



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
13 July 2021	
DATE	SIGNATURE

CASE NO: 70447/2019

MUSA SYDNEY NSELE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

KHWINANA AJ

Introduction

- [1] The Plaintiff is MUSA SYDNEY NSELE, an adult male, who instituted action against the Defendant pursuant to a motor vehicle accident that occurred 10 October 2018.

- [2] The Plaintiff is, a major male citizen of RSA, with identity number: 870315 6355 08 4. The Plaintiff is currently 34 years old.
- [3] The issue of merits was settled 70 % in favour of the Plaintiff's agreed or proven damages.
- [4] The issue to be decided upon is quantum on loss of earnings and general damages.

Background

- [5] The Plaintiff a pedestrian, who was crossing the road along South Street and West Avenue, Centurion when he collided with motor vehicle with registration number DH 36 JL GP, driven by Zanele Ndyalivana the insured driver.
- [6] Dr M De Graad (Orthopedic Surgeon) stated that the Plaintiff will require the removal of the femoral nail from the fracture site on his right leg. Further he will require conservative pain management.
- [7] Dr L Berkowitz (Plastic and Reconstructive Surgeon) stated that all the scars of the Plaintiff will require surgical revision. He will further require radiotherapy on some of the scars following surgery as well as aqueous cream for the scars.
- [8] Dr Kolloori (Neurosurgeon) stated that rigorous speech therapy is required by the Plaintiff. The Plaintiff also requires clinical and neuropsychological assessment.
- [9] Mrs C Esterhuizen, the Speech Therapist is of the opinion that the Plaintiff needs to attend speech and language therapy for at least 40 sessions over a minimum period of 1 year.
- [10] Mrs Megan Spavins, the Occupational Therapist, states the Plaintiff will require physiotherapy, speech and language therapy, psycho-social intervention, and occupational therapy.

- [11] The Defendant made an offer to issue an Undertaking in terms of Section 17(4) if the Road Accident Fund Act, to pay for the Plaintiff's future medical expenses, limited to 70 %.

General damages

- [12] Dr M De Graad, the Orthopaedic Surgeon, completed a RAF 4 Form, stating that the Plaintiff's injury is serious long-term impairment or loss of body function. The injury is also permanent serious disfigurement. From the report it is evident that the Plaintiff suffered the following injuries: He suffered a loss of consciousness, and woke up in hospital; Subtrochantric fracture of the right femur with irregular deep laceration on the posterior aspect of the thigh; Lacerations of the optical area; Bruising of the left elbow and Head injury. The wound on the leg caused by the fracture became infected. The femur fracture was treated with an open reduction and internal fixation. The Plaintiff was in hospital from 10 October 2018 to 19 November 2018. He has difficulty speaking and with word finding. The Plaintiff cannot articulate his thoughts; He has extensive scars on his right leg; 1 cm muscle wasting of quadriceps muscles; The fracture has united. Displacement of lesser trochanter bone fragment. Dr L Berkowitz – Plastic and Reconstructive Surgeon – declared that the Plaintiff's injuries were permanent serious disfigurement, and issued a RAF4.
- [13] The Plaintiff's WPI is 20 %, and the Plaintiff suffered the following injuries: Severe lacerations of the right posterior thigh; Scalp lacerations; A 100mm x 4mm Non-hair bearing scar on the right mid-line of posterior scalp; A 10mm x 4mm scar on the right midline of posterior scalp; A Hypertrophic post-surgical scar of 30mm x 8mm on lateral aspect of the right thigh; A 30mm x 6mm hypertrophic post-surgical scar along the mid-line of the lateral aspect of the right thigh; A Hypertrophic, inverted v-shape scar, 160mm x 12mm on posterior aspect of right thigh; L-shape scar lying proximal to scar described above in , hypertrophic scar measuring 80mm x 12mm; A Hypertrophic scar measuring 15mm x 8mm lying lateral to the scar described in Hypertrophic scar of 20mm x 6mm lying distal to scar described in above. Dr A Kollorooi, the

Neurosurgeon, stated that the Plaintiff: Suffered from a severe long term mental or severe long term behavioural disturbance disorder, and therefore issued a RAF4 form.

Injuries and sequelae

- [14] The Plaintiff cannot walk unaided due to leg pain and imbalance; he has difficulty in speaking properly or understanding; he has withdrawn socially; he has a mild ataxic gait; he suffered a mild to moderate head injury; he suffers from severe headaches; he has retrograde amnesia; he suffers from speech dysphasia, he stutters as he cannot get the words out. Vanessa Gaydon, the Educational Therapist stated: The Plaintiff experiences headaches; He struggles to walk, walks with a limping gait. Has to walk while using crutch; He is in constant pain in his upper leg. His leg often swells; He has severe slurred, unclear speech; He has difficulties with fine motor skills; He is socially withdrawn, and unhappy about his loss of independence; He has difficulties with reading and writing; He is forgetful; His speech is repetitive; He is slow physically and mentally.

- [15] The length of unconsciousness, confusion, and the headache he experienced when he woke up after accident indicates a moderate to severe Traumatic Brain Injury that was diffuse in nature; He has a complex communication disorder with significant apraxia (loss of capacity to plan and execute motor actions); Difficulty in word finding and ordering his thoughts; Exhibits severe difficulty with programming and execution of general gross and fine motor movement, indicative of apraxia as a result of possible damage to the cerebellum and parietal lobe; Overt memory and attention difficulties; Disorders of thought; Extensive difficulties with bilateral integration is indicative of disconnection between the 2 hemispheres of the brain; Severe neurocognitive deficits and impairments in all domains of neurocognitive functioning consistent with diffuse neurological damage as a result of a brain injury.

- [16] The domains with which the Plaintiff struggles is attention, memory, learning, reasoning, sensory motor functioning, information processing, visuo-praxis, verbal fluency and language, higher executive functioning; These areas will

create significant barriers to independent functioning and employment in future; His physical, neurocognitive and emotional functioning have deteriorated significantly; He is unlikely to gain even simple, unskilled work due to the physical difficulties and pain, along with the neurocognitive deficits; He will not be able to earn an income or care for himself independently. The Plaintiff was examined by a Speech Therapist and Audiologist, Mrs C Esterhuizen, who stated that the Plaintiff suffers from: Receptive language is limited to short sentences. He can only follow instructions up to two part simple instructions; He has attention and memory problems which intervenes with receptive language; Some word finding difficulties.

- [17] He would replace a word with a close alternative word, ex motorcycle with bicycle; Could not name the weekdays, he continued counting, as this was the first task presented to him; He has difficulties with descriptive narrative as well as significant semantic and syntactic deficits; Shows poor sustained focus and attention; Could repeat phrases and sentences of up to 6 words, thereafter it is difficult for him; He could not do basic math; Significant difficulty in writing. His reading is very slow and inaccurate; Mild to moderate apraxia of speech; Symptoms of dysarthria; Mild to moderate receptive and expressive aphasia.

Legal principles

- [18] Advocate Nell has referred me to a plethora of cases and *inter alia* in the matter of **Potgieter v Road Accident Fund**¹ a 30 year old semi-skilled male suffered a severe head injury. He suffered a Traumatic Brain Injury with considerable frontal lobe dysfunction, as well as extensive laceration of the scalp and a fracture of the parietal region of the skull. Soft tissue injuries to the neck, wrist, right foot and lumbar spine was suffered, as well as a ruptured bladder which was conservatively treated by inserting a catheter. The Plaintiff suffered from decreased cognitive abilities, defective memory, impaired concentration and significant change in personality. Advocate Nell opines that the head injuries suffered by the Plaintiff in **Potgieter** is very similar to the present matter. He

¹ (Quantum of Damages, Vol VI, A4-195)

further submits that the Plaintiff suffered from further horrific orthopaedic injuries, such as the femur fracture and has the significant speech problems.

- [19] The Court awarded Potgieter an amount of R 650 000.00, which is R 1 029 006.50 in 2021 value. In the matter of **M A v Road Accident Fund**² the Plaintiff suffered a head injury and scarring whereas *in casu* the Plaintiff's injuries include scarring over his right forehead, over the upper left eye lid, a 4cm scar over lower eye lid and cheek, Multiple scars over left cheek and the multiple scars over left cheek not unsightly.
- [20] The neurocognitive deficits and reported word-finding difficulties, along with his observed dysarthric speech, and comprehension and expression difficulties would be in keeping with the expected outcome following a severe brain injury, with a left-hemispheric focus. The Plaintiff's sister confirms the speech and language deficit, saying he makes little sense and does not respond to conversation appropriately. The Plaintiff reported minimal symptoms of depression on psychometric assessment and his mood was clinically observed to be euthymic, and his affect varied. However, the Plaintiff lacks insight into his deficit, which would account for this. The Plaintiff expressed that he only feels unhappy when he thinks about the accident. The Plaintiff displays neurovegetative and behavioural changes such as social withdrawal, passivity, lack of interest, poor appetite, sleep disturbances and irritability (as noted by his sister).
- [21] These changes, as well as the lack of insight can be attributed to the significant injury to the brain. From a neuropsychological perspective, the Plaintiff is not a fair competitor in the open labour market. His fluctuations in attention, comprehension difficulties, slowed psychomotor and processing speeds, as well as stimulus resistance difficulties renders him unemployable as the Plaintiff would have difficulties understanding and following instructions and would be too slow to be effective. In addition, he lacks drive and ambition now, which is due to the injury to the brain. Given the suspected organic aetiology of these

² (17158/2017) [2020] (28 February 2020)

symptoms it suggests that therapeutic intervention would play a supportive role only. The Plaintiff has suffered a head injury with expected (moderate to) severe neurocognitive, neurobehavioral and altered mood sequelae.

[22] Counsel referred me to the matter of *Dlamini v Road Accident Fund*³ (was a 37 year old male involved in a motor vehicle collision. The Plaintiff sustained a head injury. The plaintiff has made good recovery but was still symptomatic with neuropsychological sequela consistent with a head injury of that nature. The psychometric testing confirmed that his neuro-cognitive function has been seriously impaired by the accident. Counsel has alluded to the American Medical Association guides to the evaluation of permanent impairment a whole person's impairment of 31 percent is calculated. No meaningful improvement can reasonably be expected of the plaintiff. The Plaintiff sustained a severe head injury and a fracture of the maxilla and teeth. He is left with neuropsychological sequelae because of his head injury. The experts agreed that although the plaintiff has not developed post-traumatic seizures, he now has an increased risk of developing seizures. He is symptomatic with post-traumatic headaches, and there is a 20 percent chance that he will remain symptomatically lifelong. The plaintiff's tests results showed that his neuro-cognitive functioning has been seriously impaired by the accident. He is experiencing much inner stress and finds it difficult to control his impulses especially aggression and irritation. He believes in abilities that he no longer has because he despises being so reliant on others. He has difficulty in expressing himself and finding the right words.

[23] He is slow in completing tasks and is unable to grasp the different parts of his experiences. Test results show signs of brain injury and defective functioning. He has lost interpersonal relationship with his wife because of the changes in his personality and uncontrollable behavioural outbursts. His personality has undergone changes and becomes agitated, frustrated and angry very quickly. Those emotions are typical of a frontal lobe injury. He will not be able to

³ 10/39907) [2012] ZAGPJHC 13 (21 February 2012)

continue working in his current environment in the future. His prognosis for the injury to the lumbar and cervical spine is poor. The Court awarded *Dlamini* R850 000.00 in 2012, which is R 1 320 109.87 in 2021. The severe neuro-cognitive deficits suffered by *Dlamini* is similar to Plaintiff in present matter.

- [24] Counsel alluded to the matter of *Mtshali v Road Accident Fund*⁴ where a 22 year old male suffered the following injuries in an accident. A head injury with frontal and parietal cranial impacts, accompanied by a moderate to severe head injury. Soft tissue injury of the shoulder and wide spread abrasions and soft tissue injuries. His Glasgow Coma Scale was 15/15. Loss of memories for 2 to 8 hours. The Plaintiff had cognitive deficits typical of a brain injury which were mild to moderate in nature. The mild to moderate deficits were consistent with a mild to moderate brain injury. An award of R850 000.00 was made in 2017, which is R1 005 168.81 in 2021 value.
- [25] Counsel submits that It is trite law that the assessment of general damages cannot with ease, be done with any measure of mathematical accuracy, and the court has a wide discretion. See, for example, *AA Mutual Insurance Limited v Maqula* and *Southern Insurance Association Limited v Bailey N.O.* It is equally trite that no two cases are always similar since it is difficult to find a comparable matter that is on all fours in respect of the facts. Each case must be adjudicated on its own particular merits. See also *Van Dyk v Road Accident Fund* for the proposition that an amount for general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which she/he has been subjected as a result of the particular injuries sustained; and that such an amount should be updated to present day values where appropriate.
- [26] The principle as set out in *RAF v Marunga*⁵ should also be taken into consideration, which states that there is a modern approach which takes into consideration the rising standards of living and the fact that past awards in our

⁴ (23918/2013) [2017] ZAGPPHC 868 (22 March 2017)

⁵ 2003 (5) SA 164 (SCA) at 170

court were conservative as compared to other jurisdictions. Counsel submits that an award of R 1 100 000.00 is fair and reasonable in the circumstances

Past and future loss of income

- [27] Pre-accident the Plaintiff was working as a cleaner, which work can be classified as that of light physical work. He was unable to return to work and has remained unemployed to date. Residual work capacity: When comparing his physical abilities to that of his pre-accident position it is evident that he meets the minimal physical demands of his pre-accident occupation as a cleaner. The Plaintiff has the physical ability to meet work demands for sedentary, light and mid-range medium physical demand work. However, he presents with significant communication and cognitive deficits. He is unable to learn new tasks or follow a set of instructions. Clinically, he presents as follows: He is not fully oriented to the date; He presents with reduced cognitive endurance. The quality of his attention deteriorates as his cognitive endurance deteriorates; He demonstrates difficulty with immediate and delayed visual memory; He demonstrated difficulty learning and recalling new information; He demonstrates significant difficulty following verbal English instructions.
- [28] He demonstrates moderate word finding difficulties; His response to verbal demand and task execution is remarkably slow; He has significant deficits with motor planning; He demonstrates significant deficits in abstract thinking, decision making, problem solving and judgment; He demonstrates poor cognitive endurance. The Plaintiff presents with significant communication and cognitive deficits. The Occupational Therapist is of the opinion that he is not suited to formal or informal open labour market employment at present. He is not capable of learning new tasks, even those of a simple nature. He is therefore not even capable of unskilled employment. It is unlikely his limitations will improve to the extent that he will be capable of earning a living in the future. It is likely that he will remain financially dependent for the remainder of his lifespan.

Pre-accident income potential

- [29] The Plaintiff's highest level of education is a Grade 11. He has working experience as a store man, general worker building on construction sites and a cleaner. At the time of the accident he was employed as a cleaner. He would have mainly been employable in jobs categorized as unskilled to semi-skilled which tend to be more physically demanding. The Industrial Psychologist is of the opinion that the Plaintiff would have continued in these fields, receiving inflationary increases until retirement at the age of 65 years. Pre-accident the Plaintiff was most likely earning within the Informal sector earnings for unskilled labourers, which were as follows (according to Robert J. Koch, Quantum Yearbook, 2018): R8 700 – R25 500 – R73 000 per annum. He was earning between the median and the upper quartile of the sector. It is likely his earnings would have increased until he reached his career ceiling at the age of 40 – 45 years, earning at the upper quartile of the unskilled sector. He would have then received inflationary increases until retirement at the age of 65 years.

Post-accident income potential:

- [30] The Plaintiff has remained unemployed as he was unable to continue his work as a cleaner as a result of the injuries he sustained. Counsel submits that in taking into account the above expert opinions and assessments performed the expert is of the opinion that the Plaintiff's employability has been adversely affected. He has been diagnosed with a mild to moderate head injury, he has an established expressive dysphasia and has sustained significant neurocognitive impairments. He has been compromised to the extent that he is unlikely to be able to gain even simple, unskilled work as a result of his physical difficulties and pain, along with the neurocognitive deficits. He will be unable to earn an income or care for himself independently. Further to the above, his quality of life has been significantly compromised. It is unlikely that his limitations will improve to the extent that he will be capable of earning a living in the future. He is therefore rendered unemployable as a direct result of the injuries sustained.
- [31] Taking cognizance of all the above, the accident in question has had a negative effect on the Plaintiff's employability, work and subsequent earning capacity.

Given the significance of his current communication and cognitive deficits, he is not suited to formal or informal open labour market employment. He is not capable of learning new tasks, of even a simple nature. Consequently, he is not capable of unskilled employment. It is unlikely that his limitations will improve to the extent that he will be capable of earning a living in the future. He is therefore rendered unemployable as a direct result of the injuries sustained. This is indicative of the fact that there is a loss of income.

Calculations

- [32] Working on the report of the Industrial Psychologist, the Plaintiff's actuaries calculated the Plaintiff's past and future loss of income. The normal 5 % deduction is proposed for the past loss. With regards to the future loss, the Plaintiff is deemed unemployable, therefore no contingency ought to be deducted on the injured scenario. A normal 15 % deduction on the uninjured scenario is proposed.

- [33] The following calculations are proposed:

UNINJURED	INJURED	TOTAL PAST EARNINGS	R114 859 011-22
LESS CONTINGENCY 5%/-	% R5 7434	Sub-total	R109 116 R109 116
FUTURE EARNINGS	R1 442 734	LESS CONTINGENCY 15%/-	% R216
410.10	Sub-total	R1 226 323.90	R1 226 323.90 TOTAL R1 335 439.90.

Counsel for the plaintiff submits that a fair and reasonable offer for past and future loss of earnings would be R1 335 439.90.

Conclusion

- [34] The plaintiff requests that all the relevant circumstances and expert reports, be taken into account. The Plaintiff seeks 70% of the Plaintiff's agreed or proven damages for the following:-

That the Defendant be ordered to issue an undertaking in terms of Section 17(4) of the Act, to pay for the Plaintiff future medical expenses, limited to 70 % that the Defendant pay the amount of R1 335 439.90. in respect of past and future loss of income. That the Defendant pay the amount of R1 100 000.00 in respect of general damages. Less Apportionment, the total amount payable by the Defendant is R 1 704 807.93. Costs to be awarded on a High Court Scale.

- [35] I am inclined to agree with the experts in relation with their informed recommendations and counsel for the plaintiff. The plaintiff will no longer be employable therefore it is proper that he be fully compensated and the amount as alluded to *supra* is in order. The plethora of cases particularly the matter of *Dlamini* has almost similar injuries and sequelae. In the matter of *Van Dyk v Road Accident Fund*⁶ for the proposition that an amount for general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which she/he has been subjected as a result of the particular injuries sustained; and that such an amount should be updated to present day values where appropriate.

In result I made the following order:

Draft order marked "X" is made an order of Court.



E.N.B. KHWINANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

⁶ 2003 (SE8) QOD 1 (AF), at paragraphs [22] and [23]

CASE NO: 70447/2019

HEARD ON: 01 June 2021

FOR THE PLAINTIFF: ADV. A. NELL

INSTRUCTED BY: Moss & Associates Inc

DATE OF JUDGMENT: 13 July 2021

IN THE HIGH COURT OF SOUTH AFRICA

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GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2019/70447

HELD AT PRETORIA ON 13 JULY 2021
 BEFORE THE HONOURABLE JUDGE KHWINANA (AJ)
 VIRTUAL HEARING

In the matter between: -

MUSA SYDNEY NSELE

and

ROAD ACCIDENT FUND

Claim Number: 326/12800102/17/1

Link Number: 4736193



Plaintiff

Defendant

DRAFT ORDER

AFTER hearing counsel for the Plaintiff, and reading the papers filed on record, the following order is made:

1. The issue of merits was previously settled at 70 % in favour of the Plaintiff;
2. The Defendant shall make payment to the Plaintiff the capital sum of 1 704 807.93; in full and final settlement for loss of income and general damages which amount has been apportioned accordingly, within 180 days of this order, failing which interest will start accruing on the aforesaid sum at the rate of 7 % per annum, from 180 days of the date of this order, until date of final payment which amount is made up as follows:

13/7/21

- 2.1. Loss of income: 1 335 439.90
 2.2. General Damages: 1 100 000.00

3. The said payment shall be made into the trust account of the Plaintiff's attorneys of record, with the following account details:

Name of account holder: Moss and Associates
 Bank Name: First National Bank
 Branch Name: RMB Private Bank
 Account number: 624 605 65 751
 Branch Code: 250 655
 Type of Account: TRUST ACCOUNT
 Ref: N1357



4. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, for 70% of the costs of the Plaintiff's future accommodation in a hospital or nursing home or treatment or rendering of a service or supplying of goods to the Plaintiff or related expenses arising out of the injuries sustained by the Plaintiff in the motor vehicle collision on 10 October 2018, after such costs have been incurred and upon proof thereof;
5. The Defendant shall make payment of the Plaintiff's agreed or taxed party and party High Court costs.
6. The Defendant shall be liable for any costs attendant upon obtaining capital payment.
- 7.1. The Plaintiff shall, in the event of the costs not being agreed, serve the notice of taxation of the Defendant's attorneys of record;
- 7.2. The Plaintiff shall allow the Defendant 180 days to make payment of the taxed costs; and
- 7.3. The Plaintiff shall not issue a writ against the Defendant prior to the expiry of the 180 day period allowed for payment to be made.
8. The Plaintiff did enter into a contingency fee agreement.

4/13/21

By the Court


REGISTRAR



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13/7/21