

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

Case No: 76370/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: **27/10/2023**

SIGNATURE

In the matter between:

**WELLINGTON TSHUTSHA**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

**J U D G M E N T**

**MNGQIBISA-THUSI, J:**

- [1] Plaintiff, Mr Wellington Tshutsha, seeks damages for injuries sustained in a motor vehicle collision which occurred on 15 November 2015. The collision occurred at around 20h30 on the R61 National Road, Ntunjeni Location, Bizana, Eastern Cape, a collision occurred between a motor vehicle bearing registration number N[...] 7[...] and the plaintiff who was at the time pedestrian.

- [2] As a result of the collision, plaintiff sustained the following injuries:
- 2.1 a head injury;
  - 2.2 right ankle fracture;
  - 2.3 decreased hearing on the right ear; and
  - 2.4 right shoulder rotator syndrome.
- [3] On 12 September 2019 the parties reached a settlement with regard to the merits on the basis of 100% in favour of the plaintiff of the proven or agreed damages and the settlement was made an order of court.
- [4] For future medical expenses, the defendant has agreed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
- [5] The defendant has made an interim payment in the amount of R450,000.00.
- [6] The only issues remaining in dispute is the claim for general damages and future loss of income and or loss of earning capacity.

### **General Damages**

- [7] The plaintiff is claiming of R1, 600,000.00 in respect of general damages. I have been referred to some authority which may serve as a guideline in my consideration or the appropriate amount to be awarded for general damages.
- [8] The purpose for the award of general damages is to compensate a claimant for pain, suffering, discomfort and loss of amenities of life to which he has been subjected as a result of the particular injuries that

were sustained. Awards in previous cases can only offer a broad and general guideline as there are no scales upon which the court may weigh pain and suffering and loss of amenities of life. The broadest general consideration and the figure arrived at will necessarily be uncertain depending on the judge's view on what is fair in all the circumstances of the case.<sup>1</sup>

[9] In their joint report, Ms S Shabangu and Ms K Kelly, occupational therapists, due to the injuries the plaintiff sustained, including the visible scarring he has, the plaintiff has acquired psychological problems which may have an effect on his interpersonal relations in social participation settings.

[10] Drs Mosadi and Okoli, neurosurgeons, have opined that, as a result of his injuries, the plaintiff suffers from neuropsychological and neurocognitive disorders. Further that the plaintiff now has a hearing impairment as a result of a base skull fracture, which is permanent. Further, the experts have reported that the plaintiff suffers from consistent headaches, is forgetful and has poor concentration.

[11] Taking the above into consideration and taking past awards into account, I am of the view that the plaintiff's suggested amount of R1, 600,000.00 would be a just and reasonable award in the circumstances.

### Loss of Earnings

[12] It is trite that a court has a wide discretion in assessing quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. In *Southern Insurance Association Limited v Bailey* NO<sup>2</sup> 1984(1) All SA 98 at 113 (G) Nicholas JA held:

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<sup>1</sup> Sandler v Wholesale Suppliers Ltd 1941 AD 194 at 199.

<sup>2</sup> 1984 (1) SA 98 (A) at 113F.

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

- [13] At the time of the accident the plaintiff was 48 years old. Further at the time of the accident the plaintiff was self –employed as a bricklayer in the construction sector. The plaintiff went up to Grade 6 (standard 4) at school. The plaintiff is currently unemployed as a result of the sequelae of the injuries sustained.
- [14] The parties have filed their expert reports and the joint minutes of the occupational therapists and neurosurgeons.
- [15] It is common cause that the plaintiff has suffered a mild to moderate brain injury that has left him with residual neurological and cognitive deficits that are permanent. These impairments exhibit themselves in recurrent headaches; forgetfulness, attention and concentration lapses; short-temperedness. However, the experts have postulated the risk of epilepsy in the future has not increased. Further the experts are in agreement that the plaintiff’s life expectancy has not been affected.
- [16] The neurosurgeons are agreed that the plaintiff sustained a neurocognitive disorder. As a result of the injuries the plaintiff sustained his interpersonal relations are affected.
- [17] The parties’ occupational therapists agree that as a result of his injuries, the plaintiff is precluded from doing heavy to very heavy duty work. They opine that the plaintiff now qualify for sedentary and light work.

[18] The plaintiff's orthopaedic surgeon, Dr LF Oelofse, reports that the plaintiff continues to experience pain on his right ankle and uses a crutch to work. Further that cold weather aggravates his pain.

[19] The plaintiff's industrial psychologist, Mr B Moodie, reports that the plaintiff's injuries have had a profound impact on his productivity and that as plaintiff is no longer in a position to do physical work. Taking into account of the plaintiff's level of education, he will find it difficult to get employment. He concluded that the plaintiff was functionally unemployable. With regard to the plaintiff's pre-accident income, the psychologists were of the view that based on the plaintiff's affidavit, they do not have proof of the amounts stated there.

[20] Further, the plaintiff's physiotherapist was also of the view that the plaintiff's injuries, he is vulnerable and would not be able to compete in the labour market.

[21] Counsel for the plaintiff addressed the court on the contingency which should be applied with regard to future loss of earning capacity using as a point of reference the actuarial calculation done by Munro Forensics Actuaries.

[22] According to Robert Koch' Quantum Yearbook (2017):

“... General contingencies cover a wide range of considerations which vary from case to case and may include: taxation, early death, savings in travel costs; loss of employment, promotion prospects, divorce etc. There are no fixed rules as regards general contingencies. The following guidelines can be helpful: Sliding scale: ½ per year to retirement age, i.e 25% for a child, 20% for a young and 10% in middle age”.

[23] The plaintiff's actuaries have suggested a contingency deduction of 5%/15% for loss of earnings (past and future). Counsel for the plaintiff

argued that due to the plaintiff's injuries and its sequelae, plaintiff was a vulnerable employee who would find it difficult to compete in the open market. In his heads of argument plaintiff's counsel proposed a contingency deduction of 5%/20% for past and future loss of income, contrary to the calculation made by the actuaries.

[24] I am of the view that the contingency deduction as suggested by counsel for the plaintiff is fair and reasonable in the circumstances, having regard to the sequelae the plaintiff has suffered and recognising that the plaintiff is now unemployable.

[25] In the result the following order is made:

1. The defendant shall pay to the plaintiff the sum of R6, 844, 780.00 in respect of the plaintiff's general damages and loss of earnings and/or earning capacity, less the pre-paid amount of R450, 000.00.
2. The above amount to be paid to the plaintiff's attorneys, **Godi Attorneys**, by direct transfer into the trust account whose details is as follows:

Name of Bank: Standard Bank

Account Number: Godi Attorneys

Account Number: 4[...]

Branch Number: 0[...]

Type of Account: Trust Account

Branch Name: Van der Walt Street (Pretoria)

3. In the event of the said amount not being paid within 60 days from date of this court order, the defendant shall be liable for interest on the amount at the rate of 10.50% per annum, calculated from the date of this order to date of payment.

4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale subject to the discretion of the Taxing Master. Such costs shall include:
  - 4.1 fees of Counsel;
  - 4.2 The reasonable taxable reservation, qualifying, preparation fees of all experts whose report(s) were provided to the Defendant and / or its experts;
  - 4.3 The reasonable cost of consultation fees between the Plaintiff's experts and the Plaintiff's the legal teams;
  - 4.4 The reasonable traveling- and accommodation cost, incurred in transporting the Plaintiff to all medico-legal appointments and to the court proceedings;
5. The above-mentioned payment with regard to costs shall be subject to the following conditions:
  - 5.1 The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and
  - 5.2 The plaintiff shall allow the defendant 180 (one hundred and eighty) calendar days to make payment of the taxed costs

**N P MNGQIBISA-THUSI**  
**Judge of the High Court**

Date of hearing : 03 February 2021  
Date of judgment : 27 October 2023

Appearances:

For the Plaintiff : Adv P M Leopeng (instructed by Godi Attorneys)

For the Defendant :None