

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

CASE NR: 44487/2021

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES

DATE: 24 APRIL 2024

SIGNATURE:

In the matter between:

DAVID THABO SETSHOGO

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 24 April 2024

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] This is a delictual claim wherein the plaintiff seeks to hold the defendant liable for injuries he sustained as a result of being involved in a motor vehicle

accident in which he was a passenger on 14 November 2020. The judgment was delivered on 17 April 2024. After delivering the judgment, I was advised by my secretary that the parties raised a query about the content of the judgment and correctly identified a mistake that needed to be addressed.

[2] I requested my secretary to remove the judgment from case lines so that the identified mistake can be addressed to ensure that none of the parties in this matter are prejudiced. My secretary also ensured that a transcript of the proceedings is expeditiously obtained, to which I am eternally grateful. This is a revised judgment that addresses the concern that was validly raised.

[3] Rule 42(1) of the Uniform Rules of Court

‘The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties’.

[4] The mistake identified in the initial version of this judgment will be corrected based on the above-stated rule. In this matter, the court is called upon to determine whether the defendant is liable to compensate the plaintiff for the harm suffered as a result of the accident. While the defendant disputes liability, the parties seem to have found each other on the issue of damages that ought to be paid to the plaintiff by the defendant for loss of earnings. However, they failed to do so regarding general damages. As such, the court is required to determine the defendant’s liability and the amount of compensation that should be paid to the plaintiff by the defendant for general damages. The issue of general damages was incorrectly not dealt with in the initial version of this judgment. I wish to apologise to the parties for the delays that resulted in the finalisation of this judgment.

B Factual Matrix

i) Plaintiff's Version

- [5] The plaintiff alleges that on 14 November 2020 at around 11:00 at the intersection of Hazlitt Street and Hemmingway Street, Orkney North West, he was a passenger in a bakkie driven by an insured driver. He alleges that the insured driver was speeding. Further, when the insured driver was turning the vehicle, the plaintiff fell out of the vehicle. This version is consistent with what is contained in the affidavit deposed to by the plaintiff in terms of section 19(f)(i) of the Road Accident Fund Act 56 of 1996 (hereafter RAF Act).
- [6] The plaintiff contends that he fell out of the bakkie due to the insured driver's sole negligence. In particular, the insured driver failed to keep an adequate lookout, failed to control the vehicle, failed to apply the brakes timeously, and failed to pay adequate attention to the environment. Further, the insured driver was travelling at an unreasonably high speed and attempted to turn at the intersection in an unsafe and reckless manner.
- [7] According to the plaintiff, due to the negligent conduct of the insured driver, he sustained severe bodily injuries which included: severe spinal cord injury; fracture dislocation of the thoracic spine; chance fracture of the T10-T11; transection of the spinal cord; fracture of the anterior superior corner of the T11 vertebral body; paravertebral haematoma; hemiplegia; acute abdominal pain; and head injury. He alleges that these injuries are serious and qualify him to be compensated through general damages.
- [8] The plaintiff contends further that due to the accident and the injuries sustained therein, he is permanently disabled and disfigured. Further, he suffered shock as well as pain and a loss of life amenities. The plaintiff alleges that he received medical attention and treatment after the accident and will require ongoing care and medical treatment for the remainder of his life.
- [9] To substantiate his claim, the plaintiff requested this court to admit into evidence the reports of five experts.

- [9.1] The first report is compiled by Dr TP Moja, a Neurosurgeon. Dr Moja examined the plaintiff and established that he has a 33cm midline scar over the thoracolumbar spine. However, Dr Moja did not find any scars on the head or any deformities. Dr Moja's examination revealed that while the plaintiff's visual acuity was normal, he is wheelchair-bound, suffered acute pain from his multiple injuries, sustained a thoracic spine fracture, developed paraplegia, has urinary and fecal incontinence, and his residual neurological deficits are permanent.
- [9.2] According to Dr Moja, the CT scan showed evidence of soft tissue swelling on the left posterior region of his head. However, the brain appeared normal on the CT scan. Further, the plaintiff sustained a minor to a mild head injury which is not expected to result in long-term organic brain dysfunction. Dr Moja is of the view that the plaintiff lost amenities of life due to his leg paralysis, incontinence, and sexual dysfunction. Further, the plaintiff is at risk of developing complications related to his paraplegia which includes repeated urinary tract infections. Dr Moja is of the further view that the plaintiff's life expectancy has been reduced by about ten years.
- [9.3] In his report, Dr Moja indicated that the plaintiff is left with permanent injury of the spinal cord and needs medication and consultations with relevant medical professionals which can cost about R 15 000. Further, the plaintiff needs ongoing physiotherapy and medication to prevent the development of leg spasticity and contractures, with an estimated cost of R 20 000. He is of the view that the plaintiff qualifies for general damages.
- [9.4] Dr Macfarlane, a clinical psychologist and neuropsychologist, also provided a report which this court was asked to consider. Dr Macfarlane indicated that while the hospital records indicate that the plaintiff sustained spinal cord injury, he did not find indications of

traumatic brain injury. Further, the hospital records include a Glasgow Coma Scale score of 15/15.

- [9.5] Dr Macfarlane's report indicates that the plaintiff was a passenger at the back of the bakkie when the accident took place. According to Dr Macfarlane, the plaintiff left school after standard 5 to look for work. He started as a farm labourer and went on to work for a mine. He was eventually employed by the municipality where he did plumbing work. He remained in this job until the accident and he has not worked since the accident.
- [9.6] The plaintiff is married with three children. The plaintiff takes hypertension medication. According to Dr Macfarlane, the tests to which he subjected the plaintiff revealed that he has short-term memory capacity, and extremely low mental operations over a sustained period.
- [9.7] The third report is compiled by Ms Lizelle Wheeler, who is an occupational therapist. She confirmed that the plaintiff is wheelchair-bound and is unable to walk and stand. He cannot perform his previous job as a plumber assistant and his employment was terminated after the accident. Ms Wheeler reports that the plaintiff cannot do any light to heavy work.
- [9.8] Ms Wheeler is further of the view that the plaintiff is limited to sedentary work and his employment options are significantly restricted. She is of the view that given the significant impairments that rendered him completely paraplegic, he will probably never work again in the open labour market. She recommends that provision should be made for total loss of income for the rest of the plaintiff's life.
- [9.9] The fourth report used in favour of the plaintiff's claim is compiled by Mr Lance Marais, who is an industrial psychologist. Mr Marais notes that at the time of the accident, the plaintiff was 56 years old. According

to Mr Marais, the plaintiff would have continued with his work before the accident until he retired. Further, the plaintiff's residual work capacity for a sedentary position is negated because of his poor sitting tolerance, limited level of education, incontinence, and to a lesser degree, being wheelchair-bound. Mr Marais is of the view that these circumstances exclude the plaintiff from potential future sedentary work.

[9.10] According to Mr Marais, no earnings are anticipated for the plaintiff after the accident because he is not expected to work in the future. Further, the plaintiff has not retained his pre-accident employability or earning ability. He has sustained a potential future loss of employment leading to loss of earnings. Mr Marais concluded that the plaintiff has been severely compromised and compensation should be favourably considered.

[9.11] The last report this court was asked to consider is compiled by Mr GA Whittaker, an actuary. At the time this report was compiled, the plaintiff was 57 years old. After calculating the plaintiff's past and future losses, the actuary came up with two scenarios. In the first scenario, the total nett loss was calculated at R 1 280 563.00, and in the second scenario, it was calculated at R 1 268 344.00. The actuary applied the normal 5% contingency deduction on the past loss and 5% contingency on the future uninjured loss.

[10] The plaintiff submits that the injuries he sustained should be regarded as serious. In support of this allegation, the plaintiff referred the court to a serious injury assessment report completed by Dr Moja. In this report which is dated 10 August 2021, Dr Moja classified the injuries sustained by the plaintiff as serious. The court was informed that there was a verbal offer by the defendant accepting that the injuries the plaintiff sustained were serious.

[11] Ms van Rooyen, on behalf of the plaintiff, indicated that the issue of liability in this matter is in dispute. She submitted that she had discussions with Ms

Mothiba, who appeared on behalf of the defendant, but they could not reach an agreement on how to dispose of this matter. Further, there was a verbal offer for general damages made by the defendant, meaning that the issue relating to the seriousness of the injuries was no longer in dispute.

- [12] Ms van Rooyen further submitted that the defendant's special plea is no longer before the court and the issue of contributory negligence and risk apportionment were not pleaded by the defendant. She submitted that the defendant should be held 100% liable in this matter.

ii) Defendant's version

- [13] The defendant submitted a special plea where it alleged that it should only be obliged to compensate the plaintiff for non-pecuniary loss if his claim is supported by the serious injury assessment report and it is satisfied that the injury has been correctly assessed as being serious as statutorily provided.
- [14] During the oral argument, the defendant's counsel did not persist with any of the pleaded special pleas. Ms Mothiba argued that the defendant does not dispute that the plaintiff was a passenger in a bakkie. However, given the circumstances of the accident, the defendant wanted a risk apportionment of 50% to be applied because the plaintiff was at the back of the bakkie. She indicated that while she could agree to the liability of 100%, she did not have the instructions to do so. She conceded that the issue of risk apportionment was not pleaded.
- [15] Ms Mothiba argued again that the defendant does not dispute the issue of general damages, but disputes the amount suggested by the plaintiff. She suggested that the fair and reasonable amount of general damages that should be awarded to the plaintiff is R 1 600 000. Concerning loss of earnings, she indicated that the defendant had already provided an offer that had been accepted by the plaintiff.

C LEGAL PRINCIPLES AND EVALUATION

i) Liability

- [16] The defendant is generally liable to pay compensation to victims of road accidents that arise from the driving of motor vehicles where the identity of the owner of the vehicle or the driver of such vehicle has been established, as is the case in this matter.¹ Such victim is compensated for any loss or damage that he or she suffered due to any bodily injury to him/herself caused by or arising from the driving of a motor vehicle within the boundaries of South Africa. The defendant will only be held liable if the conduct of the driver or owner of the vehicle was wrongful and negligent.²
- [17] In this case, the plaintiff was at work and placed in the back of a bakkie driven on one of the South African roads. The driver of the bakkie acted wrongfully and negligently by disregarding the safety of the passengers at the back of the bakkie. In particular, the driver decided to drive at an unreasonably high speed and turn without applying the brakes to stop the vehicle, thus placing the life of the plaintiff in significant danger. The version of events as narrated in the affidavit deposed in terms of section 19(f) of the RAF Act and repeated in the particulars of the claim is uncontested and there is no reason for this court to reject it.
- [18] Despite the defendant not admitting full liability, I am satisfied that the driver of the bakkie acted both wrongfully and negligently. I agree with the plaintiff's counsel that since the defendant did not plead the issue of contributory negligence and risk apportionment, this issue is not before this court and ought not to be entertained. The defendant did not call any witnesses to substantiate this claim or, at the very least, submit expert reports to that effect that could be considered by the court. I am of the view that the defendant should be held to be 100% liable in this matter.

ii) Non-pecuniary claim

¹ Section 17(a) of the RAF Act.

² Ibid. See also *Qelesile and Another v Road Accident Fund* (14719/2020; 5168/2021) [2023] ZAGPJHC 221 (11 February 2023) para 18.

[19] It is not enough for the driver to act both wrongfully and negligently. The defendant's liability to compensate the plaintiff for non-pecuniary loss is limited to compensation for a serious injury.³ Section 17(1A) provides that:

'(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

*(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974).'*⁴

[20] In this case, a medical professional, Dr Moja assessed the plaintiff and concluded that the injuries sustained by the plaintiff are serious. He completed a serious injury assessment report which the plaintiff alleges was provided to the defendant. It appears that this was done in 2021. The court was informed during the oral hearing that the defendant accepted that the injuries sustained are serious. The plaintiff's counsel argued that this was done verbally whereas the defendant's counsel submitted that this was done in writing. However, there is no document provided to the court indicating that the defendant accepted in writing that the injuries sustained by the plaintiff are indeed serious.

[21] I am of the view that it is ideal for the defendant's decision to accept or reject the seriousness of injuries sustained due to a motor accident in writing. Such a decision must also be provided to the court. In my view, verbal agreements that are communicated by parties' legal representatives create uncertainty and may lead to complications in the finalisation of these matters. There

³ Section 17(a) of the RAF Act.

⁴ See *Road Accident Fund v Duma*, *Road Accident Fund v Kubeka*, *Road Accident Fund v Meyer*, *Road Accident Fund v Mokoena* (202/2012, 64/2012, 164/2012, 131/2012) [2012] ZASCA 169; [2013] 1 All SA 543 (SCA); 2013 (6) SA 9 (SCA) (27 November 2012) para 5 where it was held that '[a]ll s 17(1A) adds is that the assessment of whether or not a particular injury meets the threshold requirement of "serious" must be carried out by someone registered as a medical practitioner under the Health Professions Act 56 of 1974 and on the basis of a 'prescribed method'.

should be a clear and uncontested written record of the offer, which must be provided to the court.

[22] A written record of an acceptance or rejection of the seriousness of the injury will eradicate the barrier provided by the applicable Regulations that prevent this court from entertaining the road accident victims' claims for non-pecuniary damages without the defendant's prior intervention. In terms of Regulation 3 of the Road Accident Fund Regulations, 2008 (hereafter RAF Regulations), first, *the '[a] third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner ...'*⁵ Such a medical practitioner shall assess whether the third party's injury is serious using the prescribed method.⁶

[23] Secondly, *'[a] third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report'*.⁷ Surely, it is reasonable to expect the defendant once it has been furnished with this report to indicate whether it wishes to make an offer and whether it rejects or accepts the seriousness of the injury. In my view, it is undesirable for the defendant's decision to be communicated from the bar in court years after receiving the report.

[24] Thirdly, and as pointed out by the defendant in its special plea, in terms of Regulation 3(3)(c) of the RAF Regulation:

'[t]he Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations'.
(my emphasis)

⁵ Regulation 3(1)(a) of the RAF Regulations.

⁶ Regulation 3(1)(b) of the RAF Regulations.

⁷ Regulation 3(3)(a) of the RAF Regulations.

[25] This is a statutory barrier that subjects victims of road accidents who wish to claim from the defendant to the mercy of the defendant. As is the case in this matter, these victims can do their due diligence and submit themselves to be assessed so that their serious injury assessment reports can be completed and submitted to the defendant, only for the defendant to drag its feet in deciding whether to reject or accept these reports.⁸ In terms of Regulation 3(3)(dA) of the RAF Regulations:

'[t]he Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment'.

[26] Regulation 3(3)(dA) of the RAF Regulations is peremptory. The defendant is obliged to evaluate the serious injury assessment report sent to it by the plaintiff within 90 days and make its decision whether to accept or reject the report. In other words, the defendant was obliged to decide whether the defendant's injury was serious within 90 days of receipt of the report. However, over three years later, this decision was only communicated in court when the matter was argued without any document being provided to the court that records the defendant's decision.

[27] I align myself with the view that the defendant tends to fail to accept or reject serious injury assessment reports and then argue that the court cannot decide the seriousness of an injury without its decision thereto.⁹ Unfortunately, where the seriousness of the injury has not been accepted or rejected by the defendant in writing, ordinarily the hands of the court would be tied.

⁸ See among others *Mnisi v Road Collision Fund and Seven Similar Matters* (1823/19; 2538/18; 315/20; 208/20; 4082/19; 4423/19; 2382/19; 4067/19) [2022] ZAMPMBHC 23 (1 April 2022).

⁹ *Knoetze obo Malinga and Another v Road Accident Fund* (77573/2018 & 54997/2020) [2022] ZAGPPHC 819 (2 November 2022) para 45.

[28] Where there is no acceptance or rejection of the seriousness of the injuries, the court is bound by the view of the Supreme Court of Appeal that was expressed in *Mphala v Road Accident Fund (Mphala)*, where it was held that:

*‘[a]n interpretation that seeks to suggest that because the Fund did not make a decision within 90 days of receipt of the SIA report, it is deemed to have accepted that the third party has suffered serious injuries is untenable and in conflict with the provisions of subsecs 17(1) and 17(1A) of the Act, and regulation 3. It is always open to the Fund to reject the SIA report when it is not satisfied that the injury has been correctly assessed in terms of regulation 3(3)(dA). This regulation does no more than prescribe a period within which the Fund can reject or accept the report. It would be an anomaly if, in terms of regulation 3(3)(dA), where the Fund has failed to make a decision within the prescribed period, an otherwise not serious injury would by default become serious because of the delay’.*¹⁰

[29] However, there was an error made in the initial version of this judgment. On that note, the court was informed during oral argument by the plaintiff’s counsel that there was a verbal offer for general damages which indicated that the seriousness of the injuries was accepted. The defendant’s counsel went further and indicated to the court that the offer was made in writing. Unfortunately, this written offer to which the plaintiff’s counsel appeared to also not be aware was not placed on case lines for the court to consider. It is common cause that there is such an offer and this court should deal with the issue of general damages. While the court accepts the mistake that necessitated the varying of this judgment, had this offer been duly uploaded on caselines, the mistake would have easily been avoided.

[30] The fact that there was no written offer placed on case lines raises questions relating to the process that the defendant follows to consider the serious injury assessment report. It is not clear why there are delays in evaluating the reports and accepting or rejecting them so that written offers can be made

¹⁰ (698/16) [2017] ZASCA 76 (1 June 2017) para 14.

and timeously provided to the court. It is not clear who makes the assessments and the capacity of the defendant to consider these reports timeously. What is clear is that the defendant's inability to timeously make its decision has serious consequences for those who are in desperate need of compensation.

[31] On the one hand, the plaintiff claims general damages in the amount of R 2 500 000. On the other hand, the defendant maintains that a fair and reasonable amount that should be awarded is R 1 600 000. Apart from the defendant maintaining that this court should consider the issue of contributory negligence and apportionment of liability, there is no dispute relating to how the injury occurred and the nature of the injuries sustained by the plaintiff. These injuries are serious and led to the plaintiff's disablement as detailed by various expert reports furnished to this court. Their evidence is uncontested.

[32] While the awarding of general damages is discretionary, such discretion must be exercised judiciously and not arbitrarily.¹¹ The full court of this division in *R.S.M v Road Accident Fund*, held that:

'[t]he assessment of general damages awards through reference to awards made in prior cases poses a challenge. It is essential to analyse the specific circumstances of each case comprehensively, as direct comparability between cases is usually limited. Although previous awards can serve as a helpful reference for what other courts have deemed appropriate, their significance is restricted to that purpose alone'.¹²

[33] When exercising its discretion, the court must be guided by what would be fair in the circumstances. It is generally accepted that while the process of estimating the amount of damages that must be awarded may be difficult, generally, the court through its assessment of the facts and evidence before it must try its best to take care and ensure that it makes an award that is fair to

¹¹ *P.M.N obo N.N v Road Accident Fund* [2023] ZAGPPHC 337; 11999/2016 (31 March 2023) para 8.

¹² (A137/2018) [2023] ZAGPPHC 641 (31 July 2023) para 30.

both sides.¹³ *Ncama v Road Accident Fund*, it was held that adequate compensation must be determined considering several facts and circumstances connected to the plaintiff and the injuries suffered, including the nature of such injuries, their permanence and severity as well as how they impact the plaintiff's lifestyle.¹⁴

[34] I accept the expert testimonies contained in various reports that the plaintiff is paraplegic with fractured ribs, and fractured T10/T11 of the spine with transection of the spinal cord. Due to the injuries sustained in the accident, the plaintiff suffers from incontinence and has erectile dysfunction. The plaintiff is disabled and uses a wheelchair and he needs to be assisted to bath, dress, and go to the toilet. While there is no brain damage, a mild concussion cannot be excluded. Based on these injuries which are not only severe and permanent but have also negatively impacted the plaintiff's life, I am required to determine, in the circumstances, what would be a fair compensation.¹⁵

[35] Both parties referred the court to previous cases from which they urged the court to attain some guidance. Among others, the plaintiff referred the court to *Webb v Road Accident Fund*.¹⁶ In this case, the plaintiff was involved in a motor vehicle accident when he was 20 years old. He sustained L1 burst fracture with T12/L 1 dislocation resulting in paraplegia leading to permanent disability.

[36] The plaintiff was also bound to a wheelchair for the rest of his life. When determining compensation for general damages, the court remarked that '*it is correct that notwithstanding the best available medical treatment that he may receive the plaintiff's current condition will never be restored to its original position*'. The court awarded R1,500,000, which the plaintiff submits that its value today amounts to R 2 099 000.

¹³ *Pitt v Economic Insurance Co. Ltd* [1957] 3 All SA 354 (D) 358. The Supreme Court of Appeal endorsed this approach in *De Jongh v Du Pisanie NO* [2004] 2 All SA 565 (SCA) 582.

¹⁴ (3854/2012) [2014] ZAECPHC 74 (4 November 2014) para 25.

¹⁵ See *Sandler v Wholesale Coal Suppliers Limited* 1941 AD 194 at 199.

¹⁶ (2203/14) [2016] ZAGPPHC 15 (14 January 2016).

- [37] Among others, the defendant referred the court to the decision of *MC v RAF*.¹⁷ In this case, at the time of the accident, the plaintiff was 44 years old. Due to the accident, the plaintiff suffered a traumatic injury to the cervical spine, causing paralysis to both his legs and arms. This resulted in severe quadriplegia forcing him to use a wheelchair. The plaintiff sustained C3/4 damage with paraplegia and had an abdominal skin graft due to a split in the abdominal skin. The plaintiff also experienced erectile dysfunction as well as bladder and bowel incontinence. The court awarded general damages of R1 200 000, which the defendant contends it is R 1 577 804.58 in today's value.
- [38] It is worth noting that the court in *MC v RAF* referred to the award that was made in *Webb v Road Accident Fund*. However, the court did not explain what justified a lesser amount of compensation being awarded as compared to that awarded in the latter case. Despite the differences in amounts awarded for general damages by the respective courts, it cannot be doubted that both cases are similar and comparable to the present case.
- [39] In my view, there was no reason for the court in *MC v RAF* to have awarded a lesser amount than that awarded in *Webb v Road Accident Fund*. The award made in *Webb v Road Accident Fund* seems to be fair under the circumstances. The plaintiff in this case, just like the plaintiffs in both *MC v RAF* and *Webb v Road Accident Fund* is wheelchair-bound and will never work again. There was no reason for the court in *MC v RAF* to deviate from the compensation awarded in *Webb v Road Accident Fund*, and there is no reason for this court to also do so.

ii) Pecuniary Claims

- [40] Regarding pecuniary damages that can be determined in financial terms, the plaintiff claims payment of future hospital and medical expenses, as well as past and future loss of income or earning capacity. To be eligible for compensation, the defendant must be found to be liable to compensate the

¹⁷ (26299/2018) [2019] ZAGPJHC 242 (12 June 2019).

plaintiff. In this matter, the defendant did not concede the merits and the issue of its liability is in dispute. However, the defendant has neither provided its version of events nor has it submitted any evidence by its experts.

[41] In *Groenewald v Road Accident Fund*, it was correctly held that

*‘[i]t is trite that the plaintiff, as a passenger claimant, need to prove only 1% negligence on the part of the insured driver in order to succeed with her claim against the defendant’.*¹⁸

[42] The version of the plaintiff is very clear. He was a passenger at the back of the bakkie on a South African road. The bakkie was driven negligently and the insured driver’s conducted himself wrongfully. This led to the plaintiff falling from the bakkie and sustaining injuries. This version is uncontested. In my view, it is clear that the defendant is liable to compensate the plaintiff because the negligence of the driver of the bakkie caused the injuries the plaintiff sustained.¹⁹

[43] From the expert reports provided by the plaintiff, and in the absence of contrary expert reports from the defendant, it is difficult not to accept that due to the accident, the plaintiff has been rendered disabled to the extent that he now relies on a wheelchair. In particular, I accept that the plaintiff experienced traumatic spinal cord injury and injury to his urinary system with urinary incontinence which has seriously impacted his ability to earn a living.

[44] There is no doubt that the plaintiff has been rendered paraplegic by the injuries sustained from the accident causing him post-traumatic stress disorder. I also accept that the plaintiff experienced erectile dysfunction. Based on these medical conditions, the experts recommended among others, extensive therapy, medication, and other medical treatment for the plaintiff to deal with the *sequelae* of the accident.

¹⁸ (74920/2014) [2017] ZAGPPHC 879 (5 October 2017) para 3.

¹⁹ See *Mashego v Road Accident Fund* [2023] ZAGPPHC 296; 64934/2019 (4 May 2023) para 20 – 22.

- [45] Section 17(4)(a) of the RAF Act makes provision for the plaintiff where he has claimed among others, costs for future accommodation in a medical facility and where an undertaking has been provided by the defendant or where the defendant has been ordered to provide such an undertaking, to compensate the plaintiff of the costs associated thereto. There is no reason why the plaintiff cannot be compensated for these costs upon furnishing the relevant proof thereof to the defendant.
- [46] It is also clear from the evidence provided by the experts that the plaintiff's employment prospects are non-existent. Given his level of education and age, he is unlikely to be employed again. The plaintiff was medically boarded and received a portion of his retirement fund benefits. These benefits have no bearing in the assessment of any heads of damages the compensation thereof is payable to the plaintiff. These are patrimonial benefits that the plaintiff was always entitled to receive by virtue of his employment. In this case, the plaintiff is claiming non-patrimonial losses.
- [47] The plaintiff was medically boarded because he was unable to perform his duties after the accident. I accept that, but for the accident, the plaintiff would have been able to work until he reached the age of retirement, which is 65 years. I also accept that due to the injuries sustained, the plaintiff will never return to work because he uses a wheelchair and his level of education does not make it easier for him to attain work that requires manual labour. He is also excluded from potential sedentary work because of his poor sitting intolerance.
- [48] Regarding past and future loss of income, an actuary provided two scenarios in his actuarial report. The parties agreed that payment relating to loss of earnings should be made in accordance with the second scenario indicated above. It is trite that the determination of contingency deductions falls within

the discretion of the Court.²⁰ This discretion is guided by various factors which include the expertise of actuaries.

[49] There is nothing that suggests that I should not align myself with the estimates suggested by the actuary, as agreed to by the parties. It does not appear to be much of a speculation that the plaintiff will never work again. This view is made having regard to the plaintiff's advanced age and level of education as well as his state of disability that forced his employer to medically board him. Due to the accident, the plaintiff has lost his employment earnings which also affected his ability to continue contributing towards his retirement benefits to which he was forced to have early access. I accept the calculations and estimations made by the actuary.

E CONCLUSION

[50] In the initial judgment, the issue of general damages was not dealt with based on a mistake that this judgment seeks to rectify. The order granted below is also a revised order in terms of Rule 42(1) of the Uniform Rules of Court. This revised judgment and order are final.

ORDER

[51] In the result, I make the following order:

1. An order that the defendant is liable for 100% of the Plaintiff's damages.
2. The Defendant shall pay to the Plaintiff an amount of R 3 268 344.00 (three million two hundred sixty eight thousand three hundred forty-four rands only) in full and final settlement of the plaintiff's claim made up as follows:

²⁰ *R.J.M v Road Accident Fund* (60042/2019) [2024] ZAGPPHC 238 (4 March 2024) para 18.

- 2.1 In respect of general damages, payment of the amount of R 2 000 000.00 (two million rands only)
 - 2.2 In respect of past and future loss of earnings, payment of the amount of 1 268 344 (one million two hundred sixty-eight thousand three hundred forty-four rands only)
3. The amount referred to in paragraph 2 above shall be paid by the Defendant within 180 days of service of this order on the Defendant.
4. The Defendant shall pay interest on the amount referred to in paragraph 4 above at the prescribed rate per annum calculated from the 181st day of service of this order on the Defendant.
5. The amount referred to in paragraph 4 shall be paid into the Trust Account of the Plaintiff's Attorneys of Record JERRY NKELI & ASSOCIATES.
6. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to pay for the costs of future accommodation of the Plaintiff in a hospital or nursing home, treatment of, or rendering of a service to his, or supplying of goods to him arising out of the injuries he sustained in a motor vehicle collision on the 14 November 2020 and the sequelae thereof after such costs have been incurred and upon proof thereof.
7. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs which costs shall include Counsel's fees, on the applicable High Court Scale as well as the reasonable costs of the medico-legal, radiological, actuarial, and addendum reports as well as confirmatory affidavits and qualifying fees of the following Experts:-
 - 7.1. Dr Peter Moja (Neurosurgeon);

- 7.2. Mr Robert Macfarlane (Neuropsychologist);
- 7.3. Ms Lizelle Wheeler of Alison Crosbie Inc, (Occupational Therapist);
- 7.4. Mr Lance Marais (Industrial Psychologist); and
- 7.5. Mr G. A Whittaker (Algorithm Actuaries)
8. If costs are not agreed, the parties agree as follows:-
- 8.1. the Plaintiff shall serve the notice of taxation on the Defendant and;
- 8.2. the Plaintiff shall allow the Defendant 14 court days to make payment of the taxed costs.
9. In the event that payment of costs is not effected timeously, the Plaintiff shall be entitled to recover interest at the applicable prescribed rate on the taxed or agreed costs calculated from the 15th day of payment becoming due to date of payment.
10. Plaintiff's Attorneys trust banking details are as follows:
- Name of account holder: Jerry Nkeli Attorneys
Account held: First National Bank
Branch name: Bank City
Account No: 6[...]
Branch code: 2[...]
11. There is a valid contingency fee agreement entered into between the Plaintiff and the Attorney.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

**GAUTENG DIVISION
PRETORIA**

Counsel for the applicant:	Adv M van Rooyen
Instructed by:	Jerry Nkeli Attorneys
Counsel for the respondent:	Adv RP Mothiba
Instructed by:	State Attorney
Date of the hearing:	07 November 2023
Date of judgment:	24 April 2024