

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

Case No: 14/2017

In the matter between:

MPAYIPHELI BONGANI GRIFFITHS

Applicant

And

ROAD ACCIDENT FUND

Respondent

JUDGEMENT

NQUMSE AJ

Introduction

1. The plaintiff, a 14 years and 10 months old boy who was doing grade nine at the time of the accident that gives rise to this claim, was on 14 June 2009 at a bus stop at Mitford in the area of Ntabethemba when he was hit by a motor vehicle with

registration number: DYG 874 EC, rendering him unconscious and as a result suffered the following injuries:

- 1.1 A severe head injury with loss of consciousness (Glasgow Coma Scale 10/15) ;
- 1.2 Multiple head lacerations;
- 1.3 Mandibular jaw fracture;
- 1.4 Left peri-orbital hematoma and traumatic uveitis and
- 1.5 Left elbow sprain and deep abrasion wound right proximal lower leg.

BACKGROUND FACTS

- 2. The accident occurred on a dirt road in Mitford. The sketch plan denotes the width of the road as 7,5 meters. The motor vehicle in question was driven by one Ayanda Dingezweni, the insured driver.
- 3. After the impact, the plaintiff was conveyed to a mini hospital in Thornhill. Subsequently he was taken to Hewu Hospital, where it was opined that due to the severity and seriousness of his injuries he should be transferred to Frere Hospital in East London. At Frere Hospital he remained disorientated for approximately 7 days and he underwent surgery for the fractured mandible with wires and plates inserted. He was further attended by a neurosurgeon, an ophthalmologist, an orthopaedic surgeon and a maxilla-facial surgeon. He was detained in the hospital until 29 June 2009.

4. In his pleadings plaintiff avers in paragraph 7, that as a result of his injuries, he underwent hospitalization and received medical treatment, he was disabled and disfigured; he suffered pain and loss of amenities of life. Consequently he suffered damages as follows:

4.1 He claims R500 000.00 for estimated future medical treatment comprising of:

The costs of conservative treatment, consultation with doctors, costs of neurological consultation, orthopaedic surgeon, controlled x-rays, medication and transportation to appointments.

4.2 He claims R5, 923, 900.00 for estimated future loss of employability as per the actuarial calculations.

4.3 He claims R1, 500, 000.00 for general damages for pain and suffering.

5. Initially, this claim was launched in Johannesburg and it was enrolled in the Gauteng Local Division sitting in Johannesburg. The matter was subsequently transferred to this court despite it being trial ready in that court. The defendant disputed merits and quantum until the last minute on the day of trial, 29 November 2018. At tea break during the trial the defendant conceded 100% liability of plaintiff's damages and sought an indulgence to be afforded an opportunity to consult with the claim handler and to obtain a mandate in respect of quantum. This caused the matter to be rolled over to the next day, however, it could still not be finalised owing to the same reason of obtaining the necessary mandate. It was only after 3 days without

any success by the legal representative of the defendant, that the court had to cause the parties to proceed with arguing of the matter.

6. The plaintiff filed expert reports which eventually were admitted by the defendant after the experts were flown in from Johannesburg. The reports are from the following experts:

6.1 Dr TM Ramakgopa (Orthopaedic Surgeon)

6.2 Prof. Lekgwana (Neurosurgeon)

6.3 Margaret Anne Gibson (Neuropsychologist)

6.4 Clara Tsatsawana (Occupational Therapist)

6.5 Elna Roussow (Industrial Psychologist) and

6.6 Amith Haribhai (Actuary)

7. Although it was left until the last minute, counsel for the defendant conceded that albeit not tendered by the defendant, that plaintiff will require future medical treatment and consequently plaintiff's claim for future medical expenses should be covered by an undertaking or certificate in terms of section 17(4) of the Road Accident Fund Act.¹

8. The concern goes also for the general damages which defendant is not contesting, save to mention that notwithstanding the R1, 500, 000.00 claimed, a reasonable amount to be awarded is within the court's discretion. He referred the court to case law, more particularly *Manewel v AA Onderlinge Assurassie Assosiasie Bpk* 1967 (1)

¹ See par 5 of Defendant's Heads of Argument.

C&B755(C) and Hendriks v Minister of Safety and Security 2016(6) QOD A4 – 34 (ECG). In both cases the plaintiffs suffered head injuries and sequelae thereof, however according to the defendant's counsel they were a bit more severe than the plaintiff's in this case. He therefore argued that a reasonable award should be between R750, 000.00 and R800, 000.00.

9. Despite admitting the actuarial report the defendant's submission is that taking into account the age of the plaintiff, his projected working life, such as illness, early death and unemployment, it opined a 25 % contingency deduction on plaintiff's future uninjured income as more realistic and that would give an amount of R5, 258, 304.75 and a 20 % contingency on the future injured income which would amount to R173 021.00. A deduction of the future injured income from the future uninjured income would give the plaintiff a nett future loss of R5, 085, 283.75. It was further submitted that if the same contingencies of 25 % could be applied in respect of past uninjured income of R175 929.00 and a 20 % in respect of past injured income, this would leave plaintiff with a net past income of R123 891.40. The result is that the plaintiff's reasonable loss of income would be in the amount of R5, 209, 175.15.

10. Accordingly, the only items of the claim which I am called upon to determine are the plaintiff's future loss of earnings and a reasonable award of general damages. In this regard I turn to deal with the expert report briefly. The Neuropsychologist, Ms Gibson, had indicated that in between 2 assessments which she has done over a period of 3 years, the plaintiff has instead regressed dramatically. Of most significance is her conclusion that the brain injury was a watershed in the life of the

plaintiff. That no further improvement in the functioning of plaintiff is likely to occur from her perspective as a Neuropsychologist. Plaintiff remains with neurocognitive, neurobehavioral and neuroaffective as well as neurophysical difficulties consistent with brain injury.

11. The Orthopaedic Surgeon, Dr Ramokgopa, indicates that the plaintiff's current chronic headache and personality change are a direct consequence of the severe head injury he had suffered. The plaintiff has a poor vision to the left eye. He has been left with a peri-orbital hematoma. His elbow that was sprained in the accident has stiffness, although with a fair range of motion, which is accounted for by the sprain injury at the time of the accident.

12. The Neurosurgeon, Professor Lekgwara, concludes that the plaintiff has some neuropsychological problems which need to be assessed by a Clinical Psychologist. His prognosis is that the plaintiff suffers from post-concussion headaches. That there is a 10 to 20 % chance of the plaintiff developing epilepsy, treatment of which will cost approximately R15 000, 00 per annum. His further prognosis is that their literature records that 80 % of patients who suffer from post-concussion headaches recover within a period of 2 – 3 years. However, the remaining 20 % of patients remain with chronic symptoms. According to his opinion is that a spontaneous resolution of these headaches the plaintiff suffers from is not expected, taking into account that it has been 9 years since the accident. Treatment for the headaches will cost up to R3 000, 00 per annum.

13. The Occupational Therapist, Ms Clara Tsatsawane, concurs with the Neurosurgeon on the issue of plaintiff's total loss of employability. She concludes that the plaintiff

is not a preferred candidate in the open labour market owing to his accident related injuries. It is her contention that plaintiff qualifies for general damages and he should undergo 10 (ten) sessions with an Occupational Therapist at a cost of R750, 00 per session. She further recommends that plaintiff should have 30 (thirty) sessions with a Clinical Psychologist/Psychiatrist at the rate of R1 200, 00 per session. She also allocated an amount of R9 000, 00 for care giver / home facility should the plaintiff's condition deteriorate and become disabling due to organic disorder.

14. The Industrial Psychologist, Elma Rossouw, notes that the plaintiff with a Matric level of education would have been able to compete for a sedentary type of work. She further opines that he is not likely to have had any physical, emotional and cognitive restrictions since he was reportedly healthy prior the accident life. It is her further opinion that the plaintiff left his previous employments due to sequelae of the accident namely, pain and inability to perform certain duties. Having taken regard of the other expert reports, she opines that the plaintiff's prior test results when she assessed him, compiled with his chequered work record and intermittent periods of unemployment, the plaintiff will be totally unemployed in about five (5) years' time. She also confirms that the plaintiff's amenities, qualities of life and life enjoyment have been negatively impacted by the accident of 14 June 2009 and its sequelae.

15. The Actuary, Amith Haribhai, taking into account the plaintiff's residual difficulties and various factors in the open labour market, he allocated higher than normal contingency for the past morbid loss of income. He applied more than the normal contingency deductions in his calculations, at 20 % on the injured income and 40 %

on the uninjured income. Counsel for the plaintiff submits that if the court is inclined to interfere with the contingency assumptions of the actuary, it must apply the normal contingency deductions which are 5 % for the uninjured income and 15 % for the injured income.

16. It is trite that general contingencies cover a wide range of consideration which may vary from case to case.² As already indicated that at the time of the accident the victim was 14 years of age. He is relatively of young age and as was stated in *Bee v Road Accident Fund*³ the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty assessing the claimant's likely career path.

In *Road Accident Fund v Keridge*⁴ Nochohls AJA writing for the majority judgment stated as follows:

“Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger the claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earning they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchments, unemployment, ill-health, death and myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally

² Robert J Koch *The Quantum Yearbook* (2015) at 120

³ 2018(4) SA 366 SCA at par 116

⁴ *RAF v Keridge* (1024/2017)[2018] ZASCA 151 (01 November 2018) at par 44 (Reportable)

awarded higher contingencies, the younger the age of the claimant. This court in Guedes⁵, relying on Koch's Quantum Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20 percent which would decrease on a sliding scale as the claimant got older. This of course depends on the specific circumstances of each case but is a convenient starting point."

17. Taking into consideration that the claimant is 24 years old, and his surrounding circumstances, I am inclined to accept the submissions by Mr Bester for the fund who suggested that a 25 % contingency to be applied for future uninjured income and a 20 % be applied for future injured income as more reasonable. The same percentage be applied for past uninjured income at 25 % and past injured income at 20 % leaving claimant with a reasonable loss of income of R5, 209, 175.15.

18. In regard to general damages I find the approach in *Sandler v Wholesaler Coal Supplies Ltd*⁶ very instructive where the following is stated.

"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 on the Judge's view of what is fair in all the circumstances of the case."

19. I have been referred to a number of cases by counsel for the plaintiff in which general damages were awarded. Whilst I find those helpful it has been stated in the matter of *Bay Passenger Transport v Frainzan*⁷ that

⁵ Road Accident Fund v Guedes [2006] ZASCA 19, 2006 (5) SA 583 (SCA) (Guedes) par 8

⁶ 1941 AD 194 at 199

“Comparable cases, when available should rather be used to afford some guidance in a general way, towards assisting the court in arriving at an award which is not substantially out of general accord with the previous and broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible in an appropriate case to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and the sequelae may have been either more serious or less than those in the case under consideration.”

Having regard to the reports of the experts more particularly that of the Industrial Psychologist I am of the view that an amount of R1, 200, 000.00 for general damages would be an appropriate award.

20. Turning to the question of events, the less said about the conduct of the defendant in handling the matter the better. However, the court is unable not to express its displeasure in the ineptness of the officials of the Fund in causing such an inordinate delay and the attended burden of costs to the taxpayer. What is mostly lamentable is the arrogance of the officials of the Fund; disregarding the many frustrations suffered by our courts in the delinquent manner they handle these matters. I find no better way to express the court's displeasure than the articulation of Davis J in *Mashiqa v Road Accident Fund*⁸ when he stated

⁷ 1975 (1) SA 269 (A) at 274

⁸ (2120/2014) [2018] ZAGPP HC 539 (13 June 2018)

“There is a disconcerting number of these trials where the facts pertaining to the merits are either common cause or undisputed but in any event would in all probability result in 100 % liability of the Fund yet the merits remain contested until the last moment. Many of these include claims on behalf of minor pedestrians or passengers. In an equally disconcerting number of these cases the answer to the question by the court as to why merits had not settled or conceded is given by counsel or attorney representing the Fund as being a lack of instruction from the Fund.”

The learned Judge continues to vent his frustration and said:

“By its own inaction the Fund has therefore not only increased the pain and suffering of an innocent plaintiff but also increased the amount of public funds to be paid in respect thereof. In all probability this will be the same consequence in other cases where similar delays occur. The unsatisfactory manner in which the Fund conducts its litigation in this court therefore has a public element.”

21. Despite the matter being a relatively straightforward one, the manner in which this case has been litigated by the defendant fits in all fours with the situation described by Davis J above. Despite the defendant not providing counter expert reports having received plaintiff's as early as 2016, it refused to concede merits until the day of trial. Even then, counsel for the Fund could tender no undertaking for lack of instruction from the claim handler. The call by the counsel for the plaintiff to summon the claim handler to court and to proffer an explanation on his or their ineptitude is not an unreasonable request. However, owing to the further delay in

finalising this matter and the consequent costs likely to be incurred I declined the invitation and suffice to order that the defendant pays costs on a punitive scale.

22. In the draft order prepared by the plaintiff, the court had been requested to order the creation of a Trust Account at ABSA Trust.

In the result I order as follows:

1. The merits having been settled between the parties, the Defendant is liable for 100 % of the Plaintiff's damages.

2. The Defendant pay to the Plaintiff the amount of :

R1, 200,000.00 (One Million Two Hundred Thousand Rand only) in respect of general damages.

2.1 R5, 209,75.15 (Five Million Two Hundred and Nine Thousand One Hundred and Seventy Five Rands and Fifteen Cents) in respect of loss of future income.

2.2 The monies to be paid into the Plaintiff's Attorney Trust Account:

ACCOUNT HOLDER : M. Ndimma Incorporated

BANK : Standard Bank

BRANCH NAME : Carlton Centre

ACCOUNT NUMBER : 0...
BRANCH CODE : 0...
TYPE OF ACCOUNT : Cheque Account

3. The Defendant will furnish to the Plaintiff with an undertaking in terms of Section 17 (4) (a) of Road Accident Fund, Act 56 of 1996 to pay 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 him, arising from injuries sustained by him in a collision, on 14 June 2009 after the costs have been incurred.
4. The Defendant shall pay the Plaintiff's taxed or agreed attorney and client costs on the High Court scale, to date, subject thereto that such costs shall include the following:
 - 4.1 The costs of Plaintiff's counsel;
 - 4.2 The costs of all medico-legal reports, addendum reports and joint reports served by the Plaintiff, as well as such reports furnished to the Defendant or its attorney;
 - 4.3 The qualifying fees of the experts referred to and listed in the Court Order dated 30 October 2018;
 - 4.4 The reasonable costs incurred by and on behalf of the Plaintiff, as well as the costs consequent to attending the medico-legal examinations;

4.5 The costs of all necessary witnesses and a Plaintiff who attended court.

5. The Plaintiff is directed to cause a trust ("the Trust") to be established in terms of the Trust Property Control Act 57 of 1988.

6. The Trust instrument contemplated in paragraph 5 above shall make provision for the following:

6.1 The Plaintiff (Bongani Griffiths Mpayipheli) is to be sole beneficiary of the Trust;

6.2 The Defendant shall be responsible for costs related with the establishment and administration of a Trust in terms of Section 84(1)(b) of the Administration of Estates Act 66 of 1965 as amended according to the prescribed tariff applicable to curators as reflected in the Government Gazette notice R 1602 of 1 July 1991 specifically paragraph 3(a) and 3(b) of the Schedule thereto;

6.3 The trustee(s) administration costs shall be borne by the Defendant;

6.4 The trustee(s) are, if so required, to provide security to the satisfaction of the Master of the High Court;

6.5 The ownership of the trust property vests in the trustee(s) of the Trust in their capacity as trustees;

6.6 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by the Honourable Court;

6.7 The amendment of the trust instrument is subject to the leave of this Honourable Court;

6.8 The reasonable costs incurred in the provision of the security to the satisfaction of the Master of the High Court for the administration of the award and the annual retention of such security to meet the requirements of the Master in terms of Section 77 of the Administration of Estates Act.

VM NQUMSE

ACTING JUDGE OF THE HIGH COURT

Appearances:

**For the applicant: Adv Babalo Metu Instructed by M. Ndimma Incorporated c/o
Mandla Falithenjwa INC. KING WILLIAM'S TOWN**

**For the respondent : Adv Johan Bester Instructed by Smith Tabata Attorneys,
KING WILLIAM'S TOWN**

Date heard : 4 December 2018

Date judgment delivered : 12 February 2019