



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

Case No: 682/22

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	02 May 2024
SIGNATURE	DATE

In the matter between:

Fostah Nyathi

Plaintiff

And

Road Accident Fund

Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10:00 on 02 May 2024

Judgment

Phahlamohlaka AJ

1. This is a claim for damages as a result injuries sustained in a motor vehicle accident that occurred on 3 March 2021. The plaintiff was a passenger in the motor vehicle when the accident occurred.
2. The defendant conceded 100% liability for the plaintiffs agreed or proven damages. Counsel for the defendant submitted that the issue of future hospital, medical and other expenses are not in dispute and therefore the defendant will furnish an undertaking in terms of section 17(4)(a) of the Road Accident, 56 of 1996 ("the Act").
3. The issues for determination are, therefore, general damages as well as past and future loss of earnings. The defendant has not appointed any experts and therefore relied on the plaintiff's experts to argue its case. At the commencement of the trial the plaintiff made an application in terms of Rule 38(2) for the experts' evidence to be adduced through affidavits. The application was not opposed by the defendant, and I accordingly granted it. The plaintiff testified under oath and the defendant called no witnesses.
4. The plaintiff, Foster Nyathi, testified under oath that as a result of the accident he sustained the following injuries:
 - Right shoulder dislocation;
 - Left pelvic fracture;
 - Painful lower leg;

- Left ribs fracture;
 - Loss of teeth;
 - Neck injury;
 - Injured mouth.
5. The plaintiff further testified that he had scratches on the head and an injury underneath his chin. As a result of the shoulder injury he is unable lift objects when he wants to work. He is unable to bend as a result of the pelvic fracture. Sometimes his ribs are painful even when he is seated. His chin would also be painful at times. He experiences persistent headaches. The plaintiff is a forklift driver working for Alba packages. At the time of the accident the plaintiff was not employed. He only got employment after the accident. He testified that the injuries affected his productivity adversely.
6. Dr Oelofse, the orthopaedic surgeon recorded the following injuries:
- Facial injuries;
 - Chest injury;
 - Right shoulder injury;
 - Left hip injury;
 - Lower leg injury.
7. Dr Oelofse confirms that the plaintiff was injured under his chin, he broke and lost a tooth during the accident. Dr Oelofse further noted that the plaintiff also sustained a head injury with resultant post-traumatic headaches. According to Dr Oelofse the plaintiff will be able to perform light manual work, with restricted climbing, carrying objects and standing. Dr Oelofse qualified the plaintiff for general damages under the narrative test, with the Whole Person Impairment of 21%.
8. Dr Irsigler, the Plastic and reconstructive surgeon, recorded the following scars:

- Over his (plaintiff's) scalp on the right side there are two scars both measuring 2,5 cm x 2mm. The scars are linear, slightly raised and homogeneous. It is amenable to surgical improvement;
 - Over his nose on the right side there is a scar measuring 1,5 x 1cm. It is irregular and homogeneous and amenable to surgical improvement;
 - On his bottom lip he has a scar measuring 2cm x 5mm;
 - He has a deformity of the upper lip (step deformity);
 - Over his chin there is a 2cm x 5mm scar;
 - Underneath his chin, extending onto his neck, there is a scar of 8cm x 7cm.
9. Dr Irsigler concludes that the plaintiff will retain scarring which will not lend itself to any further surgical improvement. Dr Irsigler also qualified the plaintiff for general damages under the Narrative test.
10. The occupational therapist, Mr C Durandt, recorded that since the accident, the plaintiff has been able to work in the same capacity as his work history, but with reported left hip discomfort when getting onto and off the forklift, as well as with excessive sitting. Based on the physical and functional capacity evaluation, the plaintiff is currently able to meet all the inherent job demands of a forklift operator. He may require a small step to minimise the climbing height onto the forklift. Although there are no formal requirements pertaining to sitting, rest breaks are advised after every 1-2 hours of sitting.
11. The occupational therapist concludes by opining that should the plaintiff receive suitable and successful medical intervention it is anticipated that he will experience relief in his discomfort and experience of pain. He may be capable of performing work as a forklift operator with better mobility and agility and with improved manual coordination and lifting ability until retirement age.
12. According to the industrial psychologist, David De Vlamingh, prior to his involvement in the accident, the plaintiff's work history was limited to work as an Assembler, Barman and Forklift Driver. At the time of the accident, he was

recently unemployed because his contract just ended, but he was actively looking for employment when involved in the accident.

13. On the pre-accident vocational and earning potential, the industrial psychologist opines that his pre-accident employment earnings progression would likely have mirrored his actual post-accident career progression to date, however, without any limitations. At the time of the accident, Mr Nyathi was just 30 years of age and at the early stages of his career development. According to the industrial psychologist the plaintiff would still have secured his current employment as a forklift driver in the employer of alpha Packaging in June 2021, earning between the lower quartile and median of the Paterson A3 level in 2022 (R13,843 salary plus pension benefits) as per September 2022 payslip.) In addition, the plaintiff would have commenced his higher certificate in logistics and supply chain management studies in 2023, as it was reportedly financed by Alpha Packaging. Upon completion of his higher certificate in logistics and supply chain management (at the end of 2024), the plaintiff's total package would have increased to fall at the median of the Peterson B2 level (R45,833 p/m in 2023-rand value, total package) By the age of 45. Thereafter, only inflationary increases would have applied until his retirement age of 65.
14. With regard to the post-accident career prospects, the Industrial psychologist opines that based on all the available information, research conducted in the expert medical opinion is received, the writer concluded that post-accident he will no longer be able to reach his pre-accident career and earnings potential. Taking into account his self-reported difficulties he has done well to secure his current position and is fortunate to have understanding employers. The industrial psychologist further records that following the recommended treatment and rehabilitation, Mr Nyathi's vocational capacity should improve somewhat, and he should be able to retain his current employment and still develop his career in line with his pre-accident postulation. However, there is no doubt that Mr Nyathi has been rendered less productive and efficient than his uninjured colleagues and his lack of self-confidence due to his dental and facial injuries will probably result in lower career peak than in his uninjured scenario. The industrial psychologist concludes that Mr Nyathi has clearly

Sephardic future loss of earnings as a result of the accident in question and its sequelae.

15. In order to succeed on a claim of future loss of earnings or earning capacity, the plaintiff must prove that the accident affected his estate adversely. In other words, the plaintiff must prove that as a result of the accident his estate has diminished. It is common cause that at the time of the accident the plaintiff was unemployed, and therefore had no estate. It is further the plaintiff's evidence that he obtained employment after the accident, and he was even able to pursue his studies.
16. Counsel for the plaintiff submitted that, considering the setback of the plaintiff's career, caused by the accident and the injuries sustained, the plaintiff is likely to reach a lower career and earnings ceiling and also likely to reach such ceiling at a later stage than postulated in the injured scenario. He will have slightly slower earnings growth according to expert opinion. I was also referred to the matter of **Van Dyk v Road Accident Fund**¹ where a 10% pre-morbid contingency deduction and a 25% post-morbid contingency deduction was applied. Counsel also referred me to **Van Rooyen v Road accident Fund**² where the court applied a 15% pre and 35% post-accident contingency deduction. The plaintiff in *Van Dyk supra* was 44 years of age and in *Van Rooyen supra* the plaintiff was 42 years of age.
17. I agree with the principle in the two cases referred to in paragraph 16 above. However, they are both distinguishable to this case because the plaintiff in this matter was unemployed pre-accident. I agree with the argument by the plaintiff's counsel that a 25% contingency deduction is fair and reasonable considering the age of the plaintiff.
18. Counsel on behalf of the defendant submitted that since the accident the plaintiff has been able to work in the same capacity as his work history, but with

¹ 2003 95^E8) QOD 1 AF

² 2011 (6C4) QOD 25 (ECM)

reported left hip discomfort when getting onto and off the forklift, as well as with excessive sitting. Counsel further submitted that the plaintiff will still be able to do his forklift work. The plaintiff was not hindered by the accident to complete his qualification for Logistic Management at Rosebank College. The plaintiff was able to get a job within the same field of skill and earning more than he was before the accident. Therefore, the defendant submitted, it is clear that the accident has not adversely affected the plaintiff's earning capacity and as such no future loss of earnings can be justified.

19. The defendant contended that because the plaintiff suffered no loss of earning capacity, the court should order absolution from the instance or alternatively apply a 10% contingency differential spread based on the pre and post morbid scenarios being the same. I agree with counsel for the defendant that the plaintiff is able to work post-accident. However, the 10% contingency deduction cannot be justified.
20. In light of the evidence presented before me, the plaintiff is able to function optimally post-accident. There is no evidence regarding the plaintiff's pre-accident employment status. The experts only rely on postulations which, in my view, are speculative. It is settled that the plaintiff did not suffer any loss of earnings as a result of the accident although he may have suffered a residual capacity to earn. In **Rudman v Road Accident Fund**³ Jones AJA said:

"In my opinion the learned Judge in the court a quo has not misdirected himself in his understanding of these authorities or in his application of the law to the facts. His judgment correctly emphasises that where a person's earning capacity has been compromised, that capacity constitutes a loss, if such loss diminishes the estate" (Rumpff CJ in the above quotation from Dippenaar's case) and "he is entitled to be compensated the extent that his patrimony has been diminished" (Smalberger JA In President Insurance Co Ltd v Mathews)."

This principle was adopted in a number of cases, and it is now settled that once there is a diminution of the estate this will translate into a monetary loss. The

³ (370/01) [2002] ZASCA 4 All SA 422(SCA) at para 11

converse thereof is that where there is no diminished estate there is no loss. See also **Griffiths v Mutual and Federal Insurance Company Limited**⁴ [1993] ZASCA 121; 1994(1) SA 535(A); and **President Insurance Company Limited v Mathews**⁵ 1992 (1) SA 1.

21. In my view, the plaintiff *in casu* suffered only a residual capacity loss. The plaintiff testified that he is able to do his job as a forklift driver, albeit with discomfort. He said that his co-workers are complaining because he takes constant breaks, but that is the only complaint he testified about. I did not understand the plaintiff to assert that his employer is complaining about his work performance. Because he was not working at the time of the accident, his patrimony has not diminished and therefore his pre and post-accident employment potential are the same. The Actuary calculated the plaintiffs value of loss as follows:

-	Income if the accident did not occur	:7 256 007
-	Income given accident did occur	:5 747 107
-	Difference	:1 508 900

22. As alluded to earlier, the plaintiff's pre and post-accident earning potential are the same and I will apply a contingency differential spread of 5%. The results of my calculations are as follows:

-	Income but for the accident	:7 256 007
-	Less 15%.	:1 088 401.05
-	Subtotal.	:6 167 605.95
-	Income having regard to the accident	:7 256 007
-	Less 20%	:1 451 201.4
-	Subtotal	:5 804 805.60

⁴ [1993] ZASCA 121; 1994(1) SA 535 (A)

⁵ 1992(1) SA

Total value of loss.

362 800. 35

23. In as far as general damages are concerned, the Road Accident Fund has accepted the injuries sustained by the plaintiff as serious and therefore the issue is the quantum of damages in this regard. The duty of the court is to award fair and just compensation to the plaintiff who sustained serious injuries as a result of the accident. Because there is no mathematical formula to calculate the amount to be awarded for general damages, previously decided cases should serve as a guide in that regard. I am alive to the fact that the award of the amount is discretionary, but one must be guided by comparable cases in order to arrive at a fair amount of compensation. I agree with the principle in **Protea Insurance Co Ltd v Lamb**⁶ where it was held that a comparison of a plaintiff's general damages with previous awards need not take the form of a meticulous examination of awards made in other cases in order to fix an amount of compensation, nor should the process be allowed to dominate the inquiry so as to fetter the general discretion of the court.
24. Counsel for the plaintiff submitted that I should award the plaintiff an amount of R 700 000.00 as compensation for general damages. On behalf of the defendant, it was submitted that I should award an amount of R 350 000.00. Both Counsel referred to two common comparable awards to argue for their different amounts. In **Seconds v Road Accident Fund**⁷ the plaintiff was a 43-year-old female educator who sustained several injuries, including posterior dislocation of the left hip joint and a fracture of the posterior wall of the acetabulum. After initial exploration of her left hip joint, a hip replacement was eventually undertaken. Hereafter her bone crumbled, and she was eventually boarded due to her inability to continue with her work as educator. An amount of R 200 000 was awarded, with a current monetary value of R 516 000.00. In **Peter v Road Accident Fund**⁸ the plaintiff was a 40-year-old male electrical technician. He had a displaced intra-articular fracture of the acetabulum as result of the violent compression of femur head against it, as well as

⁶ 1971(1) SA 530(A) at 535H-536A

⁷ 2006(5F3) QOD 30(SE)

⁸ 2003 (5F3) QOD 9 (BHC)

considerable articular ligamentous damage. Osteo-arthritis to follow, which by itself would require total hip replacement in 5 years' time, and significant prospect of necrosis developing, in which event the hip replacement would have to be performed even earlier. Second hip replacement (a more comprehensive and risky procedure than the first) to be required some 15 years later. Also, some marked scarring of the right arm for which plastic surgery could achieve 50% improvement. An amount of R 180 000.00 was awarded with the current monetary value of R 514 000.00.

25. Counsel for the plaintiff also referred to **Mpondo v Road Accident Fund**⁹ and **Mdinginya v Road Accident Fund**.¹⁰ The injuries in these two cases are more serious than the injuries sustained by the plaintiff in the present case. However, a more comparable case is that of **Mills v Road Accident Fund**¹¹ where the plaintiff was a 42-year-old broker consultant who sustained significant scarring of the right forearm and glass that became embedded therein, had to be removed under general anaesthetic. There was an obvious scar of the forehead. He also sustained a fracture of the acetabulum on the right hip and will require a right hip replacement within approximately 10 years. Plaintiff was an active sportsman prior to collision, but significantly hampered in participating in sports thereafter.
26. In *casu*, the plaintiff sustained, among others, fracture of the acetabulum which was managed conservatively, and he received pain medication, anti-inflammatory medication, and crutches. He also sustained a soft tissue injury of the shoulder, with residual soft tissue pain. The plaintiff also presented with mild tenderness over the left ribs and anteriorly over the chest. The plaintiff was also injured under his chin, he broke a tooth and lost another tooth during the accident. Dr Irsigler, the plastic and reconstructive surgeon, recorded the following scars on the plaintiff:

26.1 two scars measuring 2,5 x 2 mm on the right side over his scalp;

⁹ 2011(6F2) QOD 11(ECG)

¹⁰ 2008(5F3) QOD 50 (CHC)

¹¹ 2011(6F2) QOD 1 (KZD)

- 26.2 a scar measuring 1,5 cm x 1 cm over his nose on the right side;
- 26.3 A scar measuring 2cm x 5 mm on his bottom lip;
- 26.4 He has a deformity of the upper lip (step deformity). The deformity is slightly diagonal;
- 26.5 Over his chin there is a 2 cm x 5mm scar;
- 26.6 Underneath his chin, extending onto his neck, there is a scar of 8 cm x 7 cm.
27. Counsel for the defendant could not justify the amount he proposed, except to submit that the injuries sustained by the plaintiff and their sequelae are less serious than the injuries in the two judgments he referred to. I do not agree with the defendant's counsel because he did not make mention of the several scars recorded by the plastic and reconstructive surgeon. In **Mashigo v Road Accident Fund**¹² the plaintiff had sustained a soft tissue injury to the left wrist, a soft tissue injury of the left knee, and bum wounds to her arms and breasts. The plastic and reconstructive surgeon in that case described that scarring as follows: *"a disfiguring scar measuring 180 mm x 20 mm on the anterior aspect of the left breast the lower medial and upper quadrants and extending onto the outer quadrant of the breast. It has a hypertrophic margin and the centre of the scar is depigmented. There is a similar scar measuring 100 mm by 25 mm running transversely across the surface of the right breast. It also has a hypertrophic margin with a depigmented centre. The scars to the arms are similarly 10 cm or longer each and are hypertrophic or post abrasion in nature but they are hyper pigmented."* The plaintiff was awarded R 450 000.00 as compensation for general damages with the current monetary value of R 612 000.00.

¹² [2018] ZAGPPHC 539 (13 June 2018)

28. Considering the injuries as recorded by the experts and the sequelae thereof, I am of the view that a fair and reasonable amount to be awarded for general damages should be R 650 000.00.
29. In the result I make the following order:
- (a) The defendant is ordered to pay the plaintiff the sum of R 1 015 800.35 (one million fifteen thousand and eight hundred rand and thirty five cents) being R 365 800. 35 (three hundred sixty-five thousand eight hundred rand and thirty-five cents) as compensation for future loss of earning capacity and R 650 000.00(six hundred and fifty thousand rand) for general damages.
 - (b) Interest thereon at the rate of 11.75% from the date of judgment until the date of final payment.
 - (c) The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act,56 of 1996, for 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of, or the rendering of the service or supplying of goods to him resulting from a motor vehicle accident that occurred on 3 March 2021, after such costs have been incurred and on proof thereof.
 - (d) Costs of suit.


K f Phahlamohlaka
Acting Judge of the High Court,
Mpumalanga Division,
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Date judgment reserved: 12 March 2024