

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

518/15
CASE NO: 17587/13

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| (1) | REPORTABLE: YES /NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |

IN THE MATTER BETWEEN:

ADV. AJ DU TOIT

PLAINTIFF

OBO KADEPHI WILLIE MTSHEMLA

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI, J

[1] On or about 1 March 2010, at or near the pavement of Vanguard Drive, Cape Town, Kadephi Willie Mtshemla (Mr Mtshemla), who was at that time pushing a bicycle on the pavement of the roadway, was knocked down by a motor vehicle. Neither the identity of the owner nor that of the driver has been established.

[2] As a result of the injuries sustained by Mr Mtshemla when he was hit by the said unidentified motor vehicle, a curator *ad litem* had to be appointed to him to institute action on his behalf. Consequently, Albertus Johannes Du Toit (the plaintiff), a practising advocate, was duly appointed curator *ad litem* to Mr Mtshemla, and, he is as such suing the Road Accident Fund (the Fund) for damages in respect of bodily injuries sustained by Mr Mtshemla during the collision in question.

[3] At the commencement of the hearing, I was informed by the plaintiff's counsel that the Fund has tendered an offer of 80/20 (in favour of the plaintiff) on merits and that the plaintiff has accepted the offer. The Fund's counsel applied to separate *quantum* from merits so as to facilitate the procurement of joint minutes. I refused to grant the application and ordered that the matter be proceeded with on *quantum*. What is in issue, which I have to determine in respect of *quantum*, are two heads of damages, namely, general damages and loss of income or earning capacity.

[4] The plaintiff prepared a court bundle which was presented at the hearing. The court bundle consisted of the following documents:

1. Bundle "A" – The Plaintiff's Expert Reports
2. Bundle "B" – Documentation Bundle

[5] In terms of the minutes of the pre-trial conference, the parties reached the following agreement pertaining to the documents contained in the bundles of documents prepared for purposes of trial:

- “12.2.1 Documents and copies of documents and extracts from documents or copies of documents will, without further proof, serve as evidence of what they purport to be without requiring formal proof in the normal cause of events;
- 12.2.2 The foregoing arrangement is subject to the following:
 - 12.2.2.1 Neither party admits the correctness of the contents of any document as a result of the aforementioned pragmatic arrangement;
 - 12.2.2.2 Any party has the right, on at least 4 days' notice prior to the trial date, to require that any specific document or extract from any specific document be proven formally.”

[6] The plaintiff presented the oral evidence of the following expert witnesses: Dr Johan Reid (Dr Reid) a neurologist; Dr Hannes Swart (Dr Swart) an industrial psychologist and Mr Alex Munro (Mr Munro) an actuary. Besides the oral evidence, the plaintiff also presented the medico-legal reports of the three expert witnesses. There were other expert medico-legal reports in the court bundle which were not admitted into evidence.

[7] The Fund did not tender any oral evidence nor did it present any of its medico-legal reports into evidence.

[8] All the documents and/or medico-legal reports that were not admitted into evidence do not constitute real evidence but are amongst the documents which could be referred to as being what they purport to be. Extracts from some of the reports were relied upon in the expert medico-legal reports which were admitted into evidence.

[9] At the end of the trial I requested counsel to provide written submissions for their closing arguments. The submissions were duly submitted and I am thankful to counsel for the extensive manner they dealt with the issues in their respective submissions.

THE INJURIES

[10] The extent of the injuries and their *sequelae* are evident from the oral evidence presented by Dr Reid and his medico-legal report. The injuries include a severe closed head injury, with skull and facial fractures, as well as injuries to his left optic nerve. A left clavicle fracture associated with a brachial plexus injury and left femur fracture, a de-gloving laceration of the face and a traumatic amputation of his left leg below the knee.

[11] Mr Mtshemla is, as a result of the injuries, left with a number of functional impairments, a number of physical deficits and the important number one would be orthopaedic, in the sense that he has a permanent amputation of his left lower leg, below the knee. He is now fitted with a prosthesis and that would be his biggest single residual functional impairment.

[12] He sustained a severe/moderately severe head injury, as a consequence of which he suffered a cognitive change, linguistic change, behavioural and personality change. He is as a result left with a neurocognitive compromise which together with the amputated left lower leg provide for the bulk of his functional impairment and the major reason why he is unemployable and cannot compete in the open labour market and is permanently impaired.

[13] The injuries as enunciated by Dr Reid are not in dispute. Although the Fund's counsel, in his submission, contends that the plaintiff failed to prove the nature of the orthopaedic injuries sustained by Mr Mtshemla and their *sequelae*, in that, neither Mr Mtshemla nor the orthopaedic surgeon who treated him, were called to establish the orthopaedic injuries and their *sequelae*; and, because neither side admitted the other's reports, the Fund's counsel, however, concedes that the Fund's approach of the matter was on the footing that Mr Mtshemla's left leg was amputated below the knee.

LOSS OF FUTURE EARNINGS/EARNING CAPACITY

[14] It is common cause that Mr Mtshemla is unemployable in the open labour market due to the combination of his cognitive compromise and the amputation. What is in issue is the amount which should be awarded.

[15] It is also not in dispute that at the time of the collision, Mr Mtshemla was employed as an unskilled general worker earning a salary of R650 *per* week. The parties are, however, at odds as to Mr Mtshemla's future career path had the collision not occurred. According to the plaintiff's counsel, Mr Mtshemla would have progressed to become a truck driver, whereas, the Fund's counsel contends that Mr Mtshemla would have remained an unskilled general worker.

[16] The plaintiff's submission that Mr Mtshemla would have progressed to become a truck driver is based on the opinion of Dr Swart, an industrial psychologist called to give evidence in support of Mr Mtshemla's claim for loss of earnings. Dr Swart's postulation that Mr Mtshemla would have progressed to become a truck driver is based on the collateral information he received from Mr Steyl, Mr Mtshemla's employer. According to Dr Swart, he was told by Mr Steyl that he (Mr Steyl) would have assisted Mr Mtshemla to procure a driver's licence and employed him as a truck driver in his business. Based on this information, Dr Swart

testified that qualifying as a truck driver would have qualified Mr Mtshemla as a semi-skilled employee, within a range of salaries indicated in a document extrapolated from the Quantum Yearbook 2015 by Dr RJ Koch, which was admitted into evidence as exhibit "A". In terms of the said salary scales, as set out in exhibit "A", Mr Mtshemla would have reached his ceiling of R136 000 *per annum* in three years, that is, in 2015. From there he would have received linear inflation earnings until retirement age. It is upon this postulation that the final actuarial calculations are based.

[17] The Fund's counsel objected to the admission of Dr Swart's evidence relating to the collateral information he received from Mr Steyl on the basis that it was hearsay evidence. In order to expedite the matter I ruled that the evidence be admitted provisionally and that I will make a final ruling at the end of the matter. Besides the hearsay issue, the Fund's counsel objected to the admission of Dr Swart's evidence as a whole on the basis that for an expert witness he was evasive and too defensive of his opinion and that his conclusions were not based on established/admitted facts.

[18] I shall therefore deal with these objections before I go into the merits of the case.

Hearsay Evidence

[19] It is common cause that the information on which Dr Swart relies on in his opinion that but for the collision, Mr Mtshemla would have progressed to become a truck driver, was provided to him by Mr Steyl. That this information is hearsay is also not in dispute. The plaintiff's plea is that this collateral evidence should be accepted despite the hearsay nature thereof.

[20] The relevant part of the Law of Evidence Amendment Act 45 of 1988 (as amended) ("the Act") which pertains to the hearsay evidence reads:

- "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself or herself testifies at such proceedings; or
 - (c) the court, having regard to –
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice."

[21] The submission by the plaintiff's counsel is that I should allow the hearsay evidence for the following reasons:

1. The nature of the proceedings – the Patient (Mr Mtshemla) sustained catastrophic injuries and these are proceedings to recover damages by the plaintiff on his behalf;
2. The nature of the evidence – the evidence is from Mr Mtshemla's employer at the time of the accident and relates to Mr Mtshemla's employment situation and prospects. It serves

as collateral substantiation for the expert opinion expressed by Dr H Swart;

3. The purpose for which the evidence is tendered – the evidence is tendered as substantiation for the expert opinion of Dr H Swart;
4. The probative value of the evidence – the evidence was collected by an experienced expert witness on two occasions over a period of approximately two years. The said expert confirmed under oath to the court that he was happy with the validity of the said evidence which he also testified, accorded with the expert opinion and experience;
5. The reason why the evidence was not given by the person on whose credibility the probative value of such evidence depends – the employer resides in Cape Town and was not brought to Pretoria to testify at the hearing because the defendant did not deliver an expert report by an industrial psychologist, thereby creating the expectation that the evidence would not be disputed;
6. Any prejudice to a party which admission of such evidence may entail – it is respectfully submitted the defendant cannot be heard to say the admission would be to its prejudice as its counsel was able to cross examine Dr H Swart at length, *inter alia*, in respect of this hearsay evidence;
7. Any other factor – it is respectfully submitted that the fact that Mr Mtshemla sustained catastrophic injuries and these are proceedings to recover damages by the plaintiff on his behalf, is a very relevant factor to be considered.

[22] In support of these submissions the plaintiff's counsel relied on the judgments in *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA), wherein it was held that such statements are examined to see whether they fall within the statutory definition of hearsay evidence. If they do they are then measured against the requirements set out in s 3 (1) (c) (i) to (iv) of the Act and are admitted as they pass muster;¹ and in *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) wherein it was held that the Act introduced an alternative, highly flexible standard for the admission of hearsay evidence in the light of the interests of justice. Courts must rule on the admissibility of tendered hearsay evidence having regard to the collective effect of all the considerations set out in paras (i) to (iv), and any other factor that should be taken into account in the interests of justice.²

[23] The Fund's counsel on the other hand, submits that the factors in s 3 (1) (c) (i) to (vii) of the Act, should not be considered in isolation as they are interrelated and they overlap and on that basis contends that it is in the interests of justice that this hearsay evidence be excluded on the following reasons:

1. The nature of the proceedings – these proceedings are civil proceedings, adversarial in nature, where each party must adduce the necessary evidence to support its case;
2. The nature of the evidence sought to be introduced – relying in the *Makhathini*-judgment above the evidence sought to be introduced can be characterised as assertions of the plaintiff's erstwhile employer about (apparently, at least on the evidence, undiscussed) future career path of Mr Mtshemla.
3. The purpose for which the evidence is tendered – the evidence seeks to establish a basis for the quantification of Mr Mtshemla's

¹ See page 518 to 521

² See page 145 to 148

post morbid earnings scenario. It is thus a central and decisive issue on this aspect;

4. The probative value of the evidence – relying on the *Makhathini*-judgment above at page 523 para 32, the reliability of this information is highly questionable:
 - a. Dr Swart conceded that the employer is affectionate towards Mr Mtshemla and may want to help him in advancing his case;
 - b. Dr Swart's interview with Mr Mtshemla did not even touch upon this.
 - c. Mr Mtshemla was not called to testify, despite it becoming clear during cross examination that the issue is disputed. The omission was never explained.
5. It lacks a factual basis – Mr Mtshemla appears to have been oblivious to it. No evidence was tendered as to how far he is with his preparatory steps e.g. obtaining a learner's licence. Other than Mr Steyl's assertion, it has not been established whether Mr Mtshemla is actually driving, and if so for how long – Dr Swart conceded as much.
6. The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends – no reason was given in evidence or at least from the bar why Mr Steyl was not called. Clearly he was reachable. Dr Swart testified that he spoke to him "last night". Mr Steyl's evidence being decisive on this aspect of loss, every attempt should have been made to bring him to testify. Not even a postponement was attempted.
7. Prejudice to the party against whom the evidence is sought to be adduced – the inability to cross examine Mr Steyl on the

cornerstone of this aspect of Mr Mtshemla's case escalates the degree of prejudice against the Fund. This evidence seeks to lay down the foundation for high calculation that may result in Mr Mtshemla being compensated more for what is fair and due to him. The prejudice affects the funds available to other victims who also require fair compensation.

8. Any other factor – the following factors are relevant:
 - a. The plaintiff always knew that his reports have not been admitted and should have prepared fully;
 - b. The plaintiff opposed an application to separate merits from *quantum*, this would have given him ample time to subpoena Mr Steyl;
 - c. No application was made for postponement; and
 - d. There is no indication that an attempt was made to procure the evidence by affidavit.

[24] Dr Swart's oral evidence is that on 21 November 2013 he contacted Mr Mtshemla's employer, Steyl's Transport in Cape Town, and talked to Mr Steyl, the person who signed the employer's certificate on behalf of Mr Mtshemla. Mr Steyl confirmed that Mr Mtshemla worked for him and that he, Mr Mtshemla, was one of his best workers. He was a good worker and punctual, was mechanically knowledgeable –he could take out a motor vehicle gear box and put it back again, he was an all-rounder who could be used everywhere in the business. Mr Steyl told Dr Swart that, Mr Mtshemla could have progressed to a code 10 driver and would by 2013 have earned a salary of R1400 to R1500 *per week* in November 2013 values. A code 10 driver can drive a 3 ton lorry and higher but not exceeding 10 tons. Dr Swart talked to Mr Steyl again the night before the day of the hearing and Mr Steyl confirmed what he told Dr Swart on 21 November 2013.

[25] According to Dr Swart, people progress to higher positions if able to do multiple tasks, otherwise they remain unskilled which means that they do the same work all the time. Mr Mtshemla is punctual, an excellent all-rounder and trustworthy, he would therefore have progressed higher. Code 10 would have been the licence he would obtain in order to drive a lorry. He was already driving a tipper within his employer's premises without a licence and he would be able to drive any truck.

[26] I am of the view that the collateral evidence in issue should, in the interests of justice, not be admitted into evidence as will appear from the reasons stated hereunder.

[27] Firstly, the evidence lacks factual basis.

[28] In order to test the opinion of experts, the facts upon which they draw their conclusions must be considered. If the facts are incorrect, which is part of the judicial function to determine then *a fortiori* the opinion is flawed.³

[29] There is no evidence before me which indicates that Mr Mtshemla aspired to follow the career path of a driver. Dr Swart's evidence does not show that Mr Mtshemla was intending to improve his career along that path. As *per* Dr Swart's report, when he consulted with Mr Mtshemla, Mr Mtshemla told him that his work at Steyl Transport entailed loading rubble and taking the rubbish to the dump he never informed him that he intend to become a driver. Of importance is that other than Mr Steyl's assertion that Mr Mtshemla was a driver, there is no evidence that Dr Swart established this fact with Mr Mtshemla. It is also not apparent from the evidence that if Mr Mtshemla was indeed driving, for how long he was so driving. There is no evidence that indicates how far he was, if at all, with any preparatory steps to becoming a driver e.g. obtaining a learner driver's licence. Mr Mtshemla did

³ See Ndlovu v RAF 2014 (1) SA 415 (GSJ) para 35.

not testify, as such, the fact that he is a driver and aspired to improve his career along that path, as alleged by Mr Steyl, remains unproven and should be taken as speculation and at best should be characterised as assertions of Mr Steyl about future career path of Mr Mtshemla which were not even discussed with or communicated to Mr Mtshemla.

[30] There being no factual underpinning for Dr Swart's opinion in this regard, the collateral evidence ought to be rejected.

[31] Secondly, the probative value of the collateral evidence is also suspect. The submissions raised by the Fund's counsel as to the reliability of this information is to me correct. It is indeed so that Dr Swart conceded that Mr Steyl was affectionate towards Mr Mtshemla and may have wanted to help him in advancing his case. Besides that, Dr Swart himself was not a satisfactory expert witness as he was not objective. He was evasive and too defensive when answering questions put to him. He gave long winded answers in trying to make up a case for the plaintiff.

[32] The examples of Dr Swart's lack of objectivity, which I agree with, are succinctly set out in the submissions by the Fund's counsel as follows:

1. When asked to postulate a scenario "thinking away" the truck driver scenario, he refused to accept the possibility that Mr Mtshemla could have remained a general worker for the rest of his life;
2. When asked whether the client is "functionally literate", he embarked on a long discourse, not answering the question;
3. When asked a direct question on Mr Mtshemla's chances of obtaining a driver's licence within the period he estimated, the answer was, yet again a long discourse on the process of driving, not the prerequisite of a learner's licence; and

4. When challenged about the fact that Mr Mtshemla's alleged truck driver aspirations were never articulated to him indicates that they were never there, he became extremely defensive.

[33] I conclude therefore that Mr Mtshemla was an unskilled general worker and would have continued as such until retirement. His damages for loss of income should be calculated based on his employment as an unskilled general worker.

Calculations

[34] There are two actuarial reports presented in this instance. Both actuarial reports are compiled by Mr Alex Munro the actuary who was called in to testify on behalf of the plaintiff. The first actuarial report is dated 27 November 2013 and was compiled by Mr Munro on the basis of the report of Dr Swart (the industrial psychologist). This actuarial report projects Mr Mtshemla's career path as that of an unskilled general labourer. This report was not admitted into evidence.

[35] The second actuarial report which was handed in court as exhibit "B" quantifies the oral evidence of Dr Swart relating to Mr Mtshemla's career path as a driver. This actuarial report seeks to replace the initial actuarial report of Mr Munro. Dr Swart, during his testimony, as already indicated, provided me with a document admitted into evidence as exhibit "A" which was extrapolated from the Quantum Yearbook 2015 by Dr RJ Koch. The document indicated a number of skills with parameters for specific jobs. According to this document a driver with a code 10 driver's licence would earn a salary of between R53 500 to R294 000 *per annum*. Mr Mtshemla, as Dr Swart testified, would have been licenced in 2012 and reached his peak in 2015. He testified that the salary which Mr Mtshemla would have earned in 2012 was R1450 and would have progressed to R136 000 *per year* in 2015. The plaintiff's claim is based on the calculations contained in exhibit "B".

[36] The submission by the Fund's counsel is that Mr Mtshemla's post morbid career path should be considered as that of his pre-morbid, that is, an unskilled general worker along the earning level referred to by Dr Swart in his report. This would, according to counsel, imply that:

1. For Past Loss – Mr Munro's past loss calculations should remain as they are in Annexure "B", that is, at R331 900 (before contingencies).
2. For Future Loss - post morbid career path to be the same as pre-morbid, that is, an unskilled general worker.

[37] I have already rejected the evidence of Dr Swart which seeks to project Mr Mtshemla's career path as that of a driver and ruled that Mr Mtshemla's loss of income should be calculated based on his employment as an unskilled general labourer. In that sense, I have to reject the evidence of Mr Munro to the extent that it projects Mr Mtshemla's career path as that of a driver together with the calculations relating thereto as it is based on the flawed opinion of Dr Swart.

[38] To my mind *quantum* for this head of damages should be determined based on Mr Mtshemla's career path as an unskilled general labourer for both past and future loss. All other actuarial calculations are to be in accordance with the actuarial assessment of Mr Munro contained in his report dated 13 May 2014.

[39] It is my view that normal contingencies should apply, that is, 5% for uninjured past loss and, taking into account Mr Mtshemla's age, 32 at time of collision and 37 at time of calculations, 12,5% for uninjured future loss should be applied. A recalculation of the damages should therefore be produced and presented to this court for final verification within two weeks of this order.

GENERAL DAMAGES

[40] The parties are agreed that Mr Mtshemla should be compensated for general damages. The parties are at odds as to the amount of damages which should be awarded to Mr Mtshemla.

[41] The plaintiff's submission is that Mr Mtshemla's general damages are worth at least R2 000 000. In support of this contention, the plaintiff's counsel referred me to the following judgments:

1. *Bonnesse and Another v Road Accident Fund and Others* (1505/2009) [2014] ZACPEHC7 (20 February 2014) in which general damages of R2 500 000 were awarded. It was conceded on behalf of the plaintiff that the injuries sustained in this judgment were more severe than those of Mr Mtshemla in this instance.
2. *Zarrabi v The Road Accident Fund* 2006 (5B4) QOD 231 (T) in which general damages of R800 000 were awarded to a 30 year old female trainee medical specialist. The plaintiff in this judgment sustained the following injuries: a severe diffuse axonal brain injury with severe neurophysical, neurocognitive and neuropsychiatric consequences; multiple facial lacerations; fractured nose, contusions of the chest with bilateral contusions of the lungs; rupture of the liver; contusion of the kidneys with haematuria; closed fracture of the right *humerus*; open fracture of the right radius and ulna; deep laceration of the right elbow; open fracture of the right radius; fracture of the left patella; laceration of the left knee; injuries to ligaments of the right knee; and multiple contusions and abrasions of both legs. The plaintiff suffered from intellectual impairment; personality change;

dysarthria; spasticity of the right side; loss of depth perception; loss of vision of the right visual field and lack of drive; subtle speech, language and communication problems; difficulties with executive functions, sustained concentration, memory psychomotor speed and emotional control. Pre-accident the plaintiff was a high achieving scholar, medical graduate and practising doctor. As a result of the cognitive and physical *sequelae* of her injuries, plaintiff would be unable to be employed as a medical doctor or specialist. At best plaintiff would manage some form of employment in a sympathetic environment on a flexible or part time voluntary basis. General damages of R800 000 awarded in 2006 are now worth R1 419 000.

3. *Seme v Road Accident Fund* 2008 (5A4) QOD 33 (D) an amount of R800 000 was awarded to a 36 years old male AIDS facilitator/counsellor. The plaintiff sustained a severe head and brain injury, fractures of the maxilla with multiple loss of teeth, bilateral pulmonary contusion, fractures of the right tibia and fibula, compound fracture of the left knee, multiple scalp and facial lacerations, dislocation of the right elbow as well as the lumbar spine and pelvis. Plaintiff was found to be permanently disabled, immobile and totally dependent on his family for his well-being with no reasonable prospects of being gainfully employed in future. The plaintiff was HIV positive and the court found that his life expectancy should be reduced by 35%. General damages of R800 000 in 2008 are now worth R1 485 000.

[42] The submission is that even though the plaintiff in the *Bonnesse*-judgment sustained more severe injuries than Mr Mtshemla, it is contended that Mr Mtshemla's injuries and the *sequelae* thereof are worse than those suffered by the plaintiffs in the *Zerrabi* and the *Seme* cases.

[43] On the other hand, the Fund's submission is that Mr Mtshemla should be awarded an amount of between R750 000 and R1 000 000 in respect of general damages. The Fund's counsel raised a number of difficulties with the evidential basis for injuries and their *sequelae* sustained by Mr Mtshemla in the evidence of Dr Reid. The Fund's counsel conceded that the matter should be approached on the basis that Mr Mtshemla has an amputation below the knee; some kind of injury; and facial injuries (including cheekbone) resulting in an asymmetric smile. In support of his submissions in this regard, counsel relied on the judgment, in *Mnguni v Road Accident Fund 2010* (6E2) QOD 1 (GSJ) wherein the plaintiff suffered severe brain injury with fractures of the skull and facial bones; severe injuries of the right lower leg resulting in traumatic amputation; soft tissue injuries to the left ankle and a whiplash injury of the spine; significant neuropsychological difficulties including headaches; impotence; depression and change of personality. Orthopaedic injuries causing difficulty in walking with prosthesis due to painful stump; phantom pain at the site of amputation; neck pain associated with headaches; and, shoulder, knee and ankle pain with significant impact upon employment prospects.

[44] According to the Fund's counsel the telling differences between the evidence led in *Mnguni*-judgment and the current matter is on the nature and extent of the brain injury and loss of amenities of life. The plaintiff in the *Mnguni*-judgment led evidence which established that he had a permanent and irreversible diffuse neuronal injury characterised by general atrophy of his brain and in the current matter there is no evidence. He also led evidence that showed his loss as regards amenities of life whereas in this instance no evidence was led. In the *Mnguni*-judgment there was also evidence of sexual dysfunction, the infestation of the stump by maggots and the likelihood of a further surgery to amputate the stump above the knee which is not the case in this instance. The plaintiff in the *Mnguni*-judgment was awarded R700 000 which translates to R1 242 000 in current terms.

[45] The *Bonesse*-judgment is entirely inapposite here because of the following reasons: the evidence of experts, friends, teachers etc. was actually led; some of the reports were admitted; the plaintiff would never bear children, continue with school

etc.; the plaintiff was an excellent student and a leader; six years after the collision the plaintiff was the same total invalid as previously reported; she remained with a severe post traumatic dementia, severely compromised speech and vision. She is a central tetraplegic with flaccid leg paralysis; total bladder and bowel incontinence and dysaesthetic pain.

[46] It is trite that there is no hard and fast rule of general application requiring a trial court or a court of appeal to consider past awards. This is so because it would be difficult to find a case on all fours with the one being heard. Awards in decided cases might be of some use only for guidance. A court may also derive assistance from the general pattern of awards.⁴

[47] As is the case in this instance, the judgments I have been referred to are not on all fours with the case before me. The injuries sustained by the plaintiffs in those judgments, the treatment administered and the consequences of such injuries are not similar to those in the present case and as such the amount of compensation would not necessarily be the same. I am also mindful of the fact that the injuries sustained by the plaintiffs in those cases are more severe than in the current case. I am however satisfied that the general patterns in those cases are indicative of what courts would normally award in such circumstances.

[48] The Supreme Court of Appeal 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.⁵

⁴ See *RAF v Marunga* [2003] 2 All SA 148 (SCA) paras 24 and 25.

⁵ See *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A) at 534H -535A.

[49] In this instance, there is no evidence tendered which indicates the pain which Mr Mtshemla suffered after the collision and which he continues to suffer, if any. There is also no evidence as to the amenities of life that he has lost. I however, have to assume in Mr Mtshemla's favour that he suffered pain immediately after the collision and that he suffered pain after the amputation and whilst recuperating from the various injuries which are common cause. I also have to assume in his favour that he has lost amenities of life. As an amputee and because of the cognitive abnormality there must be some amenities which he enjoyed before the collision which he does no longer enjoy. There is also evidence that he has been disfigured – he has an asymmetrical scarred face which includes the eyelids and pupils.

[50] The award of general damages is by no means an easy task. There is no basic formula for the assessment of this kind of damages. To arrive at a fair and just amount both objective and subjective factors may have to be taken into account. The facts of each particular case must be looked at as a whole.⁶

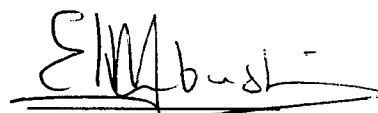
[51] There is no doubt that Mr Mtshemla has suffered severe injuries and he must be fairly compensated. I am therefore of the view that when considering the injuries sustained by Mr Mtshemla and the general trend followed by courts in awarding damages, it would be fair and reasonable if he is awarded an amount of R1 400 000.

[52] I therefore make the following order:

1. The plaintiff succeeds in his claim for 80% of his damages.
2. The damages for loss of earnings should be determined based on Mr Mtshemla's career path as an unskilled general labourer for both past and future loss.

⁶ See *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA) at para 17.

3. All other actuarial calculations in respect of the damages for loss of earnings are to be in accordance with the actuarial assessments contained in the actuarial report dated 13 May 2014.
4. Contingencies applicable are 5% for the uninjured past loss and 12.5% for uninjured future loss.
5. A recalculation of the damages for loss of earnings to be produced and presented to this court for final verification within two weeks of this order.
6. General damages are granted at an amount of R1 400 000 (One Million Four Hundred Thousand Rand).
7. The defendant is ordered to pay the costs of action including all the qualifying costs.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	: 14 MAY 2015
DATE OF JUDGMENT	: 05 AUGUST 2015
PLAINTIFF'S COUNSEL	: ADV. A. LAUBSCHER
PLAINTIFF'S ATTORNEY	: SAVAGE JOOSTE & ADAMS INC
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