) on 24 March 2021;

1.13 Ms Van der Walt (occupational therapist) on 21 September

2020; and

1.14 Mr Peverett (industrial psychologist) on 22 April 2021.

[26] Upon examining the plaintiff, Dr Mutyaba (neurosurgeon) recorded the following observations:

18.1 The Plaintiff sustained an extremely severe diffuse axonal brain injury evidenced by:

18.1.1 CT scan on the day of the accident which showed a left temporoparietal intracerebral haemorrhage lesion (10cm which is extremely large), right parietal subdural haematoma and cerebral oedema;

18.1.2 Deviation of his mouth and nasolabial fold reduced on the left which implies left-sided facial palsy due to damage to the seventh cranial nerve;

18.1.3 Bleeding from both ears;

18.1.4 Signs of epistaxis;

18.1.5 GCS dropped from 15/15 at the scene of the accident to 7/15 (he had lapsed into a coma);

18.1.6 His GCS remained reduced in hospital 10/15 and was recorded as 14/15 on 18 June 2019 which was 25 days post-accident;

18.1.7 He was confused for 32 days post-accident; and

18.1.8 Post-traumatic amnesia for at least 19 days.

[27] After examining the plaintiff's medical records, Dr Mutyaba also opined that the plaintiff sustained a severe traumatic brain injury evidenced by the period of ALOC and radiological imaging indicating acceleration/deceleration forces applied to the cranium. He also postulated that the plaintiff has a 29 fold increased risk of developing post traumatic epilepsy and twice the risk of developing early Alzheimer's dementia.

[28] Dr Mutyaba's prognosis was that a neuropsychologist will most probably find significant neurocognitive deficits.

[29] On the whole, careful consideration of all evidence filed by the above-mentioned experts in their reports indicates that the plaintiff sustained an extremely severe diffuse axonal brain injury, as set out in Dr Mutyaba's report.

[30] The plaintiff received treatment while in hospital which included:

18.1.9 intubation.

18.1.10 he was prescribed anti-epileptic drugs;

18.1.11 he was prescribed medication to reduce intracranial swelling; and

18.1.12 he was nursed with his head up at a 30 degree angle to assist in reducing intracranial swelling.

[31] The reports also show that as a result of the severe head injury the plaintiff has the following complaints:

18.2 he suffers from headaches 2 – 3 times per week;

18.3 he has a palsy on the left hand side of his face;

18.4 he suffers from nightmares about the accident;

he has reduced stamina and energy levels and fatigues easily (fatigue caused by a brain injury is often a permanent problem that shows little improvement with the passage of time);

18.5 he becomes angry easily and loses his temper; and

18.6 he suffers from anxiety when travelling.

[32] Furthermore, neurosurgical examination and neuropsychological testing revealed the following:

18.6.8.1 the patient sustained a severe traumatic brain injury and has a 29-fold increased risk of developing post traumatic epilepsy and twice the risk of developing early Alzheimer's dementia;

18.6.8.2 erratic concentration;

18.6.8.3 below average visual multitasking;

18.6.8.4 abnormally slow information processing speed;

18.6.8.5 significantly impaired rate at which he can acquire new information;

18.6.8.6 high susceptibility to proactive interference effects;

18.6.8.7 susceptibility to retroactive interference effects;

18.6.8.8 below average delayed free recall, delayed cued recall and source memory;

18.6.8.9 abnormal immediate recall;

18.6.8.10 abysmal delayed recall with absolutely no retention over time;

18.6.8.11 abnormal verbal categorization;

- 18.6.8.12 slow speech;
- 18.6.8.13 slow reading speed;
- 18.6.8.14 abnormal deductive and inductive reasoning; and
- 18.6.8.15 problems with executive functions including inability to shift response and abnormal response inhibition.
- 18.6.8.16 The patient will require occupational therapy and special adaptive equipment.
- 18.6.8.17 The plaintiff also sustained significant dental injuries including the fracturing off of the crowns of his teeth and loss of 3 teeth. He will require surgical removal of the remaining roots and placement of implants, bridge and crowns. The aforementioned will need to be replaced every 15 – 20 years.
- 18.6.8.18 The specialist neurologist made it clear that the effects of the brain injury sustained by the plaintiff are permanent and there is no reasonable prospect of a significant improvement in his neuropsychological condition. He is too mentally impaired to benefit from psychotherapy and will not benefit from cognitive rehabilitation. He has become socially isolated, and his enjoyment of life has been significantly curtailed.

CASE LAW

- [33] In the course of his submissions, counsel for the plaintiff referred me to a number of case authorities which provide a general and broad indication of the

awards made for general damages in matters where the plaintiff sustained similar injuries.

[34] In *Raupert v Road Accident Fund* (2153/2008) [2011] ZAECPEHC 5 (1 February 2011) an award of R750 000 for general damages (R1 430 000 in 2023 terms) was made to a 20 year old female photography student. The plaintiff sustained a very significant head injury which probably included a diffuse axonal injury. The effects of the brain injury pertained mainly to her executive functions, memory problems, headaches, loss of sense of smell and limited sense of taste. The plaintiff was employable but not at the same pre-accident level.

[35] In *Torres v Road Accident Fund* 2007 6 QOD A4-1 (GSJ) an award of R600 000 for general damages (R1 464 000 in 2023 terms) was made to a 24 year old male. The plaintiff in that matter sustained a severe diffuse brain injury, soft tissue injury to the neck and soft tissue injuries to the face and chin. He was left with significant neuro-cognitive and neuro-behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning, depression and adjustment disorder. He would be limited to sympathetic employment.

[36] In *Cordeira v Road Accident Fund* 2010 QOD CI A4- 45 a teenage schoolboy sustained a severe primary head injury and a secondary brain injury from raised intra-cranial pressure. This resulted in a right sided hemiparesis making walking difficult and affecting speech. He had severe neurocognitive, and neuro behavioural deficits associated with poor memory, lack of energy, lack of mental agility etc. His future employment would be restricted to structured

limited employment. An award of R800 000.00, (the present value in 2023 is R1 411 000) was awarded to the minor.

[37] In *Mohale v Road Accident Fund* 2015 7QOD A4-15 (GNP) where an award of R650 000 (R1 062 000 in 2023 terms) was awarded for a moderate to severe brain injury resulting in behavioural and neurocognitive changes, headaches, back and neck pains and a slightly increased risk of epilepsy.

[38] In *Opperman v Road Accident Fund* (27.08.2009)(SGH)(unreported) the Plaintiff sustained a moderately severe brain injury as well as a range of orthopaedic injuries, inclusive of fractures to his left collarbone, his left scapular, a left hip injury, left knee injury and a neck injury. He was able to return to work approximately 4 to 5 months after the accident. The plaintiff suffered from post-traumatic mental difficulties, speech difficulties, mental fatigue, personality change, mood disorder, chronic headaches and pain in his neck and back. Although able to continue working, the Plaintiff was limited to a rudimentary position. In respect of his claim for general damages the Plaintiff was awarded R800 000 in 2009, which currently amounts to R1 850 000.00 in 2023.

[39] In my view, having regard to the head injury sustained by the plaintiff and the sequelae thereof in the present matter, it seems to me that the award of an amount of R1 000 000 in respect of general damages is just and reasonable. This broadly accords with the aforementioned case authorities.

Loss of Earning Capacity

[40] The plaintiff was 32 years old at the time of the accident. He achieved a grade 10 level of education. At the time of the accident he worked as a houseman for Festive Poultry farm. He had been employed at Festive Poultry farm since 2009. He earned on average R6 788.14 per month plus accommodation (value R2 000 per month). The industrial psychologist concludes that he would have received inflationary increases to age 65.

[41] Post-accident the neuropsychologist concluded that the cognitive impairments would have a negative impact on his ability to work in the open labour market. His low level of education limits him to unskilled manual labour. His memory difficulties imply that he is highly likely to forget instructions. His problems with concentration mean that he will lose track of what he is meant to do. The occupational therapist states that his continued work will be affected by his inability to work consistently without making errors, he would be prone to misunderstand colleagues and superiors and behavioural difficulties should he fall into a dispute with his supervisors and colleagues.

[42] In *Makuapane v Road Accident Fund* (12871/12) 2015 (GSJ) the Court said the following:

“[22] ... there were numerous decided case law in this High Court, where the Courts held that, even if found to be gainfully employed post-accident, victims of accidents, who no longer functioned in capacities that they were employed for, and as such entitled to damages, since they had sustained a complete loss of earning capacity. See for example, Fulton v Road Accident Fund 2012 (3) SA 255 (GSJ), where C J Claassen J found that Ms. Fulton, in spite of being gainfully employed as a

teacher at her school, no longer functioned in the capacity that she was originally employed for, had as such sustained a complete loss of earning capacity. However, each case must still be decided on its own merits and peculiar circumstances. In my view, the res inter alia actus maxim finds application in this case in favour of the Plaintiff. (See Richards v Richardson, supra).”

[43] An actuarial report has been provided in light of the plaintiff’s work history and pay slips. A 30% contingency has been applied on his future earnings. The amount claimed for loss of earning capacity amounts to R2 264 465.00.

Conclusion

[44] I am satisfied that the plaintiff was able to prove on a balance of probabilities that his earning capacity has been compromised as a result of the injuries he sustained as a result of the accident. The plaintiff has also succeeded in proving. The plaintiff’s experts have also made a compelling case that the plaintiff will, in the future, be required to undergo medical treatments. 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. As with the entire plaintiff’s proven damages claim, the latter is limited to 70%.

ORDER:-

[45] In the result the following order is made:

1. I am satisfied that the plaintiff has established that he is entitled to damages, less the 30% apportioned liability, as follows:

(a) Estimated future medical expenses undertaking in terms of section 17 (4) of the Road Accident Fund Act, 56 of 1966.

(b) Past and Future Loss of Earnings: R2 474 465- 00

(c) General Damages: R1000 000. 00

Total: R3 474 465- 00

Less the 30% apportioned liability (R2 432 125, 5)

2. As a result, the defendant is liable to compensate the plaintiff in the sum of R3 474 465. 00, from which the 30% apportionment stands to be deducted, therefore the capital sum payable by the defendant is R2 432 125, 5.
3. The full terms of the order made incorporate the draft terms of the deed of trust that will be established.
4. Consequently, I make an order in terms of the order attached hereto marked **Annexure "X"**.

SL. SHANGISA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 19, 20 and 21 April 2023

Date of judgment: 18 August 2023

Appearances:

For the Plaintiff: Adv. M. Jorge

Instructed by: Raphael David Smith Inc

For the Defendant: Mr. M. Mdlovu (In the Application for Postponement)

Instructed by: State Attorney (Johannesburg)