

**IN THE HIGH COURT OF UTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 35916/18

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: Yes

30 March 2023

In the matter between:

AA SITHOLE

Applicant

and

ROAD ACCIDENT FUND

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on caselines electronic platform. The date for hand-down is deemed to be 27 March 2023.

VARIATION: JUDGEMENT

Molahlehi J

Introduction

[1] This judgment was delivered on 27 March 2023. As appears below, the defendant's liability is apportioned at 50%. However, the undertaking in terms of section 17(4) (a) of the Road Accident Fund Act was in the order placed at 100%.

This was clearly an error that deserves correction.¹ The error has been corrected to reflect the correct percentage of the liability of the defendant.

[2] The plaintiff, Mr Sithole instituted these action proceedings claiming damages against the defendant, the Road Accident Fund (RAF), following a motor vehicle accident that occurred on 17 August 2014. The motor vehicle in which the plaintiff was travelling and that of the insured driver, Mr Mehlinza, were involved in a head-on collision accident at Holfontein Road in Gauteng.

[3] The only issue for determination in this matter concerns quantification of the damages. On 17 September 2020 the court apportioned the defendant's liability 50% of the plaintiff's agreed or proven damages,

[4] After the accident, the plaintiff was transferred to the East Rand hospital by an ambulance, where he was discharged after seven days.

[5] The plaintiff avers in the particulars of claim that he, as a result of the accident, sustained the following injuries:

- (a) Brain injury (GCS of 13/1 5);
- (b) Severe injury to the right arm;
- (c) Rigid and distended stomach;
- (d) Severe body pain;
- (e) Soft tissue injury;
- (f) Neck injury;
- (g) Shock and psychological trauma.

¹ The error in the numbering of the paragraphs in the order is also corrected.

[6] The plaintiff further contends that he, as result of the accident, suffered loss of earning capacity, experienced pain and suffering and discomfort, suffered loss of amenities of life, experience, shock and psychological trauma.

[7] The total amount that the plaintiff claims is R 1 190 525.65 less 50% apportionment and thus the amount he should receive would be R595 626, 83. In support of his contention that he is entitled to compensation for the injuries sustained, the plaintiff relies on the written expert opinions of the following experts:

Dr D.A Birell -Orthopaedic Surgeon

Dr J.J. Du Plessis-Neurosurgeon

Dr L Berkowitz -Plastic Surgeon

Dr L. van der Merwe (Ophthalmologist)

Dr J.S. Enslin, Ear, Nose and Throat Surgeon

Dr M. Mazabow -Clinical Neuropsychologist~

A Greef -Occupational Therapist

K Prinsloo -Industrial Psychologist.

G. Whittaker- actuary

[8] The orthopaedic surgeon, Dr Birrel, diagnosed the plaintiff with a mild head injury, left-sided chest pain, right arm pain, and right hip pain, including lumbar pain at times. The plaintiff further had moderate acute pain for five days and moderate pain for three weeks. He complained of bilateral wrist pain, lower back pain, right knee pain, pain on top of his feet and forgetfulness following the accident.

[9] The neurosurgeon Dr Duplessis found that the plaintiff sustained a concussive head injury, an injury to the upper limb and lower limb. The Glasgow Comma Scale (GCS) was initially scored at 13/15. He also sustained a mild frontal lobe injury.

[10] Dr Du Plessis further indicated in the report that it looks as though the plaintiff may have sustained injuries to his right shoulder and mild soft tissue injury to his lumbar spine. It appears the plaintiff also suffered a fracture to the base of his skull as blood was, according to the expert witness, draining from his ear at the scene of the accident.

[11] The written report of the expert witness further found that the plaintiff qualifies for compensation for general damages due to the neurocognitive and neuropsychiatric sequelae of the brain as well as the scar on his right upper arm. The same applies to loss of earning capacity. The witness opined that because of the neurocognitive and neuropsychiatric sequelae of the brain injury, the plaintiff would not be able to fulfil his premorbid potential. He has become vulnerable in finding alternative employment if he was to lose his current employment.

[12] The plastic surgeon, Dr Berkowitz, found that the plaintiff has suffered, as a result of the accident, (a) multiple disfiguring scars on the lateral aspect of his arm, (b) a superficial scar on the right thigh and (c) minor scars on the left-hand.

[13] The ophthalmologist Dr Van der Merwe found that although the plaintiff sustained a head injury, there are no ophthalmological deficits or fallout.

[14] The ear, nose and throat surgeon, Dr Eslin, found that the plaintiff sustained a mild, moderate left-sided frequency hearing loss. The loss of hearing in the left ear is permanent.

[15] The neuro-psychologist, Dr Mazabow, attributes the behavioural disturbances of the plaintiff to a combination of factors, such as mild to moderate concussive injury, chronic mild to moderate depressive disorder, anxiety, disruptive sleep with fatigability, and chronic pain effects.

[16] The occupational therapist, Ms A Greef, noted that the plaintiff was employed as a baker at the time of the accident. She noted that post the accident, the plaintiff had a change in his behaviour. She further noted that there has, however, been some slight improvement in activity participation of the plaintiff.

[17] The industrial psychologist, Mr Prinsloo, opined in his report that the plaintiff in the premorbid scenario would have continued to perform his duties as a baker or in a job with similar requirements until retirement.

[18] The industrial psychologist records the earnings of the plaintiff premorbid as R96 671.00 per annum. In the post-morbid scenario, the earnings of the plaintiff were projected at R129 757.00

[19] In support of the contention that the plaintiff is entitled to the amount of R750 000.00 for general damages, the Plaintiff's Counsel referred to and compared three judgments with the facts of this case. The first case is that of *Oosthuizen v Road Accident Fund*,² where the court awarded the sum of R500.000.00. Similarly, in the second case of *Ramolobeng v Lowveld Bus Services (Pty) Ltd and Another*,³ the court awarded the sum of R550 000.00 for general damages.

[20] The third case is *April v Road Accident Fund*.⁴ That case involved a Grade R teacher who sustained head and spine injuries which were conservatively treated, and the plaintiff was eventually discharged with a neck brace. She returned to her pre-accident vocation, but the sequelae of her injuries never disappeared and, over time, became worse both cognitively and physically to such an extent that she found it extremely difficult to comply with the physical and cognitive demands of her job. The cognitive fallout resulting from the accident reached a stage where she simply could not remember things and thus had to make notes to remind herself of her duties and daily tasks. The court found that R750 000.00 compensation for general damages was, in the circumstances, reasonable.

² 2016 (704) OD 5 (GNP).

³ 2015 (7CS) 29 (GNP).

⁴ (2338/2018) [2021] ZAFSHC 206 (15 September 2021).

[21] The case of the defendant, as I understand it, is that it does not dispute the plaintiff's claim but disputes the quantification thereof. It further noted that the GCS was 13/15 and that the plaintiff was reported to have been intoxicated at the time of the accident, and that he never lost consciousness.

[22] The defendant further accepted that according to the hospital records the plaintiff sustained the following injuries:

- (a) Fluid was drained out of the right ear.
- (b) Laceration of the right arm, and the right-hand.
- (c) Laceration to the forehead.
- (d) Six cervical spine tenderness.
- (e) Multiple operations to the anterior arm closed.
- (f) Head injury.

[23] The other contention of the defendant is that the plaintiff did not qualify as having serious injuries under the Narrative Test.

[24] In support of its contention that the plaintiff qualified for only R450 000.00 (less 50% =R353 079.65) the defendant referred to the following cases; Schutte v Road Accident Fund (2010) LNQD 4 (NCK) and Donough v Road Accident Fund.⁵

[25] In Schecutte's case, the plaintiff was a 20-year-old male who sustained moderate to severe brain injury, mild frontal lobe hemisphere swellings, subarachnoid, haemorrhage lumbar spondylosis night haemorrhage lumbar spore the losses with progressive worsening of the lower back pain. He also suffered memory loss, aggression and sleeplessness. He was admitted to the hospital with

⁵ 2010 JDR 1371 (GSJ).

GCS on 11/15 and was awarded R350 000.00 for damages. The current value, according to the defendant, would amount to R367 600.00.

[26] In Donough's case, a 30 years-old woman sustained a head injury causing her fatigue, headaches, virtual impairment, impairment of cognitive mental function, depression and emotional difficulties of a permanent nature. She also had a knee injury causing her pain which became aggravated in extreme weather. In that case, the court awarded the plaintiff the sum of R325 000.00, with the current value being R617.000.00.

[27] It is on the basis of the above that the defendant contended that reasonable and fair compensation for the plaintiff in the circumstances of this case is R450 000.00.

General damages

[28] The written opinions of the plaintiff's experts were not challenged, and there is no reason to doubt their authenticity. In this regard, it is clear that the plaintiff suffered permanent loss of hearing, multiple disfiguring scars, laceration of the four head, concussive head injury and mild frontal lobe injury.

Loss of earning capacity

[29] In calculating the loss of income, the actuary, Mr Whittaker, took into account the opinion of the industrial psychologist and applied a deduction of 5% to the plaintiff's past loss of income. He then applied 10% to the pre-accident earnings and 38% to the post-accident earnings. The calculation which incorporates the contingencies is as follows:

Past loss

Value of income uninjured:	R12,405.00
Less contingency deduction: 5.00%	<u>R620.00</u>
Net past loss:	<u>R11,765.00</u>

Future loss

Value of income uninjured: R1,224,974.00	
Less contingency deduction: 10 00%	<u>R122,497.00</u>
R1,102,477.00	
Value of income injured: R1,224,974	
Less contingency deduction: 38.00%	<u>R465,490</u>
R759,484.00	
Net future loss: R342,993.00	
Total net loss:	<u>R354,778.00</u>

General principles

[30] The basic principle of our law is that a person who suffers patrimonial loss consequent to the negligence of another is entitled to be compensated to the extent of the loss. The damages often involve loss of earning capacity. It is generally not difficult to establish the nature of the negligent conduct of the guilty party. The difficulty which the courts have grappled with over time concerns the calculation of the quantum of damages.⁶ In dealing with this difficulty, the courts have adopted a two-pronged approach, namely (a) relying on the actuarial calculations if the same had been provided and (b) exercising its discretion in determining a just and reasonable award. In exercising its discretion, the court may take into account the actuarial calculations. The actuarial calculation is useful in that it provides the value of the loss on some logical basis. In *Southern Insurance Association Ltd v Bailey NO*,⁷ the court held:

“Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may, in the result, have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to

⁶ *Road Accident Fund v Guedes* 2006. [5] SA586 at paragraph [8].

⁷ 1948 [1] SA 1988 at 1135.

labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case".

Conclusion

[31] In light of the above analysis, a just and reasonable award to be awarded to the plaintiff in the circumstances is the following: (a) R 750 000 for general damages and R440 525.00 for loss of earnings. The total amount to be awarded before the apportionment of damages would have been R1190525.65. Deducting the 50% apportionment from this amount means that the award to be made to plaintiff is R595 262.83.

Order

[32] In the premises the following order is made:

1. The defendant is ordered to pay the plaintiff an amount of R595 262.83 in full and final settlement of the plaintiff's claim, which amount shall be paid within 30 days to the credit of the trust account of the Plaintiff's Attorneys of record, Savage Jooste & Adams Inc, Pretoria, whose trust account details are as follows:

Nedbank name: NEDCOR ARCADIA.

Account type: TRUST ACCOUNT.

Branch code: 1[...].

Account no: 1[...].

Reference no : Mr Makole / KS89.

1.1 That defendant will not be liable for any interest on the said payment on condition that payment be made timeously.

1.2 In the event of the defendant's default, interest will be payable on the full amount owing at that time at the rate of 7.25% interest per annum calculated from the due date up to and including the date of payment.

1.3 The award is the capital less costs due by the plaintiff.

1.4 The amount in paragraph 2 above is computed as follows:

1.4.1 R750 000.00 in respect of General Damages.

1.4.2 R 440 525.00 in respect of Loss of Earnings.

2. The defendant is ordered to furnish the plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, to compensate the plaintiff for 50% of the cost of future accommodation in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods to the plaintiff resulting from injuries sustained by her as a result of an accident that occurred on 17 August 2014, after such costs have been incurred and upon proof thereof.

3. The defendant is to pay the plaintiff's taxed or agreed party and party costs on a High Court scale, up to and including 15th and 18th November 2022 and which costs will include but is not limited to:

3.1. The Costs of Counsel;-

3.2. Defendant is ordered to pay the plaintiff's taxed or agreed party to party costs on the High Court Scale for the trial of the 15 and 18 November 2022, which costs shall include the cost consequent to the employ of Counsel, travelling and/or accommodation costs for the attendance of Medico-Legal examinations for the plaintiff, the costs of obtaining various medico-legal reports and where applicable, the reservation, preparation, appearance fees and/or qualifying (if any) the following:-

3.2.1 Dr JJ du Plessis (Neurosurgeon);

3.2.2 Dr Birrell (Orthopaedic Surgeon);

3.2.3 Dr Enslin (Ear, Nose & Throat Surgeon);

3.2.4 Liezel Van Der Merwe (Ophthalmologist)

3.2.5 Dr M Mazabow (Neuropsychologist);

3.2.6 Ms Claudette Reyneke (Occupational Therapist);

3.2.7 Mr Kobus Prinsloo (Industrial Psychologist); and

3.2.8 Mr Gregory Whittaker (Actuary).

3.3. The travelling and accommodation costs incurred in the plaintiff's attendance at the abovementioned medico-legal experts subject to the discretion of the taxing master.

3.4. The travelling and accommodation costs incurred in securing the plaintiff's attendance at virtual court on 15 and 18 November 2022.

4. The plaintiff shall, in the event that costs are not agreed upon, serve the Notice of taxation on the defendant's attorney of record; and
5. The plaintiff shall allow thirty (30) Court days to make payment of the taxed costs.
6. A contingency Fee Agreement is applicable.

E Molahlehi
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA.

Representation:

For the Plaintiff: Adv. P Tshavhungwe.

Instructed by: Savage Jooste and Adams.

For the DEFENDANT: MR L.A Lebakeng.

Instructed by: The State Attorney

Heard on: 23 November 2022

Delivered: 30 March 2023.