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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2016/05577

In the matter between:

S, G

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MABESELE, J:

[1] The plaintiff has instituted a claim against the defendant for damages for bodily injuries he sustained in the motor collision.

[2] On 9 March 2017 the defendant conceded merits and accepted liability for 80% of the plaintiff's proved or agreed damages.

[3] On the same date an order was made, directing the defendant to:

- 3.1 compensate the plaintiff for 80% of the plaintiff's proved or agreed damages arising from the motor collision which occurred on 23 May 2015;
- 3.2 furnish the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act¹, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or rendering of a service to him or the supplying of goods to him arising out of the injuries sustained by the plaintiff in the motor vehicle collision which occurred on 23 May 2015 and the *sequelae* thereof, after such costs have been incurred and proof thereof, which undertaking shall be limited to 80%;
- 3.3 pay the plaintiff the sum of R100 000,00 as an interim payment.

[4] The costs of the postponement were reserved for adjudication on finalisation of the matter.

[5] At the commencement of the trial the parties admitted the following:

- 5.1 the skills, expertise and qualifications of the experts of record to assist the court by furnishing their expert opinions;

¹ 56 of 1996

5.2 the truth and correctness of the facts and the opinions expressed in the respective medico-legal reports filed, in accordance with Rule 36(9)(b), of:

- i) Dr Percy Miller – neurosurgeon;
- ii) Dr M Naidoo – psychiatrist;
- iii) Mr K Viljoen – orthotist and prosthetist;

5.3 the truth and correctness of the factual basis and actuarial assumptions contained in the report of Algorithm Consultants and Actuaries CC, dated 13 August 2018;

5.4 the truth and correctness of the areas of agreement recorded in the joint minutes of the expert witnesses such that same constitute common cause evidence and which requires no further proof thereof.

[6] Due to these admissions no expert witnesses were called to testify.

[7] The parties agreed on an amount of R14 240,00 in respect of the plaintiff's claim for past loss of income. I was called upon to make a determination for the amount of general damages to be awarded to the plaintiff and the contingency deduction to be applied to the plaintiff's claim for future loss of income.

[8] The plaintiff contends that an award of R1 200 000,00 for general damages and contingency deduction of 11,5% for future loss of income are appropriate as opposed to an award of between R700 000,00 and R750 000,00 and contingency deduction of 30% for future loss of income which are considered by the defendant to be appropriate.

[9] The plaintiff was employed as a forklift operator at Sun Valley Africa Flowers since 01 September 2009. He earned a salary of approximately R3 400,00 per month.

[10] On 23 May 2015 the plaintiff was knocked by a motor vehicle and injured his head and left arm after he had fallen on his head, chest and arm on the ground. He sustained mild to moderate head injury and fracture of the left arm.

[11] Upon his return to his pre-accident employment he experienced difficulties meeting his job demands. He was subsequently placed on light duties. He left employment on 10 May 2018 after he was dismissed for refusing to train a new employee. When he left employment he was 37 years old and earned a salary of approximately R4 000,00 per month with UIF and overtime benefits. According to experts he would have worked until the normal retirement age of 60 to 65 years, depending on a variety of factors such as his health status, personal circumstances and conditions of employment.

[12] Mild head injuries, according to Dr Miller, do not produce neuropsychological organic brain damage-related effects and are always better by 6 to 9 months after the event has passed. In the case of a head injury in the mild to moderate spectrum the plaintiff can develop medium or moderate neuropsychological or cognitive changes or defects, which can sometimes get better or become worse.

[13] The plaintiff has fixed flexion contractions over the fingers and the thumb, with a total loss of active and passive movements of these areas, and of the wrist. He has no shoulder rotation, and has very minimal extension and flexion movements of the shoulder. The global power of the left elbow is reduced and circulation of the left hand and fingers appears compromised. The left upper limb is permanently injured, with a poor prognosis for the return of function. Implants in relation to the left upper limb needed to be removed. There is a possibility of the presence of Volkmann's ischaemic contracture of the left forearm. The plaintiff suffers from partial to permanent disability due to injuries to the left upper limb, with total orthopaedic disability due to complete loss of function in the left forearm.

[14] It was noted that since the plaintiff does everything with the right arm, same has now undergone some trauma. The plaintiff constantly feels pain in the right arm which relates to a chronic strain and sprain and could probably render his arm more difficult to use. The plaintiff may then, purely because of pain, not be able to exert much force with the right arm.

[15] Mrs Grootboom and Ms Nkuna who are both clinical psychologists,

prepared joint minutes dated 27 August 2018. They both noted that neuropsychological and cognitive tests that were performed on the plaintiff revealed shortcomings with regard to his attention and concentration, working memory, vision and moderate symptoms of depression which are all associated with head injury *sequelae*, compromised by psycho-emotive, behavioural and physical difficulties.

[16] The occupational therapists, in their joint minutes dated 6 March 2018, noted that due to the plaintiff's left upper limb impairment, the plaintiff is not suitable for occupations requiring bilateral hand function, inclusive of bilaterally working above shoulder, as well as bilateral or unilateral left hand manual load handling. They noted that the plaintiff does not meet the physical requirements for occupations that fall within medium, heavy to very heavy type of work category, unilaterally or bilaterally. In addition, Ms September is of the opinion that the plaintiff is no longer suitable for meaningful occupation in the open labour market. Ms Moagi is of the opinion that the plaintiff will be a vulnerable competitor and job seeker with reduced efficiency, effectiveness and productivity compared to uninjured peers. However, Ms Moagi is of the opinion that the plaintiff is still employable in occupations within his vocational exposure, from a cognitive perspective. They both agreed that the plaintiff will experience a partial loss of independence in execution of activities of daily living. He has to live with pain on the left shoulder, left elbow and left hand. He suffers from mood related disorders.

[17] The industrial psychologists are in agreement that although the

accident did not render the plaintiff unemployable, it nonetheless resulted in functional truncation and reduced employment options making him a compromised competitor in the open labour market.

[18] In considering general damages for pain and suffering, disfigurement, permanent disability and loss of amenities of life, the court has to take into account all the facts and circumstances of the case. Regard be had that each and every award depends on the particular circumstances of each case and that previous awards in broadly similar cases serve as guidelines². I am grateful to both counsel for referring me to comparative cases and awards which I found useful.

[19] Counsel for the plaintiff relied on two cases of this division. They are discussed briefly hereunder.

[20] In *Matjee v Road Accident Fund*³ the plaintiff sustained head injury and severe laceration of the brachial artery resulting in a flaccid left arm. The prolonged immobilisation resulted in a “frozen shoulder” with limited movement, which made it difficult for the plaintiff to do bi-manual activities. His permanent disability was severe as he had lost approximately 95% of his power grip in the left arm and hand. The stiffness and bad positioning of his hand had contributed to his inability to work. The main vein carrying blood into the arm was severed, causing the loss of much blood and oxygen to his arm. That resulted in the arm becoming floppy. His spine was out of balance due

² See, *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A) (2E3) QOD 117 at 535H-536A

³ 2017 (7D4) QOD 7 (GJ)

to the drooping of the left arm. The degree of movement of his shoulders had been severely impaired. His elbows were very stiff. He was unable to bend or use his left elbow and due to the minimal grip of the left hand he could not use it to eat with. Due to the frozen shoulder, his left arm was useless and he could not effectively function with tasks requiring medium or heavy work which require bilateral arm function. The court awarded him R650 000,00 in 2017. The value in 2018 would be approximately R700 000,00.

[21] In *Ramasetla v Road Accident Fund*⁴ the injuries sustained by the plaintiff in consequence of the accident were head injury, fracture of the right radius and the brachial plexus of the right arm. This simply refers to the damage to the nerves that conduct signals from the spinal cord to the right shoulder, arm and hand, rendering the plaintiff's entire right arm practically non-functional. The court awarded him an amount of R700 000,00 in 2013. The value in 2018 would be approximately R900 000,00.

[22] In similar matter of *Mdunge v Multilateral Motor Vehicle Accident Fund*⁵ which was relied on by counsel for the defendant the plaintiff sustained multiple injuries embracing left shoulder, arm and hand, loss of all useful vision in left eye and significant facial lacerations and disfigurement. The nerves that conduct signals from the spinal cord to the left shoulder, arm and hand were damaged, rendering left arm flail and completely useless. The plaintiff was awarded an amount of R180 000,00 in 1998. The value in 2018 would be approximately R550 000,00.

⁴ Case no: 2010/36120

⁵ 1998 (4J2) QOD 145 (N)

[23] In addition to the cases referred to, I found the following cases equally helpful in my assessment of damages. These are the cases of *De-Felice v South British Insurance Co Ltd*⁶ and *Smith v Road Accident Fund*⁷.

[24] In the matter of *De-Felice (supra)* the plaintiff whose brachial nerves of the right arm were wrenched out of the spinal column suffered the following *sequelae*, namely, a paralysis of the right arm which was later amputated and the shoulder which was immobilised. He also suffered pain to the spinal column. The court awarded him R5 500,00 in 1962. The value in 2018 would be approximately R500 000,00.

[25] In the matter of *Smith (supra)* the plaintiff sustained a partial fracture of the right side of his skull. He also suffered a traumatic amputation of the entire left arm. The *sequelae* were severe pain, shock and distress, resulting in future operations and behavioural problems in the form of aggression and withdrawal. The court awarded him R250 000,00 in 2013. The value in 2018 would be approximately R560 000,00.

[26] In the present matter the plaintiff suffered mild to moderate head injury with abrasion of his scalp and dizzy spells. He sustained fractured left forearm with permanent orthopaedic disability.

[27] Due to head injury sustained the plaintiff experiences difficulty in

6 1962 (1D2) QOD 22 (W)
7 2003 5D2) QOD 1 (AF)

concentration, psychomotor speed, working memory and vision, among others. However these problems seem not to be severe, in my view. This is evidenced by the plaintiff's ability to perform his work as a forklift operator for a period of 3 years after he was involved in the accident. He was also capable of training other employees. Regard be had that he was dismissed from work for refusing to train a new employee.

[28] His left upper limb is impaired and practically non-functional. He has to live with pain on his left shoulder, left elbow and left hand. Due to the accident he now suffers from mood related disorders. He suffers partial loss of independence in execution of activities of daily living and needs regular supervision.

[29] Having taken into account all the relevant factors and considered previous awards, I am of the view that an amount of R680 000,00 would be fair and equitable compensation as general damages.

[30] On the question of future loss of income it is beyond dispute that due to the upper limb impairment the plaintiff does not meet the physical requirements for occupations that fall within medium, heavy to very heavy type of work category. He is no longer suitable for meaningful occupation and his vulnerability with reduced employment options will make him a compromised competitor in the open labour market. However, the accident did not render him completely unemployable.

[31] For these reasons, I am of the view that contingency deduction of 15%

for future loss of income is appropriate. This will amount to R613 897,00.

[32] On the issue of costs the defendant agreed to pay the plaintiff the wasted costs occasioned by the postponement of the matter on 9 March 2017 in addition to costs that the defendant will be ordered to pay.

[33] In view of the above, I make the following order:

33.1 The defendant shall pay the plaintiff the sum of R946 510,00, arising from the injuries he sustained in the collision on 23 May 2015 and which comprises 80% of:

i)	General damages	R 680 000,00
ii)	Past loss of income	R 14 240,00
iii)	Future loss of income	<u>R 613 897,00</u>
	Sub-total	R1 308 137,00
	0	
	Less 20% apportionment	
	R1 046 510,00	
	Less interim payment	<u>R</u>
	<u>100 000,00</u>	
	Total	R
	946 510,00	

33.2 The aforesaid sum of R946 510,00 shall be payable within 14

days hereof to the plaintiff's attorneys, Mafate Inc Attorneys
Trust account as follows:

Mafate Inc Trust account

Standard Bank

Branch Code: 002305 – Carlton Branch

Account No: [....]

33.3 Interest *a tempore mora* on the aforesaid amount shall be payable 14 days hereof to date of payment

33.4 The defendant shall pay the plaintiff's party and party costs of the action on the High Court scale which costs shall include:

33.4.1 The costs of preparation for trial, consultations, attendances on trial on 9 March 2017 and wasted costs occasioned by the postponement of the action on 9 March 2017.

33.4.2 The costs of 29 and 30 August 2018.

33.4.3 The reasonable costs of the reports, addendum reports, if any, joint minutes, addendum joint minutes, if any, and the preparation, attendance and reservation costs to be determined by the Taxing Master, of the following expert witnesses:

- i) Dr P Miller – neurosurgeon
- ii) Dr E A Mjuza – orthopaedic surgeon
- iii) Drs Mashao and Dzichaunya – radiologists
- iv) Dr M Naidoo – psychiatrist
- v) Mrs L Grootboom – clinical
neuropsychologist
- vi) Ms N September – occupational therapist
- vii) Dr K Viljoen – orthotist and prosthetist
- viii) Ms Z Shaik – industrial psychologist
- ix) Algorithm Actuaries CC

**M M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Plaintiff's representatives:	Adv F F Docrat
Instructed by:	Mafate Inc Attorneys
Defendant's representatives:	Adv W J van Wyk
Instructed by:	Diale Attorneys
Date of hearing:	30 August 2018

Date of judgment:

20 September 2018