

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

CASE NO: 31123/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: **3 November 2023**

In the matter between:

ABEL UKHEYE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DE VOS AJ

[1] The plaintiff was in a car accident on 6 September 2018 when he was 46 years old. He was the front passenger of a motor vehicle that collided with the side of another vehicle. He was transported from the scene to the Pietersburg Hospital. He was discharged eight days later. The clinical notes indicate a spinal fracture, specifically a “C1-C2 spinous process fracture”. He also suffered a traumatic head injury as well as injuries to his shoulder and chest. The injuries have resulted in his orthopaedic surgeon, Dr Oelofse’s categorial report that a back fusion is a future certainty.

[2] The only head of damages the Court had to consider was the loss of past and future income. The RAF has conceded the merits and has accepted 100% liability in

respect of the plaintiff's claim. The HPSCA had rejected the plaintiff's claim for being non-serious. At the outset of the hearing, the plaintiff's counsel indicated that his client is in the process of reviewing the HPSCA's finding and, on this basis, the issue of general damages would be requested to be postponed sine die.

- [3] At the time of the incident, Mr Ukheye was employed as a full-time chef. He was earning about R 5 000 per month. As a result of the accident, he struggles to complete a full 8-hour day shift on his feet. Mr Ukheye struggles with pain in his back and neck. The expert reports – which I will deal with below – support this claim. In fact, the experts indicate that his injuries have worsened, and when he has worked, it is as a result of him committing to the endeavour with maximum effort.
- [4] The plaintiff claims damages for his past and future loss of income. The plaintiff claims his past loss of R 83 396.00 (5% contingency). For his future loss he claims R 561 841.00 (premised on a 10% pre-morbid and 20% post morbid), resulting in a total claim of R 645 237.00.
- [5] The RAF's opposition is that Mr Ukheye could continue with his employment subsequent to the incident and only left his employment not because of the injuries but because he was seeking "greener pastures". The RAF's position is that a 15% contingency ought to be applied (for pre and post-morbid) resulting in a loss of income of R 117 912.00.
- [6] The RAF's position is premised on the fact that Mr Ukheye had kept on working after the incident. The RAF relies on the Industrial Psychologist, Ms Steenkamp, whose report indicates he left his employment due to being paid late and not on the basis that his injuries were preventing him from working.
- [7] The RAF's position is premised on a selective reading of Ms Steenkamp's report. The report indicates that in 2019, Mr Ukheye left his employment with Thandabantu Family Lodge as they were not paying him on time. However, Mr Ukheye is not claiming any damages for this period. It is only from June 2022 onwards that Mr Ukheye is claiming damages. In relation to this relevant period, the report indicates

that Mr Ukheye left his employment in May 2022 at Kruger Maroela Lodge –as a result of being “unable to perform”.

[8] The relevant period is therefore from June 2022 – and for this period - the report indicates Mr Ukheye left his employment as he was unable to perform.

[9] Mr Ukheye concedes that he went back to work through an attempt his experts describe as "maximum effort"; he was able to work. However, as the consequences of the injuries deteriorated – to the point where he will now require a back fusion – he was unable to work the usual 8-hour standing shift expected of a chef. Even now, Mr Ukheye continues to work piece jobs as a chef when offered. This, however, amounts to an income of about R 20 000.00 per year. Mr Ukheye has tried to keep working, and even with the deterioration of his health – he still seeks employment within his physical abilities.

[10] In these circumstances, the RAF's opposition – that he could keep working – is based on a selective reading relating to an irrelevant period for purposes of this claim. In addition, the RAF's opposition is countered by the findings in the expert reports. I consider these reports in some detail.

[11] The expert report of Dr Oelofse, the orthopaedic surgeon, indicates that Mr Ukheye suffered a cervical spine injury, and the current condition is classified as Grade 2 pain – VAS: 4 (visual analogue Scale measures pain intensity) 0-10- (10 is as bad as it could possibly be). In addition, the plaintiff suffers from neck pain, stiffness and headaches, which is moderate, as well as pain between the shoulders, which is indicated as moderate. This is an indication of “pain originating from the spine”. The “range of motion is severely impaired” and associated with moderate pain with “reduced sensation at C6 on the left.” The diagnosis includes a disc bulge at level 5/6. The plaintiff's “condition has deteriorated since 2021.” In relation to treatment, Dr Oelofse reports -

“The possibility of further damage to the vertebral artery would manifest at a later stage, even after years, causing thrombosis or embolisms with resultant stroke.

Treatment:

Surgical procedure – definite probability of an anterior cervical fusion/disc prosthesis at the level or levels as determined by the special investigations. Costs R220 000,00 and 6 weeks leave required.”

[12] Dr Oelofse concludes that “the plaintiff will not be able to return to his previous job as a chef but is best suited to perform a sedentary type of work due to his neck injury. “

[13] The findings of Dr Oelofse are congruent with the findings of the Occupational Therapist, who concludes that –

“the plaintiff remains restricted to sedentary, light and medium work within the above set out parameters. This was however due to the fact that he maximally exerted himself. Although he appears to have the potential strength for higher physical demands as noted on his overall performance, signs of maximum effort relating to intrusive neck pain were observed.”

[14] Ms Steenkamp’s report refers to the pathology evident in his neck in the form of C2 to 3 anterolisthesis (uneven vertebrae) and disc bulging at C5/6, as well as his predisposition for surgical intervention, as indicated by Dr Oelofse and concludes –

“The above limits him to load handling of a light nature. Considering the MRI findings as well as Dr Oelofse’s statement that his neck condition has deteriorated, the plaintiff should be advised not to continue with medium work. It is therefore stated that the only reason why he was able to test on a medium level during the functional capacity evaluation, is due to the fact that he maximally exerted himself. Medium work will not be sustainable over prolonged periods and it is expected to place reduced strain on the affected areas. Considering that he is no longer suited for medium work, he should be advised not to continue with such work.”

- [15] Ms Steenkamp states that although the plaintiff was able to continue with his work demands between 2018 and 2022, it requires more than reasonable accommodation, such as adequate rest breaks and frequent positional changes as pathology progressed. Due to his greater need for task adaptation, he will, however, not be able to compete fairly with pain-free individuals of the same age and educational levels.
- [16] Due to the bulging of C5/6, he has trouble looking down continuously while preparing and cooking food. Additionally, the plaintiff will not be able to stand continuously, an inherent job requirement of being a chef. Mr Ukheye is advised not to continue with his work as a chef.
- [17] Based on these expert reports, I conclude that Mr Ukheye has suffered severe occupational dysfunction and that his career options have been narrowed considerably. Especially when considering that he does not have a Grade 12 level of education, he is 51 years old and has never secured sedentary work.
- [18] I reject the basis of the RAF's opposition – as they are premised on an irrelevant period and ignores the clear findings in the expert reports. I furthermore accept the findings of the expert reports presented to court. The Court is faced with an individual who after his accident, dispute a fracture in his spine, continued to work. His health has deteriorated and he will not be able to continue working in this fashion. The fact that he – through maximum effort – continued to work shortly after the accident cannot be used by the RAF to contend that his injuries are not serious. The experts indicate they are. Nor will the Court hold against him his attempts to return to work after his injuries.
- [19] I will therefore apply the contingency as contended for by the plaintiff. These are 5% on past income and 10% premorbid and 20% postmorbid on future loss of income. The RAF has not opposed these calculations – just the contingency that ought to apply.

[20] As for costs, I see no reason to depart from the general rule that costs must follow the result.

Order

[21] As a result, the following order is granted:

- a) General damages is postponed sine die
- b) The Defendant is ordered to pay to the Plaintiff the amount of R 645 237,00 in respect of the claim for loss of earnings by paying to the Plaintiff's attorney, Frans Schutte & Mathews Phosa Inc Standard Bank Trust Account number 0[...].
- c) The Defendant is ordered to furnish the Plaintiff with an Undertaking to compensate him in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of her future accommodation in a hospital or nursing home or treatment or the rendering of a service or supplying of goods to him arising from injuries sustained by him in consequence of the motor collision on 6 September 2018, after the costs have been incurred.
- d) The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on the High Court scale to date, subject to the discretion of the taxing master, which costs shall include the following:
 - i) The costs of counsel, including the heads of argument.
 - ii) The costs of the expert reports and addendums served on the Defendant.
 - iii) The qualifying costs of the experts referred to above.
- e) The Defendant will be liable for payment of interest on the capital from 15 days from the date of the order and 15 days from the date of the taxed or settled costs should the payments not be made within 180 days.

f) The Plaintiff and his attorney have entered into a contingency fee agreement.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff:	J van der Merwe
Instructed by:	Gert Nel Inc
Counsel for the defendant:	WB Ridgard
Instructed by:	Makhubela Attorneys
Date of the hearing:	24 October 2023
Date of judgment:	3 November 2023