IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no. **5048/2014**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates:YES/NO

In the matter between:

TSHEPO ALFA OMEGA SELLO **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT BY: **I VAN RHYN, J**

HEARD ON: **24 MAY 2023**

DELIVERED: **30 MAY 2023**

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[1] The plaintiff instituted action against the defendant in terms of the provisions of the Road Accident Fund Act No 56 of 1996 ("the Act") for the payment of R1,720 608.72 in damages arising from a motor vehicle accident which

occurred on 4 June 2011. The plaintiff, Tshepo Alfa Omega Sello (the "deceased"), a major male, was a passenger in motor vehicle with registration letters and number D[...], driven by Mr. B Mokhothu. The merits were conceded 100% in the plaintiff's favour during July 2015.

[2] The deceased passed away on 10 April 2022. His death is not related to the injuries sustained as a result of the motor vehicle accident. The trial was set down for hearing on 23, 24 and 26 May 2023. At the commencement of the hearing, Mr Jankowitz, counsel appearing on behalf of the plaintiff, submitted a Notice of Substitution in terms of the provisions of Rule 15 of the Uniform Rules of Court whereby Dineo Anna Folotsi, acting as executrix, has been duly authorized in terms of the provisions of section 18(3) of the Administration of Estates Act[1] to appear for and on behalf of the Estate of the late T A O Sello.

[3] Shortly prior to the hearing of the matter, the plaintiff delivered a notice in terms of the provisions of Rule 38(2) that the evidence of the following experts be adduced at the trial on affidavit: Dr J F Ziervogel (Orthopaedic Surgeon), N Potgieter (Occupational Therapist), Dr E Jacobs (Industrial Psychologist) and J Valentini – Munro Forensic Actuaries (Actuary). All the above mentioned medico-legal and actuary reports were properly served upon the defendant. The defendant did not file any medico legal reports and did not oppose the application in terms of Rule 38(2). I granted the plaintiff's application for the expert witnesses to give evidence on affidavit.

[4] This matter was set down for hearing of the remaining issues regarding the quantum of the plaintiff's claim in relation to past loss of income and general damages. On 23 May 2023 the matter stood down with the view of a possible settlement of the plaintiff's claims. The parties failed to reach a settlement and arguments were heard on 24 May 2023 in respect of the disputed issues.

THE INJURIES SUSTAINED BY THE DECEASED.

[1] Act No 66 of 1965 (as amended).

[5] The deceased was 29 years old at the time of the motor vehicle accident. He lost consciousness for a while. He was transported by ambulance to Bongani Hospital in Welkom and subsequently transferred to the Pelonomi Hospital, Bloemfontein. Approximately two weeks later an operation was performed by surgeons at the Pelonomi Hospital due to a fracture of the dens of the C2 vertebra in his neck. It was reduced and a C1/2 fusion was performed. A brace was fitted to his neck and two weeks later he was discharged from hospital. The wires used for the fusion broke with the result that the fusion served no purpose.

[6] The deceased sustained a torn labrum of the right shoulder. An osteophyte at the outer inferior edge of the acromion was observed during the medico-legal examination performed by Dr Ziervogel. X-rays revealed the narrowing of the joint space of the inferior part of the gleno-humeral joint. Signs of biceps tendonitis was noted. A total shoulder replacement was projected as well as a debridement of the shoulder joint and repair of the torn labrum of the right shoulder. Dr Ziervogel warned that as a security officer there will always be the possibility of hand to hand combat which may result to a second injury to the neck area. The neck area remained compromised and had limited movement. The deceased also suffered a laceration and soft tissue injury of the lower right back.

[7] The deceased lived alone at the time of the accident. He passed Grade 11 at the age of 21 years and left school. He started working as a security officer at White Leopard Security in Rustenburg for a period of approximately two years where after he was retrenched. He then worked as a petrol attendant at the BP Garage at Rustenburg for four months. At the time of the accident during 2014 he did piece jobs, usually as a gardener, and earned R150,00 per day. At times he was only able to obtain employment on Saturdays. He did not work after the accident.

[8] Plaintiff filed a medico-legal report compiled by Nicky Potgieter, Occupational Therapist, Kimberley, who conducted an interview with the deceased on 29

June 2016. He complained of pain in his neck during bad weather and when he performed heavy duties. He also complained of pain of his right shoulder and occasional pain in his lower back. He used to play soccer but quit playing after the accident due to fear of further injury.

[9] The deceased had no formal training apart from qualifying as a security officer and was only suitable for manual labour. Me N Potgieter opined that the deceased would have been able to perform light sedentary types of work. Due to the economic conditions and the high unemployment rate, chances remained slim for the deceased to obtain employment since the accident in 2014. The deceased's limited education and skills, and his injuries made it highlyunlikely that he would have been able to find suitable employment.

[10] From the industrial psychologist, Dr Everd Jacobs's report it is evident that the deceased's loss of income was opined to be R120,00 per day rather than R150,00 per day. Munro Actuaries in their report dated 6 April 2023, based on the information provided by the industrial psychologist, calculated the loss. The actuaries were instructed to apply the following contingencies: Uninjured: 5% past earnings; Injured: no contingencies. The actuaries suggested that the plaintiff's Capital Value of Loss of Earnings are R255 500.00 less 5% contingencies resulting in a total loss of earnings in the amount of R 242 725.

[11] Ms Mkhwanazi appearing on behalf of the defendant argued that the deceased did not work 5 days per week at the time of the accident. Therefore, a 30 % contingency should be applied in respect of past loss of earnings.

[12] The problem in the matter at hand relates to the death of the plaintiff during 2022. The only information available regarding the deceased's injuries, academic qualifications and work history, are to be found in the contents of the medico-legal reports compiled subsequent to consultations and examinations performed by the experts. The experts received instructions from the plaintiff's attorney of record. The defendant failed to properly investigate the situation of the deceased prior to his death.

[13] Normal contingencies in respect of past loss of income as applied by the defendant are deductions of 5%. If loss of earnings is proven, the loss may be compensated if it is quantifiable as a diminution in the value of the estate.[2] When quantifying a claim for past loss of income, an actuary often uses actuarial calculations based on proven facts provided by the instructing attorney. The role of the actuary is to guide the court in the calculations to be made. Relying on its wide judicial discretion the court will have the final say regarding the correctness of the assumptions on which these calculations are based.

[14] The importance of applying actuarial calculations and their advantages were discussed in **Southern Insurance Association v Bailey NO**[3] where the court referred with approval to the matter of **Hersman v Shapiro and Company**[4] *at 379* where Stratford J said as follows:

> "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"'

[15] Mr Jankowitz argued that contingencies should be applied at the rate of 5% in respect of past loss of earnings, as calculated by the actuary. I am of the view that there is no need to deviate from the normal deductions of 5 % for past loss of earnings.

[16] Mr Jankowitz further more contended that general damages in the amount of R810 000,00 less 25% amounting to R686 250,00 will be a fair and reasonable award for the non-pecuniary loss suffered by the deceased as a result of the injuries sustained and its sequelae. Ms Mkwanazi argued that the amount of R600 000.00 awarded for general damages in the matter of **Cowan**

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[2] Prinsloo v Road Accident Fund 2009 5 SA 406 (SECLD) at 409C-41A
[3] 1984 1 SA 98.
[4] 1926 TPD 367.

v The Road Accident Fund[5] less an amount of R200 000.00 resulting in an amount of R 400 000,00 will amount to reasonable compensation under this heading.

[17] In the matter of **Dickson v SA Mutual Fire Insurance**[6], the Plaintiff was awarded R10 000.00 for general damages for two cervical fractures. In that matter, the Plaintiff fractured the C7 and C11 vertebrae and suffered from a stiff neck. The current value of the award in that matter is R493 010.00.

[18] In **Moalahi v Road Accident Fund**[7] the plaintiff, an adult male, injured his neck when the C2 and C3 vertebrae fractured as a result of a motor vehicle accident. He also suffered injuries to his left elbow, left knee, a head and back injury. He underwent two operations to his neck. When he was discharged from hospital, he could not walk long distances or dress himself. He suffered from "pins and needles" in his hands and feet. For approximately 6 months after his discharge, he was assisted by family members with caring for himself. He continued to experience constant pain, especially in his neck. He remained unable to perform any tasks that required him to extend his arms upward above his head due to the fact that it affected his shoulders and neck. He was unable to return to his normal employment and remained unemployed. An amount of R600 000.00 was awarded in respect of General Damages in 2021. The current value of the award amounts to R643 000.00

[19] After considering all the above factors and circumstances, I am of the view that compensation for general damages in the amount of R600 000.00 is to be awarded to the Plaintiff.

Accordingly, the Plaintiff is awarded the following amounts:

[20] **ORDER**:

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[5] (17541/2016) [2020] ZAGPPHC (4 September 2020).
[6] 1977 (2) C&B 725 (C)
[7] Quantum of Damages VIII, B4-43.

1. The defendant is liable for payment of 100% of the plaintiff's damages and is ordered to compensate the plaintiff in the amount of R842 725.00 which consists of the following:

Past loss of earnings	R 242 725.00
General damages	R 600 000.00
TOTAL	**R 842 725.00**

2. Payment of the amount referred to in paragraph 1 above is to be made in the plaintiff attorney's trust account with the following details:

ACCOUNT HOLDER:	**P JOUBERT INCORPORATED**
BANK:	**ABSA BANK**
BRANCH CODE:	**6[...]**
TYPE OF ACCOUNT:	**TRUST ACCOUNT**
ACCOUNT NUMBER:	**4[...]**

3. Payment shall be made to the Plaintiff within 180 days of granting this court order;

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs into the account mentioned in 2 above, up to and including the trial dates of 23 and 24 May 2023, for the instructing and correspondent attorneys, which costs shall include the qualifying fees of the following experts:

4.1 Nicky Potgieter;

4.2 JA Valentini – Munro Actuaries

4.3 Dr Everd Jacobs;

4.4 Dr J F Ziervogel.

5. Payment of the taxed or agreed costs reflected above shall be effected within 180 (one hundred and eighty) days of agreement or taxation (the *"due date")* and shall likewise be paid to the Plaintiff's attorneys of record referred to in 2 above;

6. Should the capital amount or costs not be paid by the respective due dates, the Defendant will be liable for interest thereon at the prescribed rate of interest.

I VAN RHYN J

On behalf of the Plaintiff:	Adv. I Jankowitz
Instructed by:	Rosendorff Reitz Barry Attorneys
	Bloemfontein
On behalf of the Defendant:	Ms. K Mkhwanazi
Instructed by:	State Attorneys
	Bloemfontein