

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

12/2/2024
DATE

SIGNED

Case Number: 62529/2021

In the matter between:

LUCAS LEKAIWA MAFIRI

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 12 February 2024.

JUDGMENT

RANCHOD J

[1] The plaintiff instituted action against the Road Accident Fund (the Fund) claiming damages for injuries sustained in a motor vehicle accident on 13 March 2021. He was a passenger in the insured vehicle.

[2] At the commencement of the trial, the Fund conceded 100% liability in favour of the plaintiff. The matter then proceeded on the issue of the quantum of damages sustained by the plaintiff.

[3] The plaintiff obtained several expert reports while the Fund had none. An application by the plaintiff in terms of Rule 38(2) of the Uniform Rules of Court for the evidence of the plaintiff's expert witnesses to be accepted by way of affidavit was granted.

[4] The plaintiff sustained the following injuries as a result of the accident:

- 4.1.1 Fracture of the left scapula;
- 4.1.2 T3/ T4 vertebrae fracture causing paraplegia;
- 4.1.3 Fracture of the middle third of the left clavicle;
- 4.1.4 Fracture of the sternum; and
- 4.1.5 Lung contusion

4.2 Neuro-surgeon, Dr Segwapa diagnosed a mild brain injury. This is stated in his medico-legal report of an interview with plaintiff on 29 March 2022.

4.3 Mr Kalane (a clinical psychologist) concluded, from a neuropsychological assessment, that the plaintiff "was not significantly impacted by the accident under review."¹ Further, that "[t]he difficulties that were observed could not be linked directly to the head trauma but were considered to be largely related to his emotional state."

His emotional state was due to his physical difficulties and is wheelchair bound.

[5] The occupational therapist Ms Sebabu opines that plaintiff "is not expected to regain his pre-accident abilities even with the recommended treatment and rehabilitation. He is he is rendered functionally unemployable and would not be able to engage in any productive work."²

[6] Industrial psychologist Mr Peet Vorster discussed plaintiff's predicted pre-morbid career path and post-morbid employability and earning potential with reference to the other expert reports. Plaintiff reported to Mr Vorster that:

"... at the time of the accident on 13 March 2021, he was self-employed as the Managing Director of Mologadi Engineering Services. He had been working in this capacity since March 2020. He indicated that his position as the Managing Director of Mologadi Engineering Services was a full-time position. According to

¹ Caselines 06 – 191; Medico-legal report p27 at para 12.

² Caselines 06 – 228; Medico-legal report p25 at para 14.

the Occupational Therapist, the physical demands of his pre-morbid employment can be classified under the parameters of light work.

...

13.1.11 Therefore, with the above in mind, the writer believes that had the accident not occurred, Mr Mafiri would have continued working in his pre-morbid capacity or a similar skilled capacity, earning annual inflationary increases until retirement age of 70."

[7] Actuary Mr H Solanki summarizes the key recommendations of the Industrial Psychologist, Mr Vorster, regarding the plaintiff's uninjured and injured earning capacity. He says:

"5.1.1...

Uninjured earnings (Sections 9.1, 13.1 and Annexure 2 of Peet Voster's report):

- a. At the date of accident, the claimant was self-employed as co-owner and Managing Director of Mologadi Engineering Services. Earnings were as per the earnings affidavit as per Annexure 2.
- b. Thereafter, only increases via earnings inflation until retirement age of 70.

Injured earnings (Sections 9.2, 13.13 and Annexure 2 of Peet Vorster's report):

- c. Following the accident, the claimant reportedly did not generate any income during his 6-month recuperation. Thereafter the claimant returned to his pre-accident self-employment, in a reduced capacity to present. Earnings were as per the earnings affidavit as per Annexure 2.
- d. The claimant is postulated to continue in his self-employed capacity for a further 1 - 3 months before closing the business down.
- e. Thereafter, the claimant will remain unemployed."

[8] The plaintiff attained grade 11 in school and obtained a Fitter and Turner certificate in 2008 but plaintiff was unable to provide the court with a copy of the

certificate. At the time of the accident, he was running a business in which he and his wife owned 60% and 40% shares respectively.

[9] Importantly, the plaintiff has not provided financial statements or other documentary evidence regarding his pre-morbid income. Only an affidavit by his wife (Annexure 2 of Vorster's report) has been provided in which she merely states that she confirms that plaintiff earned an average income of R20,000 per month pre-morbid and none post-morbid.

Onus

[10] The onus is on the plaintiff to prove his case on a balance of probabilities. He is required to adduce sufficient evidence of his income to enable the court to assess and quantify the past loss of income and future loss of income or earning capacity.

[11] In *Southern Insurance Association v Bailey* NO³ it was stated:

"... Any inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, or augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

³ 1984 (1) SA 98 (A) at 113F – 114E.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess-work, a blind plunge into the unknown.

The other is to try to make an assessment by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

...

Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is little more than an estimate; But Even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages.

...

It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based on it."

[12] In *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd*⁴ Bressler AJ, concurring with De Villiers J, elaborated on the duty of the appellant to prove her damages. The learned Judge said:

"... We were urged, on the authority of *Turkstra Ltd V Richards*, 1926 T.P.D. 276, to find that, as there was an admission of damage, the court should not be deterred by reason of the difficulty of computing an exact figure from making an award of damages... in *Turkstra v Richards* there was an actual valuation, 'an estimate of some sort', in the language of Stratford, J. (as he then was) ...

⁴ 1952 (3) SA 49 (T) at p53 paras B – F.

It does not seem to me that *Turkstra v Richards*, supra, means that, given one or two facts, including that of damages, a judicial officer should then be required to grope at large in order to come to the assistance of a litigant, especially one whose case has been presented in such a vague way. It seems to me that the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative assessment, a state of affairs which would result in injustice to one of the parties..."

[13] Ms Gaokgwathe, for the Fund, submitted that the plaintiff has provided no factual information to prove his earnings pre-morbid. However, the Fund accepts that plaintiff has suffered some loss of earnings post-morbid and therefore it is prepared to make an interim payment of R 500 000-00 in this regard. This head of damages can in the interim be postponed to enable the plaintiff to provide the necessary proof of his loss. Plaintiff's counsel did not accept the proposal and submitted that the court can on the evidence before it, finalise the claim for loss of earnings.

[14] It is important to note that the Actuary, Mr Solanki also had difficulty relying on the affidavit of the plaintiff's wife regarding his earnings at the time of the accident. He therefore recommended (even though he provided certain calculations based on the plaintiff's wife's affidavit) that a report by a forensic accountant be commissioned, to determine the past and future profitability of the business as well as the claimant's total earnings from the business.

[15] It is up to the plaintiff to provide the necessary proof of income.

PAST MEDICAL EXPENSES

[16] Plaintiff claims R 916 665-09 for past medical expenses and has lodged vouchers in support. The Fund disputes the amount on the basis that plaintiff has only proved R30 000-00 and that is for a caregiver in 2023. It appears that the caregiver was plaintiff's wife. Counsel for the defendant says the Fund requires proof of the other expenses including ICD10 codes, proof of payment, nature of the treatment and whether it is accident related. However, counsel did not specify which specific vouchers were disputed.

[17] However, it is noted that some of the vouchers are in the form of 'quotations' or 'quote estimate';⁵ dated 2 February 2022 with expected treatment date on 4 April 2023; 'Mediclinic Limpopo Private Estimation'⁶ dated 11 September 2023 and where it is stated: 'The full estimated amount is payable on admission.' I was unable to find proof that plaintiff was actually admitted and paid the relevant amount. There are several others in a similar vein. I do not intend to list them all here.

[18] Suffice it to say that while some expenses appear to be proved, I do not intend to deal with the past medical expenses in a piece-meal fashion. I will postpone this head of damages to afford the plaintiff an opportunity to file proper proof of all the expenses incurred in relation to the injuries suffered in the accident.

⁵ Caselines 04 – 172.

⁶ Caselines 04 – 178.

GENERAL DAMAGES

[19] I turn then to the claim for damages. Both counsel for the plaintiff and the Fund, referred me to several decided cases in this regard.

[20] There is no doubt that the plaintiff suffered serious injuries in the accident. The Fund concedes as much. However, one cannot slavishly follow decided cases because, as has often been said, no two cases are exactly alike. It is now trite that when considering general damages, the court has a wide discretion to award what it considers to be an adequate compensation to the injured party. See *RAF v Marunga*.⁷⁷ Consideration of fairness and reasonableness always play determining roles in the assessment of such damages. However, that does not mean that inordinately high awards should burden the defendant.

[21] In *Mashigo v Road Accident Fund* Case No: 2120/2014; 13 June 2018, Gauteng Division, Pretoria, Davis J said:

"[13] Counsel for plaintiffs also often rely on *De Gough v Du Pisanie* NO [2004] 2 All SA 565 (SCA) as authority that the modern tendency is to award higher amounts than in the past for general damages. A careful reading of the case however, indicate (sic) that, although these appeared at the time of the judgment an upward tendency of such awards, the moving away from an overconservative approach is but one of the considerations a court should consider and that the case of *RAF v Marunga* 2003 (5) SA 164 (SCA), relied on by the plaintiff in the court a quo as a 'watershed' for the increase of general damages was not a

⁷⁷ 2003 (5) SA 164 (SCA) at 169E – F.

license to continue increasing awards without cogent reasons (other than the inflationary adjustment ...)."

Further at [14]:

"A too conservative approach to awards for general damages which would not adequately attempt to recompense a plaintiff in monetary terms for the loss suffered would not be fair in the circumstances but the following principles stated by Holmes, J (as then was (sic)) in *Pitt v Economic Insurance Co. Ltd* 1957 (3) SA 284 (D) AT287E - F was in *De Jongh v Du Pisanie* NO supra at 582 a - c found to be still applicable:

'The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.'

[22] Plaintiff's counsel referred me to the following cases:

22.1 In *Mertz v Road Accident Fund* (A96/2021) [2022] ZAGPPHC 961 (2 December 2022) the full court sitting as an appeal court awarded R3 500 000 for general damages, the plaintiff was rendered a quadriplegic. In that case the insures and sequelae were:

- 22.1.1 She was diagnosed with a C5/C6 bilateral facet dislocation and fracture of the right C5 lamina, L1 wedge compression fracture.
- 22.1.2 She was trapped in the vehicle for approximately 6 hours.
- 22.1.3 She had a fracture of the cervical vertebrae.
- 22.1.4 She has been left a tetraplegic.
- 22.1.5 She had acute respiratory failure.
- 22.1.6 She had a dislocation of the cervical vertebra.
- 22.1.7 She sustained concussion and edema of the cervical spinal cord.
- 22.1.8 She sustained a fracture of the lumbar vertebra.
- 22.1.9 An unspecified injury of the abdomen, lower back and pelvis.
- 22.1.10 She has abnormal sensation in the upper extremity and no sensation in the lower extremities.
- 22.1.11 She was transferred to Bloemfontein Medi-Clinic on 29 December 2015.
- 22.1.12 On the 29th December 2015 she had an anterior cervical disk excision and fusion for the C5/C6 fracture.
- 22.1.13 The hospital inserted a skyline plate and screws.
- 22.1.14 A bone graft from the right iliac crest was performed.

- 22.1.15 She was incubated until the 2nd of January 2016 in the ICU Unit.
- 22.1.16 On the 3rd of January 2016 she had surgery when the tracheostomy and dressings were changed on both arms.
- 22.1.17 She was transferred from the ICU Unit on the 7th of January 2016.
- 22.1.18 She had a nasogastric tube in place.
- 22.1.19 She received three blood transfusions.
- 22.1.20 On the 17th of January 2016 the tracheostomy was removed and her speaking trachea inserted.

In 2022 terms: R 3 500 000

Marine & Trade Insurance (CO) Ltd v LATS NO QOD (3) 1A decided in 2018, where an amount of R 2 982 000.00 was awarded to the plaintiff under the following background:

"Plaintiff had become a permanent and almost complete quadriplegic, she retained only a slight movement of rotation of the head and ineffectual movement of the right hand, her mental understanding of her condition distress and depression sufficient for her to think of suicide and request euthanasia, her condition was described as 'the grossest lost imaginable' it calls for the 'high water mark' for general damages. The court found that for her condition there is no comparable case recorded.

In 2023 terms: R 3 920 712.43

In *Bonese v RAF 2014 (7A3) QOD ZAECPEHC* a 13 years old paraplegic was awarded an amount of R 2 500 000.00 (inflation adjusted to current 2017 value of R 2 952 000.00).

In 2023 terms: R 4 054 744.00

Jako v RAF 2016 (7A2) QOD (i) (WCC) a 32 years old tetraplegic was awarded in 2016 an amount of R 2 000 000.00 (inflation adjusted to current 2017 value of R 2 120 000.00)

In 2023 terms: R 2 923 684.21

In *Delport NO obo Helen van Rooyen v RAF* 2003 (5) QOO A4-I(T) a 36 years old remarried mother of two who was given life expectancy of 22 years during which she would be totally dependant on others who was awarded an amount of R1 250 000.00 which is inflation adjusted to current 2023 value of R3 324 211.00

In 2023 terms: R3 324 211.00

In *Morake v Road Accident Fund* (52700/15) [2017] ZAGPPHC 761 (6 November 2017) the court awarded R 2 500 000.00 for a 64 year old paraplegic. He sustained the following injuries (i) A C5/C7 fracture coupled with a dislocation to his spine at C6/C7 and a fracture of C7. (ii) A laceration to his head. (iii) Abrasions to his right shoulder. (iv) Contusions to his right hand and lungs. (v) Pulmonary contusions. (vi) Head trauma with degloving injuries over the occipital skull. (vii) Loss of right front tooth.

In 2023 terms: R 3 429 012.00

In *Sibanda v Road Accident Fund* (94691/2016) [2019] ZAGPJHC 554 (8 February 2019) the court awarded R 2 800 000.00 for the 27 year old who

suffered a fracture of C6 and C7 vertebra and was rendered a C5/C6 quadriplegic patient and he suffered a mild diffuse traumatic brain injury.

In 2023 terms: R 3 539 021.62

[23] Plaintiff's counsel submitted that an amount of R 4 000 000 to R 4 500 000 would be fair and reasonable.

[24] Counsel for the Fund, Ms Gaokgwathe referred the court to three cases:

24.1 *Maholela v Road Accident Fund* 2006 (5A3) QOD 3 (O) where the main injuries sustained by the claimant were:

- Spinal cord lesion at L1 (comminuted fracture of lumbar vertebra);
- Paraplegia, from L3 level;
- Fractures of the right ribs

Personal sequelae:

Experienced terrible pain on his back after injury. Began to vomit from intensity of pain. Pain was unbearable only subsiding marginally after three days. Unable to detect the movement of his bowels and soiling causing tremendous embarrassment and loss of dignity when hospital staff had to clean up. Clinical depression and loss of sexuality bordering on impotence. Complete inability to walk. Mobile with crutches and dragging legs along using hips. Has to several times a day manually empty bladder. Every second day has to manually empty bowels. These procedures disturbing and also

extremely degrading. Tremendous emotional pain from inability to protect wife from unrelated mugging.

The claimant was awarded R600 000 in 2006 which, adjusted for inflation amounts to about R 1 524 800 in 2023.

24.2 *Nokomane v Road Accident Fund* [2010] ZAECGHC 24 (ECG); 2011 (A3) QOD. Here plaintiff sustained fractures of the thoracic vertebrae causing paraplegia; lacerations to the forehead; fracture of the right humerus and scapula; fracture of the right fibula and fracture of two ribs.

The sequelae of the injuries plaintiff sustained is summed up by Roberson J as follows:

[5] The plaintiff is neurologically an ASIA B T8 paraplegic, which means that he has no preserved sensory or motor function below the mid chest. He is wheelchair bound and his condition is irreversible and permanent. He has been left with mild spasticity, a restricted range of movement of his right shoulder and right little finger, lack of bladder and bowel control, erectile dysfunction and inability to ejaculate.

[6] He presently suffers from back pain which is aggravated by prolonged sitting. His respiratory function has been diminished as a result of paralysis of the abdominal muscles. The result is that he cannot cough, sneeze or blow his nose to expel mucous and needs assistance to do so. Should he develop a severe chest infection, he would need respiratory physiotherapy. He has since the accident experienced pressure sores and will be prone in the future to suffer from pressure sores. Further possible future conditions or complications will be osteoporosis, physical impaction and bowel obstruction, hemorrhoids, bladder infections and stones, urinary tract infections, and inflammation of upper limb joints owing to overuse. A less likely but, but potentially life threatening, future infliction is

syringomyelia, which occurs when an area within the spinal cord becomes filled with fluid. All of these conditions would require some type of medical treatment, including surgery and admission to hospital.'

An award for general damages of R800 000 was made, the present value of which equates to about R 1 560 000.

24.3 In *Webb v Road Accident Fund* [2016] ZAGPPHC (GNP); 2016 (7A3) QOD 24 (GNP).

A young man aged 20 at the time of the accident, sustained severe injury to his spine causing paraplegia; Left displaced radius and ulna fracture. He has bladder and bowel incontinence, suffers emotional trauma, post-traumatic stress syndrome. Chronic and often debilitating pain in the back, shoulders, left forearm and wrist.

An award of R 1 500 000 was made for general damages which, in current terms, would equal about R 2 100 000.

[25] Insofar as the cases referred to by plaintiff's counsel, it is to be noted that the facts in several of them differ considerably from the present matter. In the Mertz matter as well as that of Marine & Trade Insurance Co. Ltd the plaintiffs were quadriplegic whereas here the plaintiff is a paraplegic.

[26] Whilst the claimant in *Bonese* was a paraplegic, she was only 13 years old at the time of the accident and had a normal life expectancy- which means she would endure pain and suffering and loss of amenities of life and so on for a

much longer period than plaintiff in this matter who was 41 years old at the time of the accident.

[27] In *Jacko* the plaintiff was 32 years old and a tetraplegic.

[28] In my respectable view, the awards for general damages in *Delpont NO* and *Morake* were on the high side.

[29] *Sibanda* was a case of a 27 year old who was a quadriplegic.

[30] I have anxiously considered the cases in so far as they can be compared to the matter before me and have concluded that an amount of R 1 800 000 would be a fair and reasonable award for general damages given the circumstances of this case.

[31] The following order shall ensue:

1. Defendant is held liable for 100% of the plaintiff's claim.
2. The defendant shall pay plaintiff R 1 800 000 (One million eight hundred thousand rands) for general damages.
3. The defendant shall provide an undertaking in favour of the plaintiff for plaintiff's future medical and hospital expenses in terms of section 17(4) of the Road Accident Fund Act 1996 (as amended).

4. The claims for past medical expenses and for past and future loss of income and/or earning capacity are separated in terms of Rule 33(4) of the Uniform Rules of Court and postponed *sine die*.
5. The defendant is liable for plaintiff's costs including the qualifying fees of the experts who filed reports in this matter.

RANCHOD J
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing:

25 October 2023

Date of judgment:

February 2024

Appearances:

For Plaintiff:

Adv F Kehrhahn

Instructed by Zenzele Mdluli

Attorneys

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Church Square

Pretoria

For Defendant:

Ms T Gaokgwathe

4. The claims for past medical expenses and for past and future loss of income and/or earning capacity are separated in terms of Rule 33(4) of the Uniform Rules of Court and postponed *sine die*.
5. The defendant is liable for plaintiff's costs including the qualifying fees of the experts who filed reports in this matter.



RANCHOD J

**Judge of the High Court
Gauteng Division, Pretoria**

Date of hearing:

25 October 2023

Date of judgment:

12 February 2024

Appearances:

For Plaintiff:

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Instructed by Zenzele Mdluli

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For Defendant:

Ms T Gaokgwathe