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

CASE NO: 1612/2019

REPORTABLE
OF INTEREST TO OTHER JUDGES

REVISED

DATE: 22/02/2024

IN THE MATTER BETWEEN

ONYEKACI BENJAMIN NNABUIFE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

CEYLON AJ

A INTRODUCTION:

[1] This is a claim for delictual damages suffered by the Plaintiff as a result of injuries sustained in a motor vehicle accident which occurred on 10 February 2018 at Murray Street, E[...], Mpumalanga Province.

[2] The Plaintiff was a passenger in a motor vehicle with registration number: C[...], driven by a certain Mr SW Nkosi, which vehicle collided with another vehicle with unknown registration numbers, driven by an unknown driver ("insured driver").

[3] In the amended particulars of claim, the Plaintiff alleged that the collision was caused by the sole negligence of the Defendant's insured driver as a result of which the Plaintiff suffered damages in the amount of R500 000-00, set out as follows:

(a)	past medical, hospital and related expenses	R50 000-00
(b)	estimated future medical, hospital and related expenses	R100 000-00
(c)	past loss of income	R50 000-00
(d)	future loss of income	R100 000-00

(e) general damages

R200 000-00

[4] The merits were fully (100%) conceded by the Defendant by way of an offer thereto to the Plaintiff in its letter dated 15 September 2018, which offer was accepted by the Plaintiff through his attorneys in their letter dated 17 September 2018.

[5] The Defendant and its legal representatives was absent at Court on the trial date and the Plaintiff proceeded on a default basis in terms of the provisions of the Uniform Rules of Court.

[6] The Plaintiff proceeded to lead evidence by way of its expert witness reports, which was admitted following their Rule 38(2) application, and case authority. No witnesses were called upon to testify at the hearing.

B. THE PLAINTIFF:

[7] **The Plaintiff is Onyekachi Benjamin Nnabuike, an adult male security guard, born 27 March 1983 and resident at 1[...] R[...] Street, E[...], M[...]. He is married with one dependent.**

[8] The Plaintiff was 31 years old at the time of the accident, was employed as a security guard/bouncer at the time of the accident at Las Vegas Tavern, Ermelo since 2013, working Friday to Sunday night 18h00 to 02h00 at approximately R400-00 per night. After the accident, the Plaintiff was self-employed as a lawn cutter/general worker, Mon-day to Friday, with an income of R900-00 to R.1000-00

per week. He never returned to his previous employer because of the injuries sustained in the accident and his struggles to stand and do his work properly.

[9] The Plaintiff was, according to the Industrial Psychologist, a healthy person, with no chronic illness or psychological conditions and had not been involved in any accident before or after the accident of 10 February 2018. His highest education level was grade 5 according to Dr Barlin, Orthopaedic Surgeon.

[10] According to the medical reports, the Plaintiff suffered several injuries, *inter alia*, right tibia and fibula fracture, scarring, swelling of the knee and ankle. He complains that he cannot stand for long duration, struggles to climb stairs, suffers forgetfulness, feels cold daily, cannot properly walk as he used to do, etc. He was admitted at the Ermelo hospital following the accident and remained there for 2 months, where he was treated in a cast and surgery. He also received physiotherapy and had to use a crutch to help him walking.

C. THE INJURIES AND ITS SEQUELAE:

[11] The Plaintiff suffered various injuries in the accident, which will be discussed below, through the medico-legal reports of the experts consulted by the Plaintiff.

i. Dr C Barlin (Orthopaedic Surgeon):

[12] This expert reported that the Plaintiff suffered right forearm injuries (no current complaints) and right distal tibia and fibula fractures.

[13] The expert confirmed the treatment received by the Plaintiff at the Ermelo Hospital and that he was assessed and stabilised at said hospital. He presented with, *inter alia*, the following: abrasions over the right forearm extending to the elbow; deformed right leg with bleeding laceration, which were cleared, sutured and dressed; X-rays were conducted, he underwent closed reduction, and his right lower limb was immobilised with an above the knee back slab; he also received physiotherapy. After re-admission to same hospital, he underwent an open reduction and internal fixation of the right distal tibia and an osteotomy as well as further physiotherapy. He further received pain medication and was mobilised with crutches at discharge.

[14] The expert indicated that the Plaintiff was employed as a security officer and did not return to work after the accident. The Plaintiff did not participate in any social or extramural activities and had no history of previous musculoskeletal injury or pathology.

[15] Currently the Plaintiff experience pain in his lower leg, which is aggravated by inclement weather, and he struggles to stand and walk long distances.

[16] Examination-of the cardiovascular, respiratory,-gastmintestinal and central nervous system revealed these are all normal. There is a right antalgic gait, an 18 x 1cm wide unsightly scar surrounded by numerous abrasion scars and there is an obvious slight varus deformity at the right tibial fracture site.

[17] A summary of injuries indicates that the fractures of the right distal tibia and fibula were both internally fixed with plates and screws and have united. There is a 5% varus deformity at the tibial fracture site and he experience pain and stiffness of the right ankle and subtalar joints.

[18] The prognosis and treatment: the plates may be removed but this is not absolutely essential. He requires intensive physiotherapy, analgesics and anti-inflammatories. The varus deformity should be accepted. The removal of the internal fixation would cost approximately R65 000-00 including hospitalisation and surgeon's assistance. An amount of approximately R25 000-00 will be required for physiotherapy and medication.

[19] The Plaintiff's life expectancy has not been affected, but the expert believes that the Plaintiff would not be capable to return to his previous occupation which requires him to be on his feet for long periods everyday. He may be employed in a sedentary position but is unlikely to find employment. The expert concluded that the injuries can be regarded as having caused sufficient long-term impairment to justify a claim for general damages.

ii. **Industrial Psychologist (A Potgieter, Phase Industrial Psychologist):**

[20] The expert reported the following:

- pre-accident employment: during 2007-2012 he worked for the family business in Nigeria earning R1800-00 per week. From 2013 to 2018 (date of accident) he worked as a security officer in Ermelo, South Africa, and after the accident, he was self-employed as a gardener/general worker, earning approximately R900-00 to R1000-00 per week. He came to South Africa to become an EFC fighter, but the expert was not provided with any evidence or collateral to support this position.
- post accident employment: he did not return to work after the accident due to the injuries and he indicated that he may return to Nigeria to work in his family business

if he cannot secure employment with his fiancée. His former employer advised that he worked Fridays and Saturdays and was paid R300-00 per day in cash, with no UIF deductions. He worked from mid 2016 February 2018 at the tavern in Ermelo. The expert was also unsure if the Plaintiff worked every Friday and Saturday for the duration as he may have had personal obligations and therefore did not work all the time.

- injuries sustained: the expert referred to the report of Dr J van der Westhuizen, an Orthopaedic Surgeon and confirmed the injuries of the report by latter doctor.

- current treatment: -pain medication once a day for the broken right leg and has headaches more after because he thinks too much.

- physical and work related complaints: he cannot stand for long periods and struggles to climb stairs.

- cognitive and psychological complaints: sad feelings because he cannot do things on his own; forgetfulness; feels cold daily and cannot walk where he wants to go, must use taxis, he was previously fit and healthy. The expert noted the findings of the occupational therapist (L Toerien) and emphasised that the Plaintiff's options are limited especially if one considers his level of education and that he will remain an unequal competitor in the open labour market.

- "but for the accident" scenario: the expert considered the Plaintiff's level of education, previous employment and remuneration received for same, and concluded that he would have continued working in a low-level semi-skilled type of work until retirement age. The expert opined that the Plaintiff would have grown his

income moderately with some work experience and learning basic work skills, and that he would have reached his career ceiling at age 45 years old, earning between R166 750-00 and R193 000-00 per annum. He would probably have worked until age 70.

- work capacity: after consulting the reports of other relevant experts, this expert concluded that due to the injuries and its sequelae, the Plaintiff's work ability have negatively been impacted and he is best suited for sedentary to light physical work with low mobility demands, but due to his education level, his age, work experience and vocational training (it unlikely that he will find suitable employment and do the applicable types of work. The expert indicated further that the Plaintiff will probably likely work in a self-employed capacity, selling goods or providing services or similar type of work (with the help of his fiancé). Once he received the recommended treatment and time away for recovery, he would earn approximately between R15 000-00 and R18 325-00 per year and be able to grow his business reaching career ceiling at age 55, earning optimistically R40 535-00 per year.

- contingency: the expert suggests that an appropriately higher post-accident contingency be applied for the fact that surgery may not take place and he may receive only conservative/non-surgical treatment. The expert refers to other medical experts regarding future medical costs.

iii. **Occupational Therapist ("OT") (A Ndabambi):**

[21] This expert confirmed the personal, accident, injury and treatment details of the Plaintiff, as set out by Ors C Barlin and J van der Westhuizen, orthopaedic surgeons and the industrial psychologist.

[22] The OT recorded that the Plaintiff was independent in all aspects of his self-care activities but following the accident, he had sleeping difficulties due to pain in his right lower leg (ankle joint) and inclement weather conditions. The Plaintiff's sexual activities are also affected due to the pain in his right lower leg.

[23] This expert indicated further that the injuries also impacted on the Plaintiff's home management tasks and instrumental activities of daily living such as cooking, dishwashing, and home cleaning. He was mostly responsible for certain of the activities, but since the accident, he usually only assists with the tasks, while his wife and brother took over some of the responsibilities due to the pain he suffered with prolonged standing. More or less the same applies to, *inter alia*, grocery shopping, gardening and handy work around the house.

[24] With regards to leisure and socialising skills, the OT recorded that the Plaintiff enjoyed socialising, sports and gym activities and watching tv. Since the accident he is less sociable, discontinued gym and boxing activities, but he still enjoys watching movies in his spare time. As far as traveling and community mobility is concerned, the Plaintiff walked and used public transport to access his amenities and is still doing the same following the accident. He cannot do the walks for prolonged periods due to the leg pains and he feels in danger of robbery when walking on the street as he cannot defend himself properly.

[25] The Plaintiff never returned to his security job after the accident due to injuries sustained in the accident and reported a loss of income since the accident date.

[26] According to the OT, the Plaintiff's life amenities has been affected by accident related limitations, is set out above. The Plaintiff will therefore benefit from occupational therapy intervention for 16 hours in total, which include, teaching of

alternative methods of activity execution and the introduction of assistive services; teaching pain management; vocational counselling and rehabilitation, which sessions would be charged at approximately R750-00 to R900-00 per hour, plus travelling costs. The Plaintiff will also benefit from the recommended assistive devices, such as adjustable chairs (costs R1200-00), low bench (R980-00), JoJo tank (R3000-00), shopping trolley on wheels (R1500), crutches (R900-00), long handed bath sponge (R165-00), etc.

iv. **Dr J van der Westhuizen (Orthopaedic Surgeon):**

[27] This expert confirmed the personal, accident, injury and treatment details set out by the other experts above. He also confirmed the effects on the Plaintiff's lifestyle, the scars and deformities as detailed by the other experts, including Dr C Barlin.

[28] The expert confirmed that the Plaintiff's life expectancy will not be affected by the injuries and justified the costs of the medical treatment already received by the plaintiff with regards to the future medical costs the expert recommends a conservative treatment programme as follows: visit to doctors and medication: R50 000-00 and for physiotherapy: R50 000-00. The expert indicated that costs of the removal of the plates and treatment for infections if complications occur will be approximately be R250 000-00.

v. **DJ Pretorius (Industrial Psychologist):**

[29] This expert consulted the medical reports of the experts mentioned above in relation to the other personal, accident, injury and treatment details of the Plaintiff.

[30] The expert calculated the pre-accident earnings at the time of the accident at R31 176-00 per annum, which is confirmed by the Plaintiff's payslips as a security officer. He also worked as a general worker/labourer for a certain Mr CA Ekpese and earned approximately R46 764-00 per year. This expert also proposed that retirement age of 65 years may be assumed.

[31] According to this expert, it is unlikely that the Plaintiff would remain unemployed for the rest of his life; he suffered significant loss in productivity and earnings capacity due to the accident and as a result his future earnings have been affected. This expert suggested that deference to the actuaries be made to quantify the loss of earnings in the circumstances.

vi. **L Toerien (Occupational Therapist ("OT")):**

[32] The expert confirmed the personal, accident, injury and treatment details of the Plaintiff as set out by the medical experts.

[33] This OT indicated past the injuries sustained by the Plaintiff has a significant impact on his ability to work and that he is best suited for sedentary to light physical work with low mobility demands. The OT explained if the treatment recommend is successful, the Plaintiff's ability to work will improve and he should be able to meet the demands for at least low ranges of medium physical work with moderate ability and agility demands and that his work options are limited especially if one considers his level of education, and that he will remain an unequal competitor in the open labour market.

[34] The expert then recommended certain multi-disciplinary interventions in respect of the Plaintiff, including physiotherapy, biokinetics and phycological

treatment and medication. Six sessions of occupational therapy (at R680-00 to R790-00 per hour) is also recommended. This OT opined that the Plaintiff would benefit from certain assistive devices and special equipment, including a high stool on casters (at a cost of R1300-00), wheeled shopping basket (R500-00), hippo roller (R1500-00), handheld garment steamer (R2300-00), etc. In addition, the Plaintiff would require home, transport and garden assistance.

vi. **Actuarial Report (J Sauer):**

[35] These reports set out the calculations and the basis thereof in respect of the Plaintiff's loss of earnings/earning capacity. Regard will be had to the reports in calculation of the Plaintiff's claim for future loss of income below.

D. MERITS:

[36] The merits are not in dispute, the Defendant having conceded it fully (100%) in favour of the Plaintiff. The Defendant made an offer in which the concession was made, dated 15 September 2018 and the Plaintiff having accepted the offer on 17 September 2018 [refer to pg 010-1 to 010-4, Caselines].

E. QUANTUM:

i. **future hospital, medical and related expenses:**

[37] It is evident from the expert reports before this Court that the injuries sustained by the Plaintiff will attract future medical, hospital and related expenses. Accordingly, this head of damages should be dealt with in accordance with section

17(4)(a) of the RAF Act 56 of 1996 and this Court intend to grant an appropriate order to this effect.

ii. **general damages:**

[38] The Plaintiff relied on expert reports and case authority to support their claim or general damages.

[39] It is common cause that the Defendant conceded the merits 100% in favour of the Plaintiff and that the Plaintiff's injuries was serious. The injuries, according to the relevant expert reports mentioned above, negatively impacted the health, general well-being and amenities of life of the Plaintiff and that certain of the experts stated directly that the Plaintiff would be entitled to general damages.

[40] The Plaintiff cited the following case law in support of his claim for general damages:

- **Ndzungu/RAF [2011 (6F4) QOD 8 (ECM)]:**

[41] In this matter a 70-year-old man suffered fracture of the tibia and fibular. The Plaintiff was no longer able to walk long distances and walked with limb and a crutch aid ambulation. The court made an award of R220 000-00 in 2011, the current value of which is R397 000-00.

- **Kubayi/RAF [2013 (6E4) QOD 27 (GNP)]:**

[42] An adult male suffered an open fracture of the distal tibia and fibula. His physical impairment included pain in his left ankle, exacerbated by prolonged static positions or repetitive movement, strenuous rigorous activity and hot weather, swelling of left ankle, muscle atrophy of the left foot, scarring and decreased rate of performance in walking and stair climbing. An award was made in the amount of R300 000-00, with current value of R467 000-00.

- **Solomon and Another NNO v De Waal [1972(1) SA 575 (A)]:**

[43] Plaintiff sustained scarring (5 inches wide and 9 inches long) on the left thigh following a horse bite and suffered resultant depression. An amount of Rr 7500-00 was awarded in 1972 (current value is R489 690-00).

- **Nxumalo v SA Eagle Insurance [1995 (4G5) QOD 1 (N)]:**

[44] Plaintiff, 20-year-old male, sustained extensive degloving injury to right lower limb from foot to groin making 80% of the circumference. The court awarded R90 000-00 in 1995 (current value is R356 616-00).

- **Makeke/RAF [611/2009 (2010), Eastern Cape High Court, Bisho]:**

[45] Plaintiff, 70-year-old man sustained injuries: loose teeth, neck, shoulder and wrists, which rendered him unable to continue his work as a gardener. An award of R380 000- 00 in 2010 (current value is R610 017-00).

- **Janse van Rensburg/RAF [(2014) ZAGPJHC 71, April 2014]:**

[46] Plaintiff suffered injuries to neck, lower back, bruises and abrasions of the body, wrist and right knee. He also suffered pain as a result of injuries. An amount of R450 000-00 was awarded in 2014 (current value is R580 437-00).

[47] In determining general damages, it was held that the proper approach would be to take into account a broad spectrum of facts and circumstances. These include the nature of the injuries, the severity of thereof and how it impacts on the quality of life of the Plaintiff [Hunter v RAF & Another, *supra*, at para 20]. The modern approach, which take into account the rising standards of living and the fact that past awards in our Courts were conservative as compared to that in other jurisdictions must also be taken into account. [RAF v Mosungu 2003(5) SA 164 (SCA) at 170; Masemola, *supra*, at para 21].

[48] With regard to the compensation amount it was decided as follows:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure must necessarily be uncertain, depending on the judge's view of what is fair in all the circumstances of the case" [Sandler v Wholesale Coal Supplies Ltd 1941 AD 194 at 199].

[49] In Pitt v Economic Insurance Co Ltd 1957 (3) SA284 (D) at 287E-F it was held that *"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 largess from the horn of plenty at the Defendants expense"*.

[50] With regards to the discretion of our Courts to determine compensation awards it was held that *"It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae"* [AA Mutual Insurance Association v Magula 1978(1) SA 805 (A); Myburg v RAF (11131/2019)[2021] ZAGPPHC 202 (07 April

2021) at para 44].

[51] In De Jongh v Du Pisani NO, *supra*, it was held that it is generally accepted that claims in respect of damages as a result of bodily injuries are quantified based upon comparable cases. The trial court has a wide discretion in considering all the facts and circumstances of the case in awarding what is considered to be fair and adequate compensation to the injured party. Our courts have acknowledged the existence of a tendency for awards to be higher than they were in the past. This is a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition of that our awards in the past have been significantly lower than in most other countries [Masoti v RAF (314/2015) ZANWHC at para 11 (unreported)]. It was further held that it is preferable not to consider each injury in isolation, but to consider all injuries sustained cumulatively (Masoti, *supra*, at para [11]).

[52] In Tshongolo, *supra*, it was further indicated that awards of previous comparable cases are but one of the factors which a court should take into account when considering the quantum of damages to be awarded.

(iii) **past and future loss of earnings:**

[53] The actuary (J Sauer) calculated the pre-morbid past loss of earnings at R614 491- 00 and applied a 5% contingency deduction (R30 725-00). Therefore, a total past loss of earnings is calculated at R583 766-00.

[54] The future loss of earnings is calculated by the said actuary at R3 608 330-00. A 10% contingency deduction was applied (R360 833-00). The total future loss of earnings is therefore R3 247 497-00.

[55] The total loss of earnings from the above calculations amounts to R3 831 263-00 (that is, R3 247 497-00 plus R583 766-00).

[56] This Court could not find anything contentious, unreasonable or unfair with the above calculations, the contingencies applied and totals arrived at. Accordingly, this Court is inclined to make an award in accordance with the said calculations.

F. **CONCLUSION:**

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

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

- | | |
|--|-----------------------|
| (a) past medical and hospital expenses | not applicable |
| (b) past loss of earnings | R583 766-00 |
| (c) future loss of earnings | R3 247 497-00 |
| (d) future medical and hospital expenses undertaking in terms of section 17(4)(a) | |
| (e) general damages | R375 000-00 |

G. COSTS:

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

H. ORDER:

[60] In the result, default judgment is granted in favour of the Plaintiff against the Defendant for:

- (i) payment in the amount of R4 206 263-00;
- (ii) the said amount shall be paid into the trust account of the Plaintiff's attorneys, Nel Van Der Merwe & Smalman Inc, Pretoria, within 180 days of date of this order;
- (iii) in the event of default of payment of the above amount, interest shall accrue on such outstanding amount at the prescribed rate per annum, calculated from the date of default until date of payment, both days included;
- (iv) the Defendant shall provide the Plaintiff with an undertaking in terms of section 17(4)(a) of the RAF Act 56 of 1996, for the payment of the costs of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying goods to the Plaintiff arising from the injuries sustained in the motor vehicle accident on 10 February 2018 after such costs have been incurred and upon proof thereof;
- (v) the Defendant is ordered to pay the Plaintiffs costs on a party and party basis on the High Court scale, including the costs of the Plaintiffs experts, including the qualifying costs of all experts whose notices have been served on the Defendant and costs of counsel;
- (vi) in the event that costs are not agreed between the parties, the Plaintiff will be entitled to serve a notice of taxation on the Defendant. The taxed costs will be payable within fourteen (14) calendar days of date of taxation and shall likewise be paid into the trust account of the Plaintiffs attorneys mentioned above.

BCEYLON

Acting Judge of The High Court of South Africa

Gauteng Division, Pretoria

Hearing date:09 November 2023

Judgment date:22 February 2024

APPEARANCES

FOR THE PLAINTIFF: Adv J van der Merwe

INSTRUCTED BY: Nel Van der Merwe & Smalman Inc

Pretoria

FOR THE DEFENDANT: No Appearance

INSTRUCTED BY: Not Applicable