

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

CASE NO: 40887/21

(1) **REPORTABLE:** [Y/N]

(2) OF INTEREST TO OTHER JUDGES: [Y/N]

(3) REVISED: [Y/N]

(4) Signature:

Date: 23/12/2023

In the matter between:

FELANI SAUL GUMEDE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] The plaintiff, Mr FELANI SAUL GUMEDE instituted action proceedings in his personal capacity against the defendant for damages in terms of the Road Accident Fund Act 56 of 1996, pursuant to a motor vehicle collision.

[2] The plaintiff issued summons on 18 August 2021 for future medical expenses, loss of earnings, and general damages which were served on the defendant. The defendant entered an appearance to defend. The Plaintiff served and filed a notice of Bar on the defendant. The Defendant then filed a Plea, out of time, dated the 04th of March 2022. Counsel submits that the defendant is not

proper before the court. It is respectfully submitted that the defendant's plea is not properly before this court. The defendant has not appointed any experts, nor has it filed any expert reports. The defendant has further not made tender in respect of settlement.

[3] The plaintiff proceeds on a default basis, in terms of Rule 39 (1) and (2) of the Uniform Rules of Court. The matter was set down for trial on the 24th of October 2023 and the defendant's attorney was served on the 22nd of March 2023.

[4] The matter is before me for determination on both merits and quantum.

BACKGROUND

[5] The plaintiff is **FELANI SAUL GUMEDE** an adult male person born on 02nd July 1974 residing at 2[...] P[...] Street Kinross, Mpumalanga Province.

[6] The defendant is the Road Accident Fund, a schedule 3A public entity, established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996, with its service office situated at 38 Ida Street, Menlo Park, Pretoria, Gauteng Province.

[7] Counsel for the plaintiff called the plaintiff to testify and his testimony under oath that he is 46 years of age, he was the driver when he was involved in a motor collision on the 22nd June 2020 between 19h30 and 20h00 pm. He says he was a driver of the motor vehicle with registration letters and numbers H[...] 7[...] M[...] and he was driving between Trichardt and Kinross on the N17 Highway. Another unknown motor vehicle was overtaking another motor vehicle and came into his lane of travel. He says he tried to avoid the collision by swerving on the side of the road and unfortunately, he lost control of the motor vehicle and it then overturned.

[8] He says he was traveling alone on the night in question. He says he tried to avoid the accident but it was impossible. He says he sustained injuries as a result of the accident.

LEGAL PRINCIPLES

- [9] The party who bears the onus of proof can only discharge it if he has adduced enough credible evidence to support the case of the party on whom the onus rests. "In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true."¹
- [10] "Liability generally depends on the wrongfulness of the act or omission relied on by the plaintiff. Wrongfulness, in these cases is inferred from the fact that the third party negligently caused the accident. The statutory nature of the liability is such that the RAF insures the third party *"for any loss or damage which the third party has suffered as a result of any bodily injury to himself ... if the injury ... is due to the negligence or other wrongful act of ... the insured driver"*. Thus, once negligence of the third-party driver is proved, wrongfulness is generally assumed."²
- [11] The evidence of the plaintiff's evidence has not been rebutted. It is trite that the court will not just accept the evidence because the defendant did not show but will apply its mind to the facts as presented. It is evident that the accident took place. I have evenly balanced the probabilities and they favour the plaintiff's case more than they do the defendant's, I have no reason to doubt the plaintiff and I believe him. I am satisfied that his evidence is true and that the defendant has no version. I therefore conclude for the reasons above that the insured driver was 100% negligent.
- [12] It is trite that the question that follows is whether the injuries and the sequelae sustained are a result of the accident. (*sine qua non*). The causation principle as discussed in *Lee v Minister of Correctional Services* (per Nkabinde J for

¹ National Employer's General Insurance v Jagers 1984 (4) SA 437 (E) at 440 D - G

² MS vs RAF

the majority) recognised that the 'but for' (or *sine qua non*) test as stated in *International Shipping Co (Pty) Ltd v Bentley* was the most frequently employed theory of causation but found that it was not always satisfactory when determining whether a specific omission caused a certain consequence. In finding that there was a need for flexibility in the causation assessment she had the following to say:

*"Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case"*³.

- [13] It is trite that in cases of claims for personal injury, the plaintiff must show that the injuries were sustained in the accident and that these injuries have had certain effects on the person of the claimant. Once these effects are established, the court can move to determine how such effects translate into loss. The assessment as to quantum does not require proof of facts. Instead it is based on an acceptance of the facts proved in the causation inquiry.⁴

APPLICATION IN TERMS OF RULE 38 OF UNIFORM RULE

- [14] The plaintiff further applied in terms of Rule 38 of the uniform rules of court, to proceed on the evidence as contained by the medical experts, as confirmed by the expert affidavits.
- [15] It is trite that evidence should be given viva voce at trial, but in certain circumstances the court may allow evidence to be led by way of an affidavit, such instances are exceptional based on sufficient reason given to the court, as contemplated under Rule 38(2). Gutta J, in **Bafokeng Land Buyers Association and others v Royal Bafokeng Nation** 2018 (3) All SA (NWM) at 64, held that the determination of "sufficient reason" necessarily involves the

³ Ibid

⁴ Ibid

exercise of a discretion which discretion has to be exercised judicially having regard to the options available to the Court.⁵

- [16] I have considered the application and I ordered that the plaintiff proceed in terms of Rule 38 of the uniform Rules of Court.

INJURIES SUSTAINED

- [17] According to Hospital Records and the Raf 1 form, the plaintiff sustained the following injuries in the accident under discussion:

- Head injury in the form of a concussion;
- Right sternoclavicular joint dislocation;
- Right hip pain.

TREATMENT RECEIVED

- [18] The plaintiff was evacuated to Netcare Union Hospital, where he received the following definitive treatment:

- Clinical and radiological examination;
- CT scan of the brain - opinion deferred to neurosurgeon;
- Neuro observation - opinion deferred to neurosurgeon;
- Right arm sling - until pain-free;
- Pain management; - Physiotherapy.

FURTHER TREATMENT

- [19] The plaintiff received follow-up treatment as an out-patient post-discharge.

EVIDENCE OF THE PLAINTIFF

The following exposition is a summary of the experts' reports and the expert findings contained therein.

QUANTUM

⁵ Molefe v Road Accident Fund (22195/2018) [2021] ZAGPPHC 583; 2022 (2) SA 461 (GP) (8 September 2021)

[20] The quantum further remains in dispute insofar as it pertains to:

Future medical expenses, which will become resolved, by way of an undertaking, are to be furnished by the defendant in terms of S17 (4) (a) of the Road Accident Fund Act 56 of 1996, as amended. Counsel requests that an order be furnished in terms of Section 17 (4) (a) of the Act.

GENERAL DAMAGES

[21] Counsel submits that the issue of general damages further remains in dispute. The defendant has, however, yet to accept, alternatively reject the seriousness of the injuries of the Plaintiff as per the seriousness injury assessment.

The Issue of General Damages is postponed sine side.

LOSS OF EARNINGS AND OR LOSS OF EARNING CAPACITY

EMPLOYMENT HISTORY

[22] At the time of the aforesaid accident, the plaintiff was 46 years old, and was employed at Chief Albert Luthuli Municipality as a Station Manager managing 2 fire stations at the time of the accident. He is 49 years old to date.

ORTHOPAEDIC SURGEON

DR P. KUMBIRAI

HISTORY OF ACCIDENT

[23] The plaintiff stated that he was involved in a motor vehicle accident as the driver of a private car when he lost control whilst trying to avoid a head-on collision and he was thrown out of the vehicle. He sustained a loss of consciousness and woke up in the hospital.

INJURIES SUSTAINED

[24] According to the plaintiff and hospital notes in file no. 1[...] kept at Netcare Union Hospital, as well as information on the RAF1 form filled in by Dr. M. Nell, the plaintiff sustained the following injuries: - Head injury - opinion

deferred to neurosurgeon. - Right sternoclavicular joint dislocation - opinion deferred to cardiothoracic surgeon. - Right hip pain.

TREATMENT RECEIVED

- [25] After the accident, the plaintiff was evacuated to Netcare Union Hospital, where he received the following definitive treatment: - Clinical and radiological examination; - CT scan of the brain - opinion deferred to neurosurgeon; - Neuro observation - opinion deferred to neurosurgeon; - Right arm sling - until pain-free. - Pain management. - Physiotherapy. - Wheelchair. - Rehabilitation. - Discharged after 2 months.

STATUS OF THE CLAIMANT BEFORE THE ACCIDENT SOCIAL

- [26] The plaintiff states that he is married and has two children.

OCCUPATION

- [27] The plaintiff states that his highest level of formal education is Matric, a BA in Public Management, and a Certificate in Firefighting. He was working as a Firefighter at Chief Albert Luthuli Municipality. This job required good cognitive function, lifting heavy weights and driving whilst fighting fires and carrying out other duties as a Firefighter.

HEALTH

- [28] The plaintiff informed the doctor that this was his first motor vehicle accident. He has no history of any known chronic diseases. He reports undergoing neck surgery in 2016.

STATUS OF THE PLAINTIFF SINCE THE ACCIDENT SOCIAL

- [29] The plaintiff reports that he is still working as a Firefighter. He reports that the lifting of heavy weights exacerbates the pain in the right shoulder and the prolonged standing exacerbates the pain in the right hip and lower back but he perseveres as this is his only source of income.

SPORTS, HOBBIES AND AMENITIES

- [30] He reports that he stopped playing soccer due to a painful right hip.

HEALTH

- [31] The plaintiff now complains that the injuries sustained in this accident have affected his health adversely as mentioned below.

PRESENT MAIN COMPLAINTS

- [32] The major complaints at the moment are: - recurrent headaches; - poor short-term memory. - poor concentration span, - recurrent dizziness. - Painful right shoulder - this is exacerbated by lifting of heavy weights. - Painful right sternoclavicular joint - Painful right hip joint - this is exacerbated by prolonged standing and walking.

CLINICAL ASSESSMENT

- [33] The plaintiff is a reasonably healthy 47-year-old male with no obvious signs of systemic disease, he walks with a mild right antalgic gait.

SYSTEMIC EXAMINATION

- [34] X-rays of the right shoulder showed: anterior dislocation of the right sternoclavicular joint - opinion deferred to cardiothoracic surgeon.

OPINION ON DAMAGES

PAIN AND SUFFERING

- [36] No significant negative orthopaedic effect is foreseen. Further opinion was deferred to the neurosurgeon and cardiothoracic surgeon.

SUMMARY AND CONCLUSIONS

- [37] Effect on Employment: The plaintiff reported that he is still working as a Firefighter. He reports that the lifting of heavy weights exacerbates the pain in the right shoulder and the prolonged standing exacerbates the pain in the right hip and lower back but he perseveres as this is his only source of income.

SERIOUSNESS OF INJURY:

- [38] No significant negative orthopaedic effect was foreseen, and opinion on the seriousness of the head injury and right sternoclavicular joint dislocation was deferred to a neurosurgeon and cardiothoracic surgeon.

NEUROSURGEON: DR. B. MOSADI

MAIN COMPLAINTS

- [40] Headache; Memory problems; Right shoulder pain. Headache, which started after the accident - Frontal headache; - Intermittent (approximately 3-4 x a week) Relieved by analgesia; - No aggravating factors - Not associated with seizures, Memory loss started after the accident; - Recent memory is more impaired than long-term memory; - Right shoulder pain; - Started after the accident; - Aggravated by physical activity, Relieved by analgesia.

SYSTEMIC ENQUIRY: PAST MEDICAL HISTORY:

- [41] Mr Gumede was a relatively healthy adult before the accident, with no chronic illnesses. He has never been involved in any other motor vehicle accident. Language: Felani has been right-handed since birth. During the interview speech was fluent. Intelligence: At the observation level, Felani appeared to be of average intelligence. No full evaluation of I.Q. was done, as it is beyond the scope of this report. Attention: Felani paid attention well during the interview, and sustained it throughout. MEMORY: Felani has memory problems after the accident. His recent memory seems impaired.

SUMMARY AND OVERVIEW:

- [42] He opines that he suffered the following injuries: - Grade 3 concussion as a subset of mild head injury. It is evidenced by a history of loss of consciousness, Chronic headaches, and Memory problems. Injury could result in suffering prolonged neurocognitive impairments. He has a 12-5% chance of developing late-onset post-traumatic epilepsy.

He is suffering from post-concussion headaches. It is well documented in the neurosurgical literature that + 80% of patients suffering from post-concussion headaches recover within 2-3 years. However, + 20% of patients remain with

chronic symptoms. Money should be set aside for treatment of headaches for 3-5 years.

NEUROLOGIST: DR MOKABANE

- [43] The plaintiff reported to have been the driver of the vehicle that got involved in an accident. He reported that he was avoiding a collision and the car lost control and rolled several times. He reported to have lost consciousness and to have regained same at the scene. He reported that there was no help from passers-by, and he had to walk to the garage at Kinross because it was dark. He reported that thenceforth he has no recollection of subsequent events.
- [44] He reported to have regained consciousness at Union Hospital. He stated that his family informed him that they fetched him at the garage and transported to Trichardt Hospital. He said that he does not remember being at Trichardt Hospital. He said he was injured on the head, collar bone and right side of the trunk. According to the nursing notes from Mediclinic Highveld dated 2020.08.11, 16h45 (time of arrival), the claimant presented with chest pain on the left side since 2 days ago.
- [45] The chest pain was reported to be radiating to the right side. He was reported to have a blood pressure of 143/92 mmHg, pulse of 86/min, respiratory rate of 20/min, temperature of 37.2°C, and saturating at 100%. He had an HGT of 5.8 mmol/. At 18h45 it was reported that he was waiting for blood results. At 18h50 it was reported that he wanted to go home. It was reported that he said that he would come the following day to fetch the blood results. He was reported to have signed RHT (refusal of hospital treatment), however, about 5 hours later (23h20) he presented to casualty with history of MVA.
- [46] He was reported to have complained of severe headache, right shoulder pain and pain on the upper back. He was reported to have been the driver. He was reported to be ambulant. His blood pressure was reported to be 109/93 mmHg, pulse 97/min, respiratory rate 24/min, temperature 36°C, and saturating at 99%. 6.3.7. He had a HGT of 6.1 mmol/. He was admitted with a diagnosis MVA, soft tissue injury and confusion for further management.

Radiological investigations were undertaken. 6.3.8. The CT Brain done on 2020.08.12 reported a displaced fracture of the right ramus of the mandible, chronic sinusitis and no intracranial hemorrhage.

- [45] The CT Chest was reported to have shown bi-basal areas of linear/plate atelectasis, comminuted fracture of the proximal 1/3 of the clavicle with dislocation of the ipsilateral sternoclavicular joint, multilevel degenerative changes of the visualised spine, and no lung contusions, hemo- / pneumothorax. He was transferred to Netcare Union Hospital for further management. According to the nursing from the emergency department at Netcare Union Hospital dated 2020.08.12 the claimant was reported to have been involved in an MVA.
- [46] His GCS was reported to be 15/15, and his pupils about 3 mm and reactive to light. He was reported to have swelling and tenderness over the right mandibular area and right clavicle. Intravenous (IV) analgesics were administered. A CT PAN scan was done, and the following was reported: - Non-contrast CT Brain; - Fracture of the right mandibular condyle; - Subluxation of right-sided temporomandibular joint; - Post contrast CT Chest; - Fracture first ribs, left and right side; -
- [47] Fracture medial aspect right clavicular fracture and at the sternoclavicular joint. - Extensive hematoma around the medial aspect of the right clavicular fracture and at the sternoclavicular joint; - Bilateral basal consolidation - Loss of vertebral height bodies in the upper dorsal spine but no definite fracture identified. - Un-displaced fracture of the superior aspect of the body of the sternum; Fractures right sided 11th, 12th ribs - Bilateral level 3, 4, necrotic lymph nodes.
- [48] Differential diagnosis would include metastasis, squamous cell carcinoma. He was also seen by the Physiotherapist that morning {2020.08.12 (AM)}. It was reported that he was awake, vitals stable, MVA - right and left rib fractures, multiple rib fractures, sternum fracture, right clavicle fracture, and slight

confusion. He was reported to have decreased air entry, and bi-basal crepitations.

- [49] On 2020.08.13 (Day 2), 02:48, it was reported that he was admitted to the ward from casualty accompanied by a porter and a nurse on a stretcher. He was reported to have been involved in an MVA. He was reported to be stable, no laceration noted, GCS 15/15, vital signs in normal ranges. He was reported by the Physiotherapist to be awake.
- [50] On 2020.08.14 he had a CRP of 83 mg/L, relatively normal U&E and CD4 count of 386 cells/uL. On 2020.08.15 was done - CSF Proteins 1368, 11 mononuclear cells, polymorphs, 1 red blood cell, CSF T. pallidum negative, CSF virology negative, CSF cryptococcus negative, CSF negative for TB. On 2020.08.16 (Day 5) it was reported in the nursing notes that he was confused. He was reportedly restrained, and a urinary catheter was inserted. It was reported that he was disoriented with a GCS of 14/15.
- [51] On 2022.08.18 (Day 7) it was reported in the nursing notes that he was due for surgery that day for reduction of the fractured mandible. He was reported to have a GCS of 14/15. On 2020.08.27 (Day 16) it was reported in the nursing notes that he was mobilizing independently even though he is weak. His vital signs were reported to be normal. His GCS was reported to be 14/15.
- [52] On 2020.08.28 (Day 17), 08h20, it was reported in the nursing notes that the plaintiff was handed over in a stable condition, alert and oriented. His GCS was reported to be 15/15. Pupil size was reported to be normal. It was reported that he had wires on the teeth to support the mandibular fracture. It was reported that he was able to mobilize out of bed with minimal support. At 11h50 it was reported that the doctor was notified that the plaintiff was going to be transferred to New Kensington Rehab.
- [53] The plaintiff sustained the following injuries: - Head injury; - Loss of consciousness; - Post-traumatic confusion; - Severe post-traumatic headache; - Displaced fracture of the right mandible, and subluxation of right-

sided temporomandibular joint/ Comminuted fracture of the proximal 1/3 of the clavicle with dislocation of the ipsilateral sternoclavicular joint; - Bilateral rib fractures - Displaced fracture of the superior aspect of the body of the sternum

- [54] The plaintiff was admitted to Mediclinic Highveld. He received the following treatment: - Pain management; - Radiological investigations - CT of the Brain; - CT of the Chest; He was transferred to Netcare Union Hospital and received the following treatment: - CT PAN Scan; - Non-contrast CT Brain and Facial Bones; - Non-contrast CT Cervical Spine; - Post-contrast CT Chest; - Post-contrast CT Abdomen; - Post-contrast CT Angiogram; - Admitted to High Care at Netcare Union Hospital on 2020.08.12; - Intravenous analgesics; - Intravenous antibiotics; - Lumbar puncture on 2020.08.15 (Day 4) and treated for meningitis; - He received physiotherapy in the ward - He was transferred to New Kensington Rehabilitation Centre on 2020.08.28.
- [55] He reported memory disturbance; - He reported to have become forgetful since the accident; - He reported that he misplaces things. He reported that it also affects his work - Fatigue: He reported that he tires easily. He reported that his work also includes inspection of the building. He reported that it has been difficult for him since the accident. Right shoulder pain:
- [56] He reported to have been experiencing right shoulder pain since the accident. He reported that even with minimal exertion; - Backache: She reported that she has been experiencing right thoracic pain since the accident. He said the pain is there even on minimal exertion; - Headache: He reported that he has been experiencing a right frontal headache since the accident. He reported that it is an almost daily headache. It was reported to be throbbing in nature and severe, 10/10. He reported that he takes Adol, or Lina pain for pain relief.
- [57] He reported to have been well before the accident. He reported that he was on ARTs at the time of the accident. Emotional disturbance: He reported to have become irritable and short-tempered since the accident. He stated that it affects his relationship with family and colleagues. He reported that he no

longer enjoys the company of family and friends. He stated that he prefers to be alone. He denied a history of seizures or episodic impairment of consciousness.

CARDIOVASCULAR SYSTEM

- [58] He denied a history of hypertension or diabetes mellitus. He reported to have been experiencing lower backache during sexual intercourse since the accident. He reported to have been experiencing neck pain since the accident. The neck pain radiates to the right shoulder.

IMPAIRMENT AND OUTCOME

- [59] The plaintiff has the following impairment and outcome: Post-traumatic headache; Headache post head trauma and whiplash injury. It usually resolves within 2- 3 years in about 80% of individuals. It may persist beyond 4 years in about 20% of individuals. The plaintiff has post-traumatic amnesia of an unknown duration. He was reported to have been confused even on the 7th day. However, it should be noted that the 4th-day lumbar puncture was done, and meningitis was proven on CSF. Meningitis is thus a confounder.
- [60] In conclusion, the plaintiff sustained a possible mild traumatic brain injury. About five hours before the accident, he was seen at the emergency department at Mediclinic Highveld. He presented with chest pain. About 2 hours later it was reported in the nursing notes that the blood results were still not out, and the plaintiff wanted to go home. He signed HT with the intention of coming back the following day to get the results.
- [61] Deference is made to the Maxillo-Facial & Oral Surgeon for the mandibular fracture. He has memory and emotional disturbance Deference is made to the Neuropsychologist with regards to cognitive and psychological functioning. The plaintiff reports lower backache during sexual intercourse, an activity of daily living. Deference is made to the Orthopaedic Surgeon concerning orthopaedic injuries. Deference is made to the Occupational Therapist about his occupational functioning. The plaintiff should be fairly compensated for the injuries sustained in the accident.

CARDIOTHORACIC SURGEON: DR K. MALEFAHLO:

HISTORY OF INTERVENTIONS

- [62] He was admitted to the intensive care unit (ICU) for medical management. He was seen at the emergency unit. He was diagnosed with multiple rib fractures. Closed reduction of mandible fracture, Conservative management of fractured ribs and clavicle. Nursing management, Physiotherapy, Rehabilitation management Emergency Medical Attention. The patient stayed in the hospital for about 3 months in total before he was discharged. This is because of the multiple injuries that he sustained and required rehabilitation before he could be discharged to go home.
- [63] Previous accidents or disabilities: none. Medically: none Surgically: salivary gland. Social and hobbies: he neither drinks nor smokes. He used to work as a firefighter. He used to play soccer. Marital status and family living: married with 2 children. He studied Degree in Public Management. He has been experiencing chest pains, difficulty in lifting heavy objects, and headaches.

CLINICAL EXAMINATION OF THE CHEST

- [64] Lung functions test: FEV1 (forced expired volume in 1 second) 70%
Electrocardiogram: not assessed Chest &- ray: relied on clinical notes. The long-term effects of thoracic injuries are contingent upon the nature and severity of the injury, as well as the promptness and efficacy of treatment.

PERMANENT DISABILITY

- [65] Lung damage is permanent and irreversible. The patient has a reduced lung function as evidenced by FEV1 less than 80%. LIFE EXPECTANCY: 6.4.21. Reduced FEV1 and Increased Mortality: A systematic review and meta-analysis of 29 studies found that reduced FEV1 was associated with an increased risk of mortality from respiratory-related causes, cardiovascular disease, and all-cause mortality. (Source: Global Initiative for Chronic Obstructive Lung Disease (GOLD) 2021 report). The plaintiff will need a specialist review of his chest injuries by a cardiothoracic surgeon and a pulmonologist estimated at an annual cost of R50 000.00.

CLINICAL PSYCHOLOGIST: MS.NALEDI MQHAYI

- [66] Mr. Gumede is a 47 year 11 months old married man with 2 dependents. He was living with RVD on HAART, in reasonably good health before the accident with no history of a previous head injury or mental illness. He had undergone a neck surgery in 2016. He was involved in a motor vehicle accident on the 11th of August 2020 as a driver and sustained lung contusion, multiple rib injuries, right clavicle fracture, and vascular injury with GCS 14/15 recorded by hospital medical records. He was initially evacuated to Mediclinic Highveld and transferred to Netcare Union Hospital.
- [67] His treatment included diagnostic radiologist consultation, blood analysis, wheelchair, analgesics, urinary catheter, high care, surgery, physiotherapy, and oxygen. According to the RAF 1 form, he sustained contusion and was treated with emergency transport, hospital care, stabilized radiology, and confusion fixed with STI right shoulder.

POST-ACCIDENT HISTORY

- [68] After the accident in question, Mr. Gumede returned to work after 6 months of recuperating. He is still employed as a firefighter but reported that his performance is poor due to accident-related injuries, and he is being reasonably accommodated. He complains of headaches, inability to sit, stand and walk for a prolonged period, poor concentration, and a short temper. Therefore, his physical, and mental functioning and mood state changed significantly after the accident in question as indicated by the assessments, clinical interview, and the perused documents.

PSYCHOMETRIC ASSESSMENT OUTCOMES

- [69] A neuropsychological assessment was conducted to establish the nature and severity of any cognitive impairment and how this may have impacted Mr. Gumede's ability to function interpersonally and occupationally. He demonstrates areas of difficulty in various domains of neurocognitive functioning including: - Inadequate complex attention and concentration; -

Inadequate sustained attention and impaired auditory divided attention; -
Impaired working memory and impaired double-tracking abilities;

[70] Impaired mental speed with inadequate psychomotor speed; - Inadequate short-term verbal memory, inadequate information retention with inadequate long-term verbal memory; - Impaired immediate narrative and impaired long-term narrative memory; Adequate verbal fluency and general knowledge with inadequate verbal creativity: - Visuospatial abilities and perceptual functioning were adequate with adequate - Executive functioning was inadequate: - Adequate fine motor skills on his dominant hand (right) and inadequate fine motor skills on his non-dominant hand (left).Mild PTSD symptoms with comorbid moderate anxiety and severe depression.

[71] Mr. Gumede demonstrated moderate neurocognitive deficits that are not only consistent with a mild head injury (grade 3 concussion) as opined by the Neurosurgeon. Neurologist further opined that he sustained a mild traumatic brain injury. Which can result in subtle but consistent symptoms enough to impact on quality and enjoyment of life. His performance could be affected by his emotional dysregulation and low motivation during assessment.

NEUROBEHAVIOURAL CHANGES

[72] Mr. Gumede's current clinical psychology results indicated that he is suffering mild PTSD, and moderate symptoms of anxiety with comorbid severe depression which are attributable to the sequelae of the trauma he experienced and the aftermath of the accident in question. His cognitive, physical impairments and emotional difficulties are affecting his enjoyment of life and social functioning. Personality changes including irritability and short temper could result in a negative influence on his interpersonal relationships. Mr. Gumede's moderate neurocognitive and emotional fallouts have limited his enjoyment of life and social and occupational functioning. He has serious mental and behavioural impairments that seem to be long-term.

- [73] Mr. Gumede will benefit from psychotherapy (48 sessions); He can benefit from Neuropsychological rehabilitation; Defer to the Occupational Therapist for opinion on work impact.

OCCUPATIONAL THERAPIST: BOGONE NGWATO

- [74] Mr. Gumede is married and has 2 dependent children. He lives with his wife and children. They live in a 7-roomed house. The house and yard are easily accessible. The area is urban in nature. Electricity and water are available. Essential facilities are within easy reach. Recurrent headaches; - Painful right side of the jaw. Unable to chew hard food; - Chest pain; - Right shoulder pain. He is unable to lift heavy objects; - Midthoracic to low back pain; - Right pelvic/hip pain; - Painful right leg from hip to knee. The right leg also gets cramps; - He is unable to sit for long, walk or drive for prolonged distances.
- [75] He becomes easily forgetful. Forgets information, passcodes names, etc; - He gets angry very easily, is short tempered and this affects relations at home and work; - He prefers to isolate himself and keeps quiet; - He has anxiety and flashbacks of the accident. Mr. Gumede generally appears healthy with good-quality skin and hair. He walks with a limping gait with a report of pain. He presented with functional vision and hearing. He however reported diminished vision and keeps on narrowing his right eye. He reported a diminished sense of smell. Recurrent headaches and occasional dizziness were reported. He reported pain over the right side of the jaw. Left shoulder pain was reported. Bony protuberance was noted at the end of the right clavicle.
- [76] Functional range of movement for all the upper and lower limbs. Pain at the end of the range for shoulder movements. Regarding his hand function, his movements were slow for the left hand with Incoordination of the left hand demonstrated with, DDK and FT tests. On the evaluation of his grip strength: Mr. Gumede's grip strength for both hands is within average using the sex norm of men of his age, though the right and dominant hand is weaker. On the assessment of his ability to do ADLs (Activities of Daily living, the occupational therapist noted that he is independent with self-care and uses adapted ways.

He is unable to manage heavy chores. He has Code 10 driver's license but has problems with prolonged driving. He has the necessary basic life and community living skills and is an independent member of the community. He further reported that He suffers from Insomnia and struggles to find a comfortable sleeping position.

FUNCTIONAL CAPACITY EVALUATION:

EDUCATIONAL AND EMPLOYMENT BACKGROUND:

- [77] He has Grade 12 and has a diploma, advanced diploma, and Qualification a degree, and an Honours degree in Public Administration from South African Business School. He also has diplomas in Education and Firefighting. He has no other working experience other than that of a firefighter. At the time of the Accident (Position, Duties, use of equipment, Driving, etc./ 2018): He was employed at Chief Albert Luthuli Municipality as a Station Manager managing 2 fire stations. Supervising firefighters, attending to scenes and providing strategic management, inspecting buildings for compliance, participating in fire operations and demonstration as well as performing the necessary administrative work.
- [78] Post-Accident: He returned to work after 6 months of recuperation. He resumed his normal duties with regular pain disturbance. and high absenteeism. He now delegates most physically demanding duties, which are limited to prolonged driving, standing, walking, and climbing. He is forgetful and make errors at work. He also still relieves the accident and has anxiety.

BASIC PHYSICAL DEMANDS ASSESSMENT: FIREFIGHTER:

- [79] Controls and extinguishes fires, protects life and property and maintains equipment as volunteer or employee of city, township, or industrial plant: Responds to fire alarms and other emergency calls. Selects hose nozzle, depending on the type of fire, and directs a stream of water or chemicals onto the fire. Positions and climbs ladders to gain access to upper levels of buildings or to assist individuals from burning structures. Creates openings in

buildings for ventilation or entrance, using an axe, chisel, crowbar, electric saw, core cutter, and other power equipment.

- [80] The assessment of his ability to assume Dynamic Postures revealed that it was difficult for him to balance on a simulated balance beam, with Inadequate skill demonstrated for the right leg. In summary, Mr. Gumede managed to complete all the activities at below-average speed, with pain. His ability was graded at a 3, which is below average.

“A client who has difficulty with dynamic postures will experience difficulty in a job that has demands for manual/physical labour, or work that demands good physical stamina. If a client has specific difficulties with bending, crouching, reaching, squatting, lifting, etc. They will likely have difficulty meeting the repetitive dynamic postural demands of work.”

ERGO SCIENCE PROTOCOL (ABILITY TO SAFELY PERFORM THE PHYSICAL DEMANDS OF WORK)

- [81] His heart rate was still within the acceptable limit. Signs of maximum effort included increased pain and respiration, posterior trunk lean, and increased time to complete a repetition. He reported tiredness and rested the box on his body and weight distributed more to the left. His ability rating is stated as being Light to low Medium.

CONCLUSION AND RECOMMENDATIONS

- [82] 16 hours of therapy inclusive of one home visit, is recommended to assist Mr. Gumede with adjusted ways of task approach and coping strategies. Hourly rates of Occupational Therapy services are no longer fixed. On average it is R800.00 per hour including VAT. Additional R450.00 is recommended for home and work visits. AA rates are recommended to cover the therapist traveling expenses. Due to the head injury diagnosed, a case manager (a social worker or Occupational Therapist) should be appointed on a long-term basis to oversee the coordination of services and monitor the progress and management in the labour market.

EARNING CAPACITY

- [83] Mr. Gumede has a Grade 12 level of education and has a diploma, advanced diploma, a degree, and an Honours degree in Public Administration from South African Business School. He also has diplomas in Education and Firefighting. At the time of the accident, he was employed at Chief Albert Luthuli Municipality as a Station Manager, managing 2 fire stations. His duties included supervising firefighters, attending to scenes, providing strategic management, inspecting buildings for compliance, participating in fire operations and demonstration as well as performing the necessary administrative work.
- [84] Following the accident, he returned to work after 6 months of recuperation. He resumed his normal duties with regular pain disturbance and high absenteeism. He is limited with prolonged driving, standing, walking, and climbing and now delegates most physically demanding duties. He is forgetful and make errors at work. He also still relieves the accident and is has anxiety. He continues to work as such inconveniences and difficulties.
- [85] Following the injuries sustained Mr. Gumede complains of right shoulder pain. A deformity of the right clavicle is noted, and movement are full but painful to the end of the range. The grip strength for both hands is within the norm range using age and sex norms, though the right and dominant hand is weaker than the left hand. He further complains of chest, midthoracic to lower back pain with prolonged sitting and standing. He also complains of right pelvic/hip pain affecting the right leg to the knee. The right leg also has regular cramps. He walks with a limping gait, with a report of pain. He demonstrated inadequate dynamic postural abilities but intolerance for repetitive bending, squatting, stair climbing, and inadequate balance was demonstrated for the right leg.
- [86] His speed was below the pre-determined time standards, and his competence was below normal workers' expectations due to pain. He exerted maximum effort and made appropriate pain statements during the test which are in keeping with the reported injury. Given the above assessments and other

specialists' opinions, Mr. Gumede should potentially qualify to do work within the light to low-medium work category. His pre-accident work as a Fire Station Manager has medium to heavy and very heavy physical demands and requires adequate function and strength of the upper and lower limbs as well as the trunk.

- [87] Mr. Gumede therefore does not hold adequate physical capacity for his job. His limitations, both physical and psychological including a reduced sense of smell further pose a potential safety hazard. He now works in a reduced capacity and delegates most physically demanding tasks. Should post-traumatic epilepsy occur, Mr. Gumede will further need to be exempted from work modalities that may trigger epileptic seizures or which may be considered hazardous. He remains a compromised competitor due to not only his physical limitations but also his psychological limitations.

INDUSTRIAL PSYCHOLOGIST: ORAPELENG SECHUD
FORMAL BASIC EDUCATION

- [88] Pre-accident Education Background: Mr. Gumede matriculated in 1994 at Rev. SA Nkosi Senior Secondary School. Thereafter, he furthered his education and managed to obtain the following qualifications, computer literacy certificate in 1997 from Technicon SA; Fire Fighting Certificates level 01 and 02 from FPA in 2002; Hazmat Technician Certificate in 2004 from Sasol Academy; Advanced Fire Investigation in 2006 from FPA; Fire Prevention Certificate in 2006 from FPA; Diploma in Management from SBS in 2014;

Advanced Diploma in Management from SBS in 2015; degree in Management from SBS in 2016.

Note: The claimant has a code EC1 driver's license. Mr. Gumede did not undertake any vocational training post-accident.

EMPLOYMENT HISTORY

- [89] November 2003 to December 2007: Mr Gumede was employed by the Govan Mbeki Municipality as a fire fighter, earning a monthly salary of R 5 700.00. he left this position as he had received a promotion. 17 December 2007 to date of accident (2020): Mr Gumede was employed to the Chief Albert Luthuli Municipality in the capacity of a station manager, earning a total monthly salary of R 81 610.27 (including allowances). Mr. Gumede took 06 months off from work to recuperate. On his return to work, he was accommodated by his employer.
- [90] During February 2021 to June 2022, He remained in his employment as at the time of the accident, earning a monthly salary of R 81 610.27. he left this capacity as a result of a promotion. July 2022 to date: Mr Gumede is employed as a regional manager at the Govan Mbeki Municipality, earning a monthly salary in the amount of R 67 368.18.

PRE AND POST ACCIDENT ABILITIES AND POTENTIAL:

PRE-ACCIDENT POTENTIAL

- [91] Mr. Gumede's education background indicates that he matriculated and obtained several tertiary-level qualifications. Nevertheless, the writer noticed that the claimant spent his entire career progressing in the profession of a firefighter. At the time of the accident, he was employed at Chief Albert Luthuli Municipality as a station manager (firefighter). He Lead and manage the delivery of an emergency service within the incident command system and provide strategic leadership and support at incidents and events that present a significant risk to the community to ensure their effective management. He organize and support the activities of several functional areas to achieve the objectives of the Corporate and Service Plans and control the effective use of resources.
- [92] He manages teams and individuals through effective performance - management, applying policies and procedures as necessary, to ensure that corporate aims and objectives are achieved, and developing and implement strategic plans and reports, He analyses, evaluate and communicate

information to support decision-making and facilitate the assessment of the effectiveness and quality of service provision. To represent the Service at the local, corporate, and national levels when required.

- [93] Mr. Gumede was earning a monthly salary of R81 610.27 total earnings, which amounts to R979 323.24 per year on average. The plaintiff appeared to be an individual who was interested in progressing academically regardless of his age. He had also achieved multiple promotions pre-accident.

The expert opines that the plaintiff may have pursued another promotion before allowing his career to plateau. As such, he would have likely reached his career ceiling by the age of 50 years (instead of the normative 45 years). Resultantly, his income would have in due course increased in a straight line with his earnings progressing towards the Median of Paterson level D3 [R1279 000] per year total package (Koch, 2020). From the age of 51 years, his career activities would have plateaued as he focused on maintaining his source of income until he retired from the job market. Nonetheless, he would have earned only additional inflationary increases until retirement age. Therefore, the plaintiff would have possibly retired at the age of 65 years as per employers' policy and with his health permitting.

POST-ACCIDENT POTENTIAL:

- [95] He returned to work, and he was accommodated by his employer. This has allowed him to continue working within his chosen profession. He secured a promotion in July 2022 and is currently employed at Govan Mbeki Municipality as a regional manager. Mr. Gumede is no longer a fair competitor in the labour market despite retaining his job to date. It must be considered that the claimant works within a government institution and such employment environments tend to be accommodative of their vulnerable employees and his career outlook is compromised.
- [96] Regarding the plaintiff's future employment prospects, the expert considered various factors that may hinder his capacity to discharge his duties productively and effectively. The available information suggests that he

experiences a decline in his physical aptitude as well as deficits in his neurocognitive and neuropsychological well-being. He opines that Mr. Gumede may be regarded as a somewhat vulnerable candidate in the job market. As such, it is realistic to assume that the plaintiff may struggle to retain his current job. He is already struggling to discharge his duties which may expose him as a less effective or less productive employee when compared to his colleagues. Thus, the available information suggests that Mr. Gumede likely relies extensively on the provision of reasonable accommodation.

- [97] Furthermore, he is possibly at risk of job loss either through resignation, dismissal or retrenchment. In the current socio-economic climate, it may be unrealistic to expect him to be accommodated within his current working environment until he reaches retirement age. Thus, he remains at risk of job loss should his employer become dissatisfied with his current work output or should he fail one of his physical/health assessments.
- [98] Resultantly, should he fail to retain his job as a regional manager for any reason, he may struggle to secure another job in the future. Instead, his job-seeking efforts would likely be overshadowed by prejudiced employers that show preferences for abled-bodied candidates. Moreover, the writer further noticed that the claimant has been working within the government throughout his entire career. Thus, he may struggle to secure a job in the private sector.
- [99] He opines that Mr. Gumede may continue to work within his current position for as long as he is accommodated by his employer. However, should he for any reason suffer job loss, he may be exposed to lengthy periods of unemployment. This would possibly be attributed to the limitations imposed as well as his need for reasonable accommodation in the workforce. The difficulties he may face once he suffers a job may also narrow his choice of employment. Most employers may not be convinced to accommodate him on their workforce. Thus, he may be limited to piece jobs for the rest of his life.

- [100] Resultantly, Mr. Gumede is no longer a fair competitor for employment in the labour market. It is thus apparent that the injuries sustained in the accident in question have likely compromise the claimant's participation in the open labour market.

ACTUARIAL CALCULATION: CLEMANS, MURFIN & ROLLAND

- [101] The actuary has calculated the present value of the potential loss of earnings suffered by Mr Gumede ('the Claimant') as a result of an accident that occurred the calculation is based on the findings of the primary experts and the reports of the appointed assessor as well as the industrial psychologist in particular.

PRE-ACCIDENT EARNINGS

- [102] At the time of the accident Mr Gumede was employed and at the present time he would have earned an income of R1 006 586 per annum, the same income that he is earning now that the accident has occurred. The actuary notes that the Plaintiff did not suffer a past loss of income. He postulated that his income would have increased on promotion at age 50 to R1 279 000 per annum (effective on 1 July 2020 and adjusted for inflation to R1 518 000 per annum at present per Quantum Yearbook 2023) on Level D3. (Package, Median) at age 50. Thereafter his earnings will remain constant apart from inflationary increases to his retirement, postulated at age 65.

POST-ACCIDENT EARNINGS:

- [103] Mr Gumede has incurred no past loss. At present, he is earning an income of R 1 006 586.00 per annum, consisting of a basic income of R43 500 per month plus cash allowances of R23 868.18 per month and taxable R62 62 perks (employer contribution) of R12 889 per month (per payslips for January, February and March 2023) as well as an annual bonus equal to one month's basic income (per payslips for November 2018 and November 2019.)
- [104] The industrial psychologist does not postulate any further career growth/promotions and the actuary has assumed that his income will now remain constant apart from inflationary increases until his retirement,

postulated to be at age 65. As a result of his injuries, Mr Gumede will be more prone to periods of unemployment. IP assess that it would be appropriate to use a rate of interest of 8.65% per annum compound to capitalize the compensation. The use of this rate of interest in conjunction with the inflation rates set out above gives a net capitalization rate of 2,5% per annum compound.

- [105] The actuary has allowed for taxation at the actual rates of income tax applicable in each year during the accrued period, and at the rates for the 2023/24 tax year adjusted for inflation in the prospective period. In calculating the value of the loss of income, the actuary has allowed for the fact that the compensation should be calculated as at present and not at the date of the accident. The actuary thus allowed for discounting back to the present time only in calculating the compensation and, also per Court rulings, the actuary has not allowed for interest on damages that have occurred to the present time. The actuary has made no allowance for the effect of mortality from the date of the accident to the present time.

LIMITATION ON COMPENSATION:

- [107] In terms of Section 17(4) (c) and Section 17(4A)(a) of the Road Accident Fund Act the annual loss shall be proportionately calculated to an amount not exceeding R160 000 adjusted for inflation to the date of the accident. The actuary has applied the Statutory Limit at the date of the accident to the past losses and to the present-day discounted value of the future losses arising in successive years per the Judgment in *Sweatman v 018-63 018-63*, Western Cape High Court) and *RAF v Sweatman*((162/2014[2015] ZASCA 22 (20 March 2015)).

- [108] The annual loss does not exceed the Statutory Limit in the present claim.
Total Loss of Earnings: 3 221 568.80 In assessing the value of the income allowance may be made for the various contingencies of life that occur such as sickness and unemployment. The industrial psychologist suggests a higher post-morbid contingency. Contingencies are proposed as follows:
PRE-MORBID: 15% POST MORBID: 20%

COSTS

[109] The Plaintiff will be entitled to the cost of the suit, as He will be substantially successful in his claim and it is accordingly submitted that the court is to order the Defendant to pay the Plaintiff's costs on a High Court, party and party scale.

[110] In *Southern Insurance Association v Bailey* NO⁶ it was held that:

‘ It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, Windeyer J said in the Australian case of *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213:

“It is a mistake to suppose that it necessarily involves a ‘scaling down’. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse: All ‘vicissitudes’ are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.”

[111] In *D’Oliveira v RAF*⁷ it was stated that

‘ The purpose behind applying a contingency deduction in an award for damages is to take account of the unpredictable “vicissitudes of life”. These include –

⁶ 1984 (1) SA 98 (AD) at 117B-D; see also *Ngubane v South African Transport Services* 1991 (1) SA 756 (AD) at 781F-782C.

⁷ 2019 (2) SA 247 (WCC) at para [8].

“the possibility that the plaintiff may in the result have a less than ‘normal’ expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.”

The quantification of the extent of the contingency lies entirely within the discretion of the court and must be determined upon the court’s impression of the case. In fixing the contingency deduction, a court will have regard to objective factors present, common logic, expert evidence, and the like.’

ANALYSIS

- [110] In analyzing the extensive medical, occupational, and actuarial evidence presented in this case, it is clear that Mr. Gumedede has suffered significant injuries and impairments as a result of the motor vehicle accident. These injuries have not only caused physical and psychological harm but have also substantially impacted his occupational functioning and earning capacity.
- [111] The medical evidence, including assessments from an orthopaedic surgeon, neurosurgeon, cardiothoracic surgeon, and clinical psychologist, clearly documents the severity of Mr. Gumedede's injuries and their ongoing impact. His post-accident condition, characterized by physical limitations and cognitive impairments, has markedly altered his ability to perform his duties as a Fire Station Manager effectively.
- [113] Furthermore, the occupational therapist's evaluation underscores the profound changes in Mr. Gumedede's functional capabilities, particularly in relation to his job requirements. His reduced physical and cognitive abilities have necessitated modifications in his work role and environment.
- [114] The actuarial calculation, considering the expert opinions and Mr. Gumedede's employment history and potential, presents a clear picture of his financial losses due to the accident. The calculation of loss of earnings, both past and future, reflects the reduced earning capacity and the likelihood of continued employment challenges.

[115] Given the totality of the evidence and the significant impact of the accident on Mr. Gumede's life, it is appropriate to compensate him for his losses. The proposed contingency deductions of 15% pre-morbid and 20% post-morbid are reasonable and take into account the typical uncertainties of life, such as sickness and unemployment, which are likely to be exacerbated in his case due to his injuries.

[116] In conclusion, based on the substantial and compelling evidence presented, I find that Mr. Gumede is entitled to compensation for his loss of earnings, pain, suffering, and the negative impact on his quality of life. The compensation should adequately reflect the severe and lasting effects of his injuries and the consequent changes in his personal and professional life.

I have considered the draft order and I have amended it and marked it X. I make it an order of court.

KHWINANA ENB

**Acting Judge of the High Court
Gauteng Division, Pretoria**

COUNSEL FOR THE PLAINTIFF: ADV J THEMANE

DATE OF HEARING:

DATE OF JUDGMENT: 31 DECEMBER 2023