



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

**Case No: 63013/16**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

12/07/19

DATE

*M Gwala*

M GWALA

In the matter between:

**TIEHO SAMUEL TSOAEL**

**Plaintiff**

And

**ROAD ACCIDENT FUND**

**Defendant**

**JUDGMENT**

**GWALA AJ**

1. In this matter the plaintiff instituted an action against the defendant for a claim for damages suffered by him as a result of motor vehicle collision which occurred on 06 November 2015. At the time of the collision the plaintiff was 29 years old. Currently, he is 33 years old. The matter come before me for determination of quantum, the issue of

liability having been previously determined at 80% apportionment against the defendant and the court having made an order to that effect.

2. At the beginning of the trial I was informed by counsel for the parties that a portion of the quantum relating to future hospital and medical expenses was equally resolved between the parties with the defendant furnishing the plaintiff with an undertaking certificate in terms of Section 17 (4) (a) of the Road Accident Fund Act 56 of 1996. The only issue that remained for determination by the court was the issue pertaining to the plaintiff's past and future loss of earnings as well as general damages.
3. Counsel also informed me that none of the parties would lead oral evidence instead parties would argue their cases based on the experts reports that were filed by them, all of which were admitted by the parties as evidence before court. The parties also filed joint minutes by the corresponding experts which I was asked to consider as part of admitted evidence. It was common cause between the parties that the past and future loss of income was actuarially calculated on the basis agreed to by the Industrial Psychologists and in line with their joint minutes.
4. The plaintiff appointed several experts such as Orthopaedic Surgeon, Neurosurgeon, Neurologist, Ear, Nose and Throat Surgeon, Clinical Psychologist, Occupational Therapist and Industrial Psychologist as well as an Actuary who calculated the loss of income. On the other hand, the defendant appointed Orthopaedic Surgeon, Neurosurgeon,

Occupational Therapist and Industrial Psychologist. The corresponding experts have prepared and submitted joint minutes. They agree on all material issues. During argument counsel for the parties aligned themselves with the joint minutes without departing therefrom in anyway.

5. As appearing from the medico-legal reports, the upshot of the plaintiff's injuries are the following:- mind, traumatic brain injury (concussion), dislocated jaw, right facial nerve, palsy (paralysis) abrasion on the right eyebrow, forehead, lower back (L5/S1 disc narrowing), right thigh and right knee and bleeding from both ears.
6. Plaintiff was admitted and treated at One Military Hospital for a period of approximately six (6) weeks. The following treatment was administered: -clinical and radiological examination; CT scan of the brain, neuro-observations, closed reduction of right-tempo-mandibular joint, anti-epileptic treatment, rehabilitation physiotherapy, pain management, tetanus administered and wounds dressing.
7. As to the sequelae, as noted by the experts, the plaintiff was left with the following symptoms: epilepsy, lower back pains which is exacerbated by prolonged sitting; and standing, he suffers from right thigh pain which is exacerbated by prolonged walking, he suffers from frequent headaches, a paralysis on the right of the face, a mild inner ear deafness on the left, he has poor vision with neuro- cognitive deficits associated with poor

memory, concentration and attention deficits, he suffering from neurobehavioral changes, moderate levels of anxiety and severe symptoms of post-traumatic disorder.

8. The issue taken by the defendant in argument was that there is no finding by any of the relevant experts on whether the plaintiff suffered from epilepsy as a result of the collision. He conceded though that it is mentioned in various experts reports that the plaintiff is on epileptic medication. He conceded further that prior to the collision the plaintiff was not on any epileptic treatment. He conceded too in his head of argument that the plaintiff is now suffering from epilepsy. The concessions were correctly made. The plaintiff suffered mild traumatic brain injuries as a result of the accident. It appears from the various reports, notably by both Neurosurgeons, that on admission the plaintiff was put on Epilim. There is no evidence to the effect that he suffered from epilepsy prior to the accident.
9. As mentioned above, parties had admitted the experts reports as evidence. Professor PL Lekgwara recorded in his report that the complications the plaintiff is faced with is that he is already suffering from epilepsy. He opines also that a provision should be made for future treatment of the epilepsy. Even Dr Mogwale S Motebejane, the Neurosurgeon appointed by the plaintiff, confirmed, in his report, that plaintiff is epileptic.
10. The defendant did not seek to cross-examine the experts who opine that the plaintiff is now on medication for epilepsy or that he is already suffering from epilepsy and that he will need treatment in that regard. I have already mentioned that it was conceded by the

counsel for the defendant that prior to the accident the plaintiff had no record of suffering from epilepsy. It was diagnosed for the first time when he was admitted at One Military Hospital following the accident.

11. The defendant did not submit any form of evidence to dispute that the epilepsy was as result of the accident. There is no basis, factual or otherwise, to challenge that he suffered from epilepsy as a result of the accident. It is merely an argument presented by the defendant without any factual foundation. The defendant admitted the experts reports of the plaintiff as evidence.

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12. The defendant argued that the epilepsy could be as a result of another accident which apparently currently in 2012. This argument cannot be sustained. It is not based on any evidence. It is based on conjectures. At least the defendant ought to have some factual basis for such argument to stand. According to Professor PL Lekgwara the plaintiff did not sustain any injuries in the 2012 accident.

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13. The defendant argued further that the epilepsy may be as the result of both the 2012 and 2015 accident. Of cause, this argument was more of a guesswork. Again, there is no support for the submission that the 2012 accident had resulted in plaintiff suffering from epilepsy. The argument is highly speculative. It should be dismissed.

14. According to the medico-legal reports, the plaintiff will need future treatment indicated as conservative treatment for epilepsy and headaches, surgery: thoraco-lumber decompression and fusion, psychotherapy, occupational therapy, revision of the scars and biokieticist. The defendant has provided an undertaking for the future medical treatment and did not, at that time, question the fact that the plaintiff suffers from epilepsy.
  15. I am satisfied that the plaintiff is suffering from epilepsy. This occurred for the first time after the plaintiff had suffered injury to the brain which was as a result of the accident for which he was treated with Epilim on admission at the hospital. The epilepsy is directly connected to the accident which resulted in him suffering from brain injuries. Even if I am wrong, nevertheless, probabilities favour a conclusion that the epilepsy is as a result of the injury to his brain which he suffered as a result of the collision in question.
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**LOSS OF EARNINGS AND CONTINGENCIES: -**

16. Save for the epilepsy, it was common cause that the plaintiff suffered the injuries aforesaid and that he will require the treatment aforementioned. Both parties were in agreement that the plaintiff is entitled to compensation for general damages as well the loss of earnings. The plaintiff's past and future loss of earnings was actuarially calculated on the basis agreed to in the joint minute between the industrial psychologists. The basis and correctness of the calculations are common cause between the parties. The issue is

what contingencies deductions should be applied to the figures provided for the past and future loss of income in the circumstances of this matter. This is what I now turn to.

17. In the matter **Benjamin NO v The Road Accident Fund C& B Vol 5 B4-205** the plaintiff was an 08-year-old girl at the time of the accident and she was 15 years old at the time of the trial. She had sustained severe brain injuries resulting in urinary incontinence, emotional liability, daily headaches, low self-esteem and was being subjected to ridicule by other children. She also suffered certain orthopaedic injuries and it was held that she would be incapable of earning an income. The court applied 15% contingency deduction to her claim for future loss of earnings.
18. In **Mehlo and Another v Road Accident Fund Corbett and Buchanan Vol 5 A2-30 (C)** the plaintiff was a 20-year-old male who as a result of the motor vehicle accident was left functionally useless. He was assessed as being completely unemployable. The court found that the contingency deduction to be made was 20% for future loss of income and 5% in respect of past loss of income.
19. In **Smit N.O v The Road Accident Fund C&B Vol 5 B4-251**, the plaintiff was a 12-year-old girl who suffered a severe diffuse axonal head injury and other orthopaedic as well as some soft tissue injuries. She was left with intellectually impairment and having some

personality changes and a lack of drive. The accident left her in a situation where her future employment would be limited to a sympathetic environment and for short periods. The court allowed a contingency deduction of 15% to her future loss of income.

20. In the matter of **Zarrabi v The Road Accident Fund C&B Vol 4 B4- 231** a 30-year-old female, a trainee medical specialist had suffered severe diffuse axonal brain injury with severe neuro-physical, cognitive and psychiatric consequences. She sustained some orthopaedic and other injuries. She suffered from intellectual impairment which meant that at best for her, she would manage some form of employment in a sympathetic environment. The court allowed a 5% contingency deduction in respect of past and a 15% in respect of future loss of earning.

21. In this matter the plaintiff is a young man of 33 years old. His is one of the factors to be taken into account in determining appropriate contingency deductions. The fact that the plaintiff was employed and having a stable job at the time of the accident is another factor to take into. He had a potential to be promoted even to the rank of a captain pre-accident, this too is relevant. There is no evidence to justify any departure from the normal contingencies. For all the above reasons, I am of the view that the 5% for the pre-morbid and post-morbid for the past loss of income is reasonable and fair. This fact is also admitted by the defendant.

22. As for post-morbid contingencies the following factors are taken into account: - the possible further reduction to his work capacity in the event of the recommended surgery to the lumbar spine; should he lose his employment for one reason or the other, there may also be some further deterioration as a result on his epileptic condition. Should this occur, he will be more compromised and will be an unfair competitor in the labour market as he will be precluded from doing work which requires driving for instance.
23. The plaintiff has already forfeited deployment to the Democratic Republic of Congo which was supposed to take place during May 2017 to May 2018, wherein he would have earned an income of approximately R370 000.00. Another factor to consider is the fact that he does not hold sufficient physical capacity now for his job as paramedic. For these reasons I am of the view that 15% pre-morbid and 35% post-morbid contingency deductions are justifiable in respect of the future loss of income.
24. As mentioned above, the actuarial calculations were prepared and were not placed in dispute by any of the parties. Accordingly, the actuarial calculations may be taken as correctly reflecting the plaintiff's loss of income prior to the application of any contingencies. With that in mind the award for the plaintiff's loss of earnings should be calculated as follows:

#### PAST LOSS OF EARNINGS

|                           |                            |
|---------------------------|----------------------------|
| Pre-morbid                | : R454 718 – 5% = R431 982 |
| Post-morbid               | : R431 507 – 5% = R409 929 |
| Total past loss of income | : R22, 053                 |

#### FUTURE LOSS OF EARNINGS

|                             |                                 |
|-----------------------------|---------------------------------|
| Pre-morbid                  | : R6 356 056 – 15% = R5 402 648 |
| Post-morbid                 | : R4 640 463 – 35% = R3 016 301 |
| Total future loss of income | : R2 386 347                    |

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TOTAL LOSS OF EARNINGS : : R 2 408 400

#### GENERAL DAMAGES:-

25. It is trite law that no two cases are always similar hence it is difficult to find a comparable matter that is in all fours in respect of the facts. Past decided comparable cases, although often useful, merely serve as guidelines. The need to adjudicate each case on its own particular merits is always present. In **Van Dyk v Road Accident Fund 2003 (5E8) QOD 1 (AF)**; at paras [22] and [23] it was stated:

*"[22] The purpose of an award for general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which he or she has been subjected as a result of the particular injuries that were sustained.*

*Although the determination of an appropriate amount in this regard is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases.*

[23] *This should obviously be updated to present day values in order to properly serve as a basis for comparison. In making such an adjustment I am mindful of the fact that, whereas it is permissible to have regard for the general depreciation in the value of our currency by utilising the Consumer Price Index, a 'slavish adherence' thereto, particularly in the case of awards made in older cases, may lead to somewhat anomalous results or inflated values in today's terms."*

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26. It is equally trite that in the determination of general damages it is required of the Court to exercise a wide discretion in order to award what it considered to be fair and adequate compensation, having regard to all the relevant facts and circumstances connected with the plaintiff, as well as the nature of the injuries sustained by him/her, the possible permanence thereof, and the severity and the impact on the claimant's lifestyle. As far back as 1941, Watermeyer JA in **Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 (A)** at 199 stated that:

*"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be*

*uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case."*

27. There is also no hard and fast rule of general application which requires the Court to consider past awards for no two cases can ever be the same (cf **Road Accident Fund v Marunga 2003 (5) SA 165 (SCA) 169G-H**). Previous awards may be compared where it is useful to do so to provide some guidance only. They play an important role and may be used where appropriate. However, they are by no means a decisive factor. The court still has a wide discretion.

28. In the matter of **Mnguni vs Road Accident Fund, 2006 (6) QOD E-1 (GSJ)** the plaintiff, a 32-year-old male (who was 29 at the time of the accident), had suffered severe brain injury with fractures of the skull and facial bones: severe injuries to the right lower leg resulting in traumatic amputation; soft tissue injuries to the left ankle and whiplash injury to the spine. There significant neuropsychological difficulties including headaches, impotence, depression, memory difficulties, concentration difficulties; depression and change of personality. Orthopaedic injuries causing difficulty in walking with prosthesis due to painful stump; phantom pain at site of amputation; neck pain associated with headaches; and shoulder, knee and ankle pain. The court awarded general damages in the sum of R 700, 000.00 in 2006 terms.

29. In **De Jongh v Du Pisanie N.O. C & B, Vol 5 at J 2-103** - a 35-year-old male had sustained some orthopaedic injuries including a fracture of the frontal skull causing an extradural haematoma causing brain damage giving rise to intellectual impairment as well as changed personality. He was awarded general damages in the amount of R250,000.00 in 2004 terms.
30. In **Mohale V Road Accident Fund 2015 (7A4) QOD 15 (GNP)**, the plaintiff was a 10 years old girl who suffered brain injury and injuries of the neck and back. Accident resulted in the plaintiff having headaches with slightly increased risk of developing epilepsy. Due to the severity of the neurocognitive sequelae of the head and brain injury, behavioural and neurocognitive changes, psychiatric changes, headaches, back and neck pains, poor progress at school and the industrial psychologist's opinion that the plaintiff is unemployable, the court was satisfied that the accident has had a tremendous impact on the ability of the plaintiff to work. The court awarded R650, 000.00 for general damages in 2015 terms.
31. In **Manginda V Road Accident Fund (12465/15) [2018] ZAGP JHC 410 (13 June 2018)**, the plaintiff sustained the following injuries, facial fractures, back trauma, frontal abrasion, left tibia and tibia fracture, and multiple contusions, he also suffered from epilepsy. The award in the case was R700, 000.00 in 2018 terms.

32. In this matter the plaintiff has suffered serious injuries which have left him compromised which include a mind, traumatic brain injury (concussion), dislocated jaw, right facial nerve, palsy (paralysis) abrasion on the right eyebrow, forehead, lower back (L5/S1 disc narrowing), right thigh and right knee and bleeding from both ears.
  33. He is now left with symptoms of epilepsy, lower back pains, he suffers from frequent headaches, a paralysis on the right of the face, a mild inner ear deafness on the left, he has poor vision with neuro-cognitive deficits associated with poor memory, he has concentration and attention deficits, he suffering from neurobehavioral changes, moderate levels of anxiety and severe symptoms of post-traumatic disorder.
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34. I am of the view that a fair and reasonable amount for compensation for general damages should be awarded in the sum of R 800, 000.00 (eight hundred thousand rand).
  35. The total award for both general damages and loss of earnings (both past and future loss), before apportionment, should be an amount of R 3, 208, 400.00 (three million two hundred and eight thousand four hundred rand).
  36. The merits were resolved and the defendant was found liable for 80% of the plaintiff's proven damages. This apportionment of damages must now be taken into account with the result that the amount for which the defendant is liable to compensate the plaintiff is in

the amount of R 2, 566, 720.00 (two million five hundred and sixty-six thousand seven hundred and twenty rand).

37. The costs should follow the results. It was not argued otherwise. The plaintiff is successful. There is no reason not to award costs to the plaintiff as a successful party. Accordingly, I will award costs to the plaintiff.

38. In the result, I make an order in the following terms:

36.1 The defendant is ordered to pay the plaintiff a sum of R 2, 566, 720.00 (two million five hundred and sixty-six thousand seven hundred and twenty rand).

36.2 The defendant is ordered to pay the costs of suit.



**M. Gwala AJ**

Acting Judge of the High Court of South Africa  
Gauteng Division, Pretoria

**Appearances:**

For the plaintiff: Adv RB Mphela

For the defendant: Adv RT Ramabulana