

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

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
7/09/2021**

Case No.: 05760/2019

In the matter between:

WANDILE KHUMALO

Applicant

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

MAKHOBHA J:

[1] The Plaintiff instituted an action against the defendant for damages suffered as the result of injuries sustained in a motor vehicle accident that occurred on 18 February 2018.

[2] The merits of the matter have been settled between the parties 80% (eighty percent) in favour of the Plaintiff. The Defendant was not represented on the date of trial and the attempt to settle the matter did not yield any results, on behalf of the Plaintiff, Counsel for the Plaintiff asked the court to proceed via a video link. Counsel

addressed the Court and referred the Court to his heads of argument. I was asked to decide the matter based on the papers, and no oral evidence was led.

[3] The Plaintiff file the following medical-legal reports of the following experts:

- 3.1 Dr H.J. Edeling – Neurosurgeon
- 3.2 Dr C. Barlin – Orthopedic surgeon
- 3.3 P Gibson – Neuropsychological and Educational Therapist
- 3.4 Dr L.L. Mashayambombe – Special Psychiatrist
- 3.5 Dr C. Sampson – Clinical Psychologist
- 3.6 B. Pillay – Occupational Therapist
- 3.7 L Badenhorst – Industrial Psychologist

There are no reports on behalf of the Defendant. \

[4] In the *Road Accident Fund vs Marunga 2003 (5) SA 164 (SCA)* the Court said that there was no hard and fast rule of general application requiring the court or a court of appeal to consider past awards. The Court further said that awards on decided cases might be of some use and guidance. Furthermore, in *Sandler vs Wholesale Coal Supplier Ltd 1941 AD* the court held the amount to be awarded as compensation and the figure arrived at compensation depends on the Judges view of what is fair in all circumstances. See also *AA Mutual Insurance Association Ltd vs Maqula 1978 (1) SA 805 (A)*; *Road Accident Fund v Guedes 2006 (5) SA 583 (SCA)* at para 8. Thus therefore the award of general damages must be fair to both the Plaintiff and the Defendant. See *also Pitt vs Economic Insurance Company Limited 1975 (3) SA 284 (H)*.

[5] In considering the injuries sustained by the Plaintiff as well as taking into account the case law referred to by counsel, I informed counsel that in my view the appropriate award for damages is R 900 000.00 (nine hundred thousand rand) after taking into account 80/20% apportionment of damages, counsel agreed to the amount and stated that it is reasonable.

[6] The only issue to be determined is loss of earnings. Counsel in his calculation on paragraphs 34-39 of his heads of argument suggested an amount of

R4170508.00 (Four million one hundred and seventy thousand five hundred and eight rand) after less 20% apportionment.

[7] Contingencies protect the individual from consequences that come as a result of motor vehicle collisions. The *locus classicus* with regard to contingencies is the judgment of Nicholas JA at 116-117 of the decision in *Southern Insurance Association vs Bailey NO 1984 (1) SA 98(A)* the court said “where the method of actuarial calculation is adopted, it does not mean that the trial Judge is tied: down by inexorable actuarial calculations. He has a large discretion to award what he considers right”. Zulman JA, with reference to various authorities including Southern Assurance decision, said the following in the *Road Accident Fund vs Guedes (611/04) [2006] SCA 18 RSA* “*The calculation of the quantum of the future amount, such as loss of earning capacity, is not as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, southern Insurance Association Ltd vs Bailey NO) courts have adopted the approach that, in order to assist in such calculation, amount to be awarded as compensation and the figure arrived at depends on the Judges view of what is fair*”.

[8] In the *De Jongh vs Du Pisane 2004 5 QOD J2-103 (SCA)* the Plaintiff was 35 years old at the time of collision. The Supreme Court of Appeal found further that contingency factors cannot be determined with mathematical precision. The court found further that contingency deductions are discretionary. The court confirmed 10% (ten percent) contingency deduction applied by the trial court.

[9] In the matter of *De Kock vs Road Accident Fund Case no 2237/2013* reported on the 22nd of April 2015 in the High Court of South Africa (Gauteng Division, Pretoria) the Court once again confirmed the approach to be taken with the calculation of loss stated in paragraph 22 as follows:

“[22] *In approaching claims of this nature, the courts have always had to open to it two possible approaches, namely:*

22.1 either that the Judge makes a round estimate of an amount which seems to him to be fair and reasonable. That matter is entirely a matter of guesswork – a blind plunge into the unknown; or

22.2 that the Judge tries to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative.

[23] It is manifest that either approach involves guesswork to a greater or lesser extent. However, the court cannot for this reason adopt a non possumus attitude and make no award.

[24] The inherent difficulties and uncertainties therein manifest, it has generally been accepted that it is preferable to make an assessment based on actuarial calculations rather than to take a blind plunge in to the unknown.

[25] I prefer this approach.

[26] Where the actual approach is adopted, the traditional method entails a four stage process as follows:

26.1 Calculate the present value of the future income which the plaintiff would have earned but for the injuries and the consequent disability.

26.2 Calculate the present value of the plaintiffs future income, if any, having regard to the disability.

26.3 Subtract the figure obtained under 26.2 from that obtained under 26.1.

26.4 Adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies.”

[10] In this matter before me, the plaintiff was a student studying at the University of Johannesburg. He was studying a BA in Humanities from 2014 to 2017. In 2017, he did not sit for the whole examination.

[11] The plaintiff is not employed and was only selling books and delivered graduations gowns on a part-time basis. It is not clear how much he earned for this part-time job. However, he continued to earn some income from such business ventures.

[12] In order for the court to be able to apply proper calculation of the quantum of the past and future amounts, such as the loss of earning capacity all the facts about his earning capacity must be put before court.

[13] The court must calculate the present value of the future income, which the plaintiff would have earned, but for the injuries and the consequence disability. However, the plaintiff in this matter before me will be compensated for his injuries. The plaintiff does not have a disability that will prevent him from completing his studies and becoming employed.

[14] In my view, the plaintiff cannot be compensated for what he will earn after he obtains his degree and is employed. He is still able and is currently busy with his studies to complete his degree. The injuries temporarily hindered him to complete his studies. He is not injured to such an extent that he will be unable to complete his studies and be employed.

[15] I therefore disagree with submission that he is entitled to be compensated an amount of R4170508.00 (four million one hundred and seventy thousand five hundred and eight rand) as though he is disabled and unable to complete his university studies.

[16] A Plaintiff bears the onus of proving that his damages claimed are reasonable. Thus, a Defendant, could counter the method and measure of damages claimed on the basis that the amount was not reasonable because the Plaintiff was

more likely to use public health care, which was as good as and cheaper than, private health care. I am therefore of the view that the Plaintiff did not prove that he is entitled to the amounts claimed for past and future medical expenses.

[17] I do agree that in future he might experience hindrances and might even retire sooner than expected but still the amount claimed for future loss of earnings is excessive and would have been justified if the plaintiff was known as physically disabled to complete his studies.

[18] I therefore, make the following order:

1. The defendant is to pay the net capital amount R 1200 000.00 (one million two hundred thousand rand only) in full and final settlement of the plaintiff's claim.

2. The amount referred to in paragraph 1 supra is the amount payable to the plaintiff, after applying the agreed 20% apportionment and is made up as follows:

2.1	Past Loss of Earnings	R 50 000.00	(fifty thousand rand only)
-----	-----------------------	-------------	----------------------------

2.2	Future Loss of Earnings	R 250 000.00	(two hundred and fifty thousand rand only)
-----	-------------------------	--------------	--

2.3	General Damages	R 900 000.00	(nine hundred thousand rand only)
-----	-----------------	--------------	-----------------------------------

Total =	R 1200 000.00	(one million two hundred thousand rand only)
---------	---------------	--

3. The amount referred to in paragraph 1 supra shall be payable within 180 (one hundred and eighty) days hereof into the Trust Account of the plaintiff's attorney of record, S.Twala Attorneys, the details of which are:-

- 3.1 Name:- S.Twala Attorneys Trust Account
3.2 Bank :- First National Bank
3.3 Branch Code:- 25 17 05
3.4 Account No:- [....]

4. The defendant shall furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 within 14 (fourteen) days from date hereof, for the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to the plaintiff, arising out of the injuries sustained in a motor vehicle collision on 18 February 2018 and the sequelae thereof, after such costs have been incurred and upon proof thereof, limited to 80%.

5. The defendant shall pay the plaintiff's taxed costs, such costs to include:-

5.1 the costs incurred in obtaining payment of the amount referred to in paragraph 1 supra;

5.2 the reasonable costs of the reports including addendum reports, RAF 4 forms, consultation fees and attending to sign affidavits, where applicable, of the plaintiff's experts namely:-

- | | |
|--------------------------------|--------------------------|
| 5.2.1 Dr.H.J.Edeling | neurosurgeon |
| 5.2.2 Dr.C.Barlin | orthopaedic surgeon |
| 5.2.3 Dr.L.L.Mashayamombe | psychiatrist |
| 5.2.4 Mr.C.Sampson | clinical psychologist |
| 5.2.5 Ms.M.A.Gibson | educational psychologist |
| 5.2.6 Ms.B.Pillay | occupational therapist |
| 5.2.7 Dr.L.Badenhorst | industrial psychologist |
| 5.2.8 Munro Forensic Actuaries | actuary |

5.3 the costs consequent upon the employment of counsel including the costs of consultations, preparation, drafting pre-trial agendas and pre-trial minutes and appearances on trial.

6. The notice of taxation shall be served on the defendant.

7. The defendant shall make payment of the taxed or agreed costs within 14 days of taxation or agreement.

8. The defendant shall be liable for interest a tempora mora on the agreed or taxed costs from 14 (fourteen) days after agreement or taxation to date of payment.

Judge of the High Court
Makhoba J

Counsel for the Applicant : Adv M. Patel

Instructed by : S Twala Attorneys Incorporated

Counsel for the Respondent : No appearance

Claims Handlers/Officials : M. Majozi
P.Ncukane
S. Mngcele
N.Q. Qzungu
H. Kirsten

Date of hearing : 26 August 2021

Date judgment delivered : 7 September 2021