

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

CASE NO: **938/20147**
DATE HEARD: **12 MAY 2021**
DATE DELIVERED: **23 JULY 2021**

In the matter between:

COLIN MOALAH

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Coram: Snyders AJ

JUDGMENT

Snyders AJ:

INTRODUCTION:

- [1] On 28 December 2012, the Plaintiff, an adult male, obtained a lift from an acquaintance. He was travelling from Douglas to Kimberley. He sat in the back seat of the motor vehicle on the left-hand side. While they were crossing an intersection, about 4 km outside of Kimberley, a motor vehicle travelling in the opposite direction ignored the stop sign and collided with the vehicle in which the Plaintiff was travelling. The Plaintiff sustained serious injuries and accordingly instituted action against defendant ("***the RAF***") for the recovery of

damages. The merits were conceded at 90% in favour of the Plaintiff and the trial proceeded on the issue of the quantum of the Plaintiff's damages only.

[2] The RAF is unrepresented. The trial on quantum was set down for 12 May 2021. The notice of set down was served on the RAF by e-mail on 10 December 2020. The RAF was also aware that the matter was enrolled as Ms Wells from the State Attorney was present at the hearing. However, she had no instructions to appear. The Plaintiff handed up an affidavit setting out the steps taken to notify the RAF of the trial. I was satisfied that the RAF was properly notified of and aware of the date of trial. The matter proceeded in the absence of representation for the RAF.

[3] I granted the Plaintiff his application in terms of Rule 38(2) for his expert witnesses to give evidence on affidavit, to wit, Dr PA Olivier (orthopaedic surgeon), Ms Coetzee (clinical psychologist), Ms Potgieter (occupational therapist) and Munro Forensic Actuaries. Dr Everd Jacobs (industrial psychologist) was present in court testify.

THE PLAINTIFF'S EVIDENCE:

[4] As a result of the collision, the Plaintiff injured his neck when the C2 and C3 vertebrae fractured. He also injured his left elbow, left knee and sustained a head and back injury.

[5] The Plaintiff underwent two operations to his neck. When he was discharged from hospital, he could not walk long distances or dress himself. He suffered from pins and needles in his hands and feet. For approximately 6 months after his discharge, the Plaintiff was assisted by his mother and girlfriend with bathing and caring for himself.

[6] The Plaintiff continues to experience constant pain, especially in his neck. He cannot perform any tasks that require him to extend his arms upward above his head because it affects his shoulders and neck. After the collision, the Plaintiff

became aggressive and forgetful. As a result, he was unable to retain his employment with a certain Mr Louwrens.

[7] After losing his employment, the Plaintiff did casual work for short periods of time because he could not complete tasks expected of him. During 2014 he was employed by Mr De Wit. He was permanently employed by Mr De Wit in 2015 where he worked until 2017. The Plaintiff testified that Mr De Wit was a very sympathetic employer. He was, however, dismissed because of his temper and inability to work with others. The Plaintiff has been unemployed since.

[8] The Plaintiff used to play soccer and golf and he is no longer able to participate in these activities due to the collision.

THE EXPERT EVIDENCE:

[9] Dr Everd Jacobs, an industrial psychologist, testified in Court. He placed his credentials on record and confirmed the contents of his report dated 17 February 2016.

[10] According to the report by Dr Jacobs, the Plaintiff struggles with his knee, especially when having to walk long distances, stand for long or pick up heavy objects. At the time of the accident, he worked for Ildstone Farming near Douglas. He was responsible for general farming functions with crops and animals. He was employed there since November 2012. After the accident he returned to work in June 2013 but resigned in March 2014 because he was no longer able to cope with his injuries. He had earned a monthly salary of R1 537.00 and was a contract worker for 8 months in the year.

[11] After resigning from the Farm, the Plaintiff worked at a mental hospital as a plumber's assistant on a 6-month contract. From December 2014, he worked for Mr De Wit on his farm and at his home. He earned R125.00 per day and

worked a 5-day week. He struggled with the work especially carrying heavy objects.

- [12] According to Dr Jacobs, the Plaintiff's highest level of education is Grade 10 from William Pescod School, Kimberley. With his employment history, the Plaintiff can be regarded as an unskilled worker. As a general worker, it will be required of the Plaintiff to be fit and healthy. Dr Jacobs is of the view that the Plaintiff is unemployable. He cannot do physical work and does not have the qualifications to do sedentary work.
- [13] Dr Olivier, the orthopaedic surgeon, reported that the Plaintiff sustained a fracture to the odontoid process as well as a fracture involving the 3rd cervical vertebra. He underwent internal fixation but still experiences mechanical neck pain. Dr Olivier found that the Plaintiff will probably experience progressively more pain in the future due to the progressive nature of cervical spondylosis. The Plaintiff is expected to undergo a second procedure in approximately 20 years from the date of the accident and conservative treatment is likely to continue on a permanent basis.
- [14] Dr Olivier confirmed that the Plaintiff would have experienced severe pain for a period of approximately 12 weeks after the accident and moderate to severe pain for a period of 12 weeks following the anterior cervical fusion. The accident has resulted in his inability to perform strenuous physical activity such as picking up and handling heavy objects, performing strenuous physical activities, working with his arms in an overhead position or performing any manual activities associated with mechanical neck pain. The fracture involving the C2 and C3 resulted in a post-traumatic deformity in the upper cervical area as well as multilevel disc degeneration.
- [15] Dr Olivier further opined that the Plaintiff is permanently compromised in his ability to perform strenuous activities. He has a whole person impairment of less than 30% but the injuries to the cervical area are regarded to be serious orthopaedic injuries as the Plaintiff is at a significant disadvantage in his ability

to compete in the open market. He will find it difficult to gain employment in the open labour market due to the presence of permanent functional restrictions as a result of pathology in the cervical area.

- [16] Ms Potgieter, the occupational therapist, examined the Plaintiff and set out his current complaints: constant pain in the neck which is aggravated by bad weather; headaches approximately twice a week; stiffness in his neck when he rises in the morning; constant pain in his left knee; numbness in his left leg on a regular basis which restricts his movement; short-tempered; forgetful; cannot pick up objects heavier than 20kg; cannot work on a ladder; can no longer play soccer, ride bicycle or run due to the impact and pain on his knee; and he struggles with work tasks.
- [17] Ms Potgieter found that the Plaintiff experiences pain with passive movements with the left knee flexion and extension. His movement of the cervical spine is limited, especially with rotation. He has difficulty working with his arms above his head or when doing activities which require him to look up. The Plaintiff's relationship with this girlfriend and mother of his two children had deteriorated because he cannot provide for them as he used to. He also used to be very active but is no longer able to jog, ride bicycle nor play soccer after the accident. He has a depressive mood at times and has had thoughts of suicide. At the time of the examination, the Plaintiff was studying Theology through the South African Bible Institute. The Plaintiff should be able to work until retirement age should he continue doing missionary work.
- [18] Ms Potgieter concluded that the Plaintiff should be compensated for future medical expenses, loss of income and loss of amenities of life.
- [19] The Plaintiff was examined by a clinical psychologist, Ms Coetzee. She confirmed the physical complaints as listed in the occupational therapist's report. Additionally, she noted that the Plaintiff cannot rotate his neck as before. He has to turn his whole body to see things on the side; his headaches can last up to 2 days; he has dizzy spells which accompany the headaches; his

night vision is compromised, especially in his right eye; he experiences pain in his right ear and feels that he does not hear as well as he used to with his right ear.

- [20] Ms Coetzee confirmed that the Plaintiff is forgetful and needs constant reminders, is absent-minded, constantly loses or misplaces things, struggles to concentrate for long and is often told that he lacks insight and that his reasoning is illogical. The Plaintiff's mental efficiency has dropped, especially with regard to memory and attention. He is more prone to aggression and he is both verbally and physically aggressive. The Plaintiff's family perceive him to be emotionally distant, less tender-hearted and irritable.
- [21] Ms Coetzee outlined that the Plaintiff was disorientated when he arrived at Kimberley Hospital after the accident, and had sustained a cervical fracture and a closed head injury. Based on a CT scan, she found that the Plaintiff's head injury is in the mild to moderate range, with evidence of haemorrhages in the parieto-occipital lobe. His reduced tact, empathy and aggression suggest possible frontal lobe involvement.
- [22] The clinical psychologist concluded that the accident has had an adverse effect on his physical, neuropsychological and emotional well-being. He struggles to maintain stable employment. He will require psychotherapy in the future to assist him with coming to terms with his altered physical and cognitive state and developing appropriate goals and optimal coping strategies. The Plaintiff is regarded as vulnerable to more serious mental illness.
- [23] The calculation on past and future loss of income by Munro Actuaries was based on the fact that the Plaintiff was unable to return to work to date and is expected to remain unemployed in the future as per the findings by the industrial psychologist and orthopaedic surgeon. The loss of income was calculated as follows:

23.1 Past loss of income:

R326 400.00

23.2	Future loss of income:	R1 708 600.00
	Total:	<u>R2 035 000.00</u>

[24] The Defendant had filed two expert reports, Dr Moloto (orthopaedic surgeon) and Mr Moagi (occupational therapist). These reports were not considered as no affidavits were filed by the experts to confirm the contents of the report, nor were the witnesses in Court to testify. The Plaintiff's report by Dr Wilkinson (the neurosurgeon) was similarly not considered in coming to a finding herein.

PAST AND FUTURE MEDICAL EXPENSES:

[25] Although the Plaintiff claimed for past medical expenses, no evidence was lead on this aspect, nor any vouchers presented. The Plaintiff has not made out a case for past medical expenses.

[26] Mr Jankowitz, for the Plaintiff, sought an order that the RAF undertake to pay the Plaintiff's future medical expenses in terms of section 17(4)(a) of **THE ROAD ACCIDENT FUND ACT**, 56 of 1996 ("**the Act**").

[27] I am satisfied that the Plaintiff has proven that he will incur medical expenses in the future based on the reports by Dr Olivier, Ms Potgieter and Ms Coetzee and that the RAF should compensate the Plaintiff for such expenses.

LOSS OF EARNINGS:

[28] The Plaintiff's limited education and skills, his age and his injuries make it highly unlikely that he will find suitable employment. It has been shown that the Plaintiff is compromised in the labour market.

[29] The actuary submitted that normal contingencies should apply. Contingency deductions provide for any future events or circumstances which is possible but cannot be predicted with certainty. By illustration: longevity, loss of employment, early death, and promotion prospects, and so forth.

- [30] The contingencies remain, however, within the prerogative of the Court taking into account what is appropriate, fair and reasonable.
- [31] Mr Jankowitz argued that a no contingencies should be applied to past loss of earnings and a 17% contingency applied to future loss of earnings.
- [32] I do not find any reason to deviate from the so-called normal contingency fee deductions which are applied to past and future loss of earnings. The Plaintiff is regarded as totally unemployable but did have employment for a limited time after the accident. He is an unskilled worker but cannot do physical activity. He is not qualified to do sedentary work. Accordingly, the amounts awarded will be:

32.1	Past loss of earnings with a 5% contingency fee deduction:	R310 080.00
32.1.1	Future loss of earnings with a 15% contingency fee deduction	R1 452 310.00
32.2	Total loss of earnings:	
	- before the 90/10 apportionment	R1 762 390.00
	- after the apportionment	R1 586 151.00

GENERAL DAMAGES:

- [33] Dr Olivier, the orthopaedic surgeon, found that the Plaintiff qualifies for general damages based on the narrative test. I must decide whether the Plaintiff should be compensated for pain and suffering, disfigurement, disablement, loss of amenities of life, shock and discomfort. In determining whether the Plaintiff should be so compensated, the remarks in Road *Accident Fund v Marunga*¹ are instructive:

¹ 2003 (5) SA 164 (SCA) at para 23

“This Court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial Court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party ...”

- [34] In the matter of ***Dickson v SA Mutual Fire Insurance***², the Plaintiff was awarded R10 000.00 for general damages for two cervical fractures. In that matter, the Plaintiff fractured the C7 and C11 vertebrae and the Plaintiff herein fractured the C2 and C3 vertebrae. In that matter, the Plaintiff also suffered from a stiff neck. The current value of the award in that matter is R408 000.00.
- [35] In ***Lawson v RAF***³, the Plaintiff suffered a spinal injury as he had sustained fractures of the L2, L3 and L4 on the right side of his spine together with an L4/L5 disc extrusion with L4 nerve root compression. The Plaintiff was in continual discomfort. However, in that matter, the Plaintiff was a medical doctor pursuing a career as a surgeon. Due to the accident, he could not pursue that career but had to enter into the field of specialist anaesthetist instead. Additionally, the Plaintiff was also a well-accomplished sportsman. The Plaintiff was awarded general damages in the sum of R300 000.00 with a current value of R517 000.00.
- [36] A concussive head injury of moderate degree was sustained by the Plaintiff in the matter of ***Hall v RAF***⁴. The Plaintiff was awarded general damages in the sum of R700 000.00 which equates to R1 087 000.00 in current value. The Plaintiff in that matter also sustained a fracture of the left humerus; fractured ribs on the left side; a left sixth cranial nerve lesion; soft tissue spinal injuries of the neck and back; and various abrasions.

² 1977 (2) C&B 725 (C)

³ 2010 (6) QOD C4-1(ECP)

⁴ 2013 (6) QOD J2-115 (KZD)

- [37] In the matter of *MM v RAF*⁵, the Plaintiff was diagnosed with a traumatic but moderate brain injury, compression wedge fracture L2, L3 and L4, fractured right tibia and fibula, fractured right pubic rami and ischium. The outcome diagnosis was posttraumatic neurocognitive/ neuropsychological disorder, post-concussion dizziness, mechanical back pain, scarring, mood disorder secondary to the musculoskeletal syndrome and changes in life circumstances. There had been considerable changes in physical function, mood and behaviour that were impacting on amenities, life roles and circumstances. The Plaintiff was awarded damages in the sum of R850 000.00. The current value of the award is R923 000.00.
- [38] The Plaintiff has suffered pain, discomfort, disability and loss of amenities of life after the accident. He had injured his left elbow, left knee, fractured his C2 and C3 vertebrae and sustained a closed head injury, which is in the mild to moderate range. The Plaintiff underwent two surgeries on his neck. The fracture of the C2 and C3 vertebrae caused a post-traumatic deformity in the cervical area and multilevel disc degeneration. He experiences constant headaches and neck pain, as well as constant pain in his left knee and numbness in the left leg. The Plaintiff has suffered from mood and behavioural changes after the accident. He is limited in his physical activities, which has curtailed his job prospects. The Plaintiff can no longer participate in soccer, jogging or cycling.
- [39] After considering all the factors above, I am of the view that general damages in the amount of R900 000.00 should be awarded to the Plaintiff. Factoring in the apportionment of damages, this amount would be reduced to R810 000.00.
- [40] Accordingly, the Plaintiff will be awarded the following amounts:

31.1	Past and future loss of income	R1 586 151.00
31.2	General damages	R810 000.00

⁵ 2019 (7) QOD B4-92 (FB)

[32] In the premise, the following order is made:

1. The Defendant is liable for 90% of the Plaintiff's damages.
2. The Defendant shall make payment to the Plaintiff in the sum of R2 396 151.00 (TWO MILLION THREE HUNDRED AND NINETY SIX THOUSAND ONE HUNDRED AND FIFTY ONE RAND) which amount is computed as follows:

2.1 Past and future loss of income: R1 586 151.00

2.2 General damages: R810 000.00

3. The Defendant shall furnish an undertaking to the Plaintiff in terms of *Section 17(4) (a) of the Road Accident Fund Act 56 of 1996*, for 90% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to him arising out of injuries sustained by him in the motor vehicle collision of 28 December 2012, in terms of which undertaking the Defendant will be obliged to compensate him in respect of the said costs after the costs have been incurred and on proof thereof.
4. The Defendant shall pay the Plaintiff's taxed or agreed costs on the High Court Scale, as between party and party, including but not limited to:
 - 4.1 All costs attendant upon the obtaining of payment of the capital amount;
 - 4.2 The reasonable costs of obtaining all medico-legal reports, inclusive of addendum reports, RAF4 serious injury forms and the cost of Radiological investigations done by the Plaintiff's experts which were furnished to the Defendant

and further all costs associated with attendance of medical legal assessments including but not limited to travel, accommodation, food and court attendance;

4.3 The reasonable taxable preparation and reservation fees, if any, of the following experts being:

- 4.3.1** Dr Everd Jacobs, Industrial Psychologist;
- 4.3.2** Ms Mignon Coetzee, Clinical Psychologist;
- 4.3.3** Ms Nicky Potgieter, Occupational Therapist;
- 4.3.4** Dr Pieter A Olivier (Orthopaedic Surgeon); and
- 4.3.5** Munro Forensic Actuaries, Actuary.

4.4 The costs of the necessary witnesses of attending the trial, which are:

- 4.4.1** Mr Colin Moalahi (Plaintiff);
- 4.4.2** Dr Everd Jacobs

4.5 The taxed or agreed costs of Plaintiff's counsel.

5 In the event that costs are not agreed, the Plaintiff will be entitled to have the costs provided for in this order taxed by the Taxing Master of the Northern Cape High Court.

6 The payment provisions in respect of the foregoing are to be effected as follows:

6.1 Payment of the capital amount shall be effected within 180 (one hundred and eighty) days from date hereof (the "*due date*") to the Plaintiff's attorneys of record;

- 6.2 Payment of the taxed or agreed costs reflected above shall be effected within 180 (one hundred and eighty) days of agreement or taxation (the “*due date*”) and shall likewise be paid to the Plaintiff’s attorneys of record;
- 6.3 Should the capital amount or costs not be paid by the respective due dates, the Defendant will be liable for interest thereon at the prescribed rate of interest.



J SNYDERS
ACTING JUDGE
NORTHERN CAPE DIVISION

For the plaintiff:	ADV D JANKOWITZ (oio Joubert Attorneys)
For the defendant:	NO APPEARANCE