

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: No

.....
SIGNATURE

09/07/2024
DATE

Case No: 525/2022

SIBUSISO THUNZINI NSINGWANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

This judgment was handed down electronically by circulation to the parties/and or parties' representatives. The date and time of hand-down is deemed to be 09 July 2024 at 10h00.

JUDGMENT

RYNEVELDT AJ

INTRODUCTION

[1] This case has its origins in a delictual action for damages. Mr. Sibusiso Thunzini Nsingwane (“the Plaintiff”) is holding the Defendant accountable for injuries he sustained as a passenger in a motor vehicle accident that took place on 13 November 2020 along the N4 Toll Route, Ngodwana, Mpumalanga Province.

[2] Merits have been conceded 100% in favour of the Plaintiff, and a Section 17(4)(a) Road Accident Fund Act 56 of 1996 (“the Act”) undertaking has been tendered to Plaintiff for future medical and hospital expenses, that may arise out of the said accident.

[3] Despite the Plaintiff's amended Particulars of Claim indicating a sum of R50 000,00¹, for past medical and hospital expenses, legal representatives for both parties did not address the Plaintiff's past medical and hospital expenditures in their submissions. Additionally, the Plaintiff gave no evidence to support the said sum claimed. Since the Plaintiff has not proven its case concerning this head of damages, I find no justified basis to award the Plaintiff any past medical and hospital expenses.

[4] The following issues however remained in dispute between the parties at the time of trial:

4.1 General damages

4.2 Loss of earnings- Past and Future Loss of Income.

[5] This court was called upon to determine the appropriate General damages amount and the appropriate contingencies that should be applied concerning the Plaintiff's loss of earning capacity.

¹ Trial Bundle page 298

TRIAL EVIDENCE

[6] At the commencement of the trial, Defendant's counsel Mr. Madavha, confirmed that Defendant does not have any medico-legal expert reports of its own and that Defendant will rely solely on Plaintiff's medico-legal expert reports, it was on this premise that the trial proceeded and by which the above medical- legal expert reports were accepted by agreement between the parties as evidence by affidavit in terms of Section 34(2) of the Civil Proceedings Evidence Act 25 of 1965 as amended and this Court's Uniform Court Rule 38(2).

[7] The following medico-legal experts' affidavits were marked as Exhibits:

Exhibit A- Dr Akhona Mazwi- Neurosurgeon²

Exhibit B- Mr. Samuel Mphuthi- Clinical Psychologist³

Exhibit C- Mr. Mashaba Saddy- Occupational Therapist⁴

Exhibit D- Ms. Chamisa-Maulana- Industrial Psychologist⁵

Exhibit E- Ms. Jullie Anne Valentini – Actuary⁶

Exhibit F- Dr. Joseph Sibanyoni Orthopedic Surgeon

[8] During the trial, the Plaintiff and Defendant's arguments were based on the medico-legal expert reports so marked.

GENERAL DAMAGES

[9] Regarding the Plaintiff's amended Particulars of Claim⁷, Plaintiff sustained the following injuries:

- *Multiple facial injuries;*
- *Head injuries;*
- *Clavicle Fracture;*
- *Soft Tissue injuries;*

² Trial Bundle pages 306 to 309

³ Trial Bundle pages 310 to 313

⁴ Trial Bundle pages 314 to 317

⁵ Trial Bundle pages 318 to 321

⁶ Trial Bundle pages 322 to 325

⁷ Trial Bundle page 297

- *Multiple open wounds on the face;*
- *Body injuries.*

[10] The Act was revised to include provisions that marked a new era in the history of third-party claims in South Africa. The laws related to the Defendant's responsibility to pay third parties for non-pecuniary loss (general damages) apply to this matter. The Defendant's obligation is now confined to severe injuries as defined in Sections 17(1) and (1A) of the Act.

[11] Mr. Magagula and Mr. Madavha attested to the Plaintiff's entitlement to General damages, using the Health Professional Council of South Africa's (HPCSA) letter dated December 13, 2023, as confirmation of this entitlement.

[12] The Orthopaedic Surgeon Dr. Sibanyoni, the Plaintiff '*sustained a severe injury of the cervical spine which healed with poor outcome and qualifies for general damages*⁸. He further opined that the Plaintiff's prognosis is poor even though his cervical spine injuries have healed and that the Plaintiff will benefit from future surgery⁹.

[13] Future cervical fusion medical operation is needed to help alleviate the Plaintiff's pain and improve his range of motion, according to Dr. Sibanyoni, and accordingly Plaintiff's future disability would improve¹⁰.

[14] In Dr. Mazwi's conclusion, he stated that the Plaintiff sustained a mild head injury with significant long-term disturbance¹¹.

[15] The clinical psychologist indicated that the mild head injury sustained by the Plaintiff gave rise to permanent neurocognitive deficits within a least moderate to severe degree of severity¹².

⁸ Trial Bundle page 148

⁹ Trial Bundle page 158

¹⁰ Trial Bundle page 148 and 149

¹¹ Trial Bundle page 179

¹² Trial Bundle page 212

[16] In the case of **Protea Assurance Co Ltd v Lamb**¹³, the court noted the following when addressing the potential significance of prior awards in determining general damages:

‘...the trial court, or the court of appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the court’s general discretion in such matters. 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 previous awards in 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 their sequelae may have been either more serious or less than those in the case under consideration’.

[17] Both parties submitted General damages case law ranging between R350 000,00 and R530 000, 00.

[18] Plaintiff submitted two cases, **Makupula v Road Accident Fund**¹⁴ and **Vukeya v Road Accident Fund**.¹⁵ The Defendant submitted the following two cases namely **Petronella Schecutte v Road Accident Fund 2023 ZAFSHC 391** and **Donaugh Marchie v Road Accident Fund**¹⁶.

[19] In **Ralph v Road Accident Fund**¹⁷, an unreported judgement handed down on 03 February 2023 in the Free State High Court Division- Bloemfontein, a 36-year-old male mechanic sustained a spinal injury (cervical and thoracic spine), non-orthopaedic injuries (head and chest injuries, and lower leg injury), as well as a classified mild diffuse traumatic brain injury with some cognitive and neuropsychological fallouts. The

¹³ 1971 (1) SA 530 (A)

¹⁴ 2010 (6) QOD 84-48 (ECM)

¹⁵ 2014 (7) QOD I (GNP).

¹⁶ (8962/06) [2010] ZAGPJHC 100 (5 November 2010)

¹⁷ (3069/2018) [2023] ZAFSHC 102

court awarded General damages in the amount of R600,000.00, an amount which should be slightly more in 2024.

[20] In **Ramolobeng v Lowveld Bus Services (Pty) Ltd and Another**¹⁸, a 34-year-old male, vegetable packer sustained a cervical and lumber spine as well as a head injury with a concussion. He subsequently had a spinal surgery where an artificial disk was inserted at levels L3/L4 and was hospitalized for six (6) months. He suffered from erectile dysfunction, moderate depression, low self-esteem, and struggled with domestic chores. He could not sit for long, sleep on one side, play soccer and was rendered unemployable in the open labour market. An award of R550 000.00 was made for General damages, with an updated amount of approximately R818 000.

[21] In the **Howard v Road Accident Fund**¹⁹, decided on 30 May 2011 in the Gauteng Division-Pretoria, the plaintiff a 61-year-old female, sustained the following injuries a severe compression fracture of L1, fracture of the fourth and fifth metatarsal bones on the right side, soft tissue injury to her neck, injury to her chest, and injury to her sacrum. She was hospitalised for 15 days, where she underwent a back operation. She suffered from low level of depression. She cannot maintain static postures. She has become irritable. The Court awarded her general damages in the amount of R220 000,00. In today's value, the said amount can be slightly more than double, approximately R560,000,00. Furthermore, the current Plaintiff has been diagnosed with a mild brain injury, and a severe back injury, with significant neurocognitive sequelae.

[22] Despite the cases submitted by the parties being somewhat different and distinguishable concerning the injuries sustained, sequelae, age, or gender, these awards helped guide me in determining an award that is somewhat comparable to earlier awards²⁰. In determining the appropriate award, I have taken into regard Plaintiff's discomfort, pain, and suffering because of his mild head injury and severe cervical spine injury. According to me, an award for General damages in the amount

¹⁸ 2015 (7C5) QOD 29 (GNP)

¹⁹ (19053/2010) ZAGPPHC 151

²⁰ Protea Insurance Co. Ltd v Lamb 1971(1) SA 530 (A) 534 to 5368

of R500 000.00 (five hundred thousand rand) is justifiable, fair, and reasonable. Under this head of damages, the Plaintiff has satisfied the burden of proof on a preponderance of the evidence.

Loss of Earnings

[23] At the time of the accident, Plaintiff was employed on a part-time basis as a mechanical fitter at Semfra Constructions with a basic income of R9 702,00 per month excluding allowances²¹. Ms. Chamisa-Maulana (Industrial Psychologist) postulated the Plaintiff's income as being above the medium earnings of semiskilled workers²². Premorbid, Plaintiff would have continued his employment as a mechanical fitter, reaching his ceiling at age 45 from where he would have earned an income in the upper quartile earnings of the semi-skilled workers- with an inflationary increase to the age of 65²³.

[24] In furtherance, Ms. Chamisa-Maulana postulated that Plaintiff is unemployable in the open labour market due to the injuries sustained during the accident²⁴.

[25] Dr. Sibanyoni (Orthopaedic Surgeon), opined that Plaintiff's ability to compete in the labour market has been compromised, and that should Plaintiff manage to secure sedentary work, he is more likely to retire 10 years earlier²⁵.

[26] According to Dr. Mazwi (Neurosurgeon), Plaintiff sequela will have a direct impact on his earning capacity due to the Plaintiff's memory disturbances, difficulty with concentration, and headaches²⁶.

[27] Mr. Mphuti (Neuropsychologist-Clinical Psychologist) opined that the Plaintiff's neuropsychological profile indicates that the Plaintiff's vocational functioning and prospects have been negatively impacted²⁷.

²¹ Trial Bundle page 240

²² Trial Bundle page 241

²³ Trial Bundle 244

²⁴ Trial Bundle page 246

²⁵ Trial Bundle page 150

²⁶ Trial Bundle pages 177-178

²⁷ Trial Bundle page 213

[28] For Ms. Mashaba (Occupational Therapist), Plaintiff's premorbid employment is classified to fall in the medium to heavy physical demands²⁸. She goes on to state that Plaintiff is currently unable to perform his premorbid job description, due to Plaintiff's physical limitations, and that Plaintiff is not likely to get work that falls within the sedentary/light work in the open labour market²⁹.

[29] Both parties made their respective submissions to their contingency deductions premised on factual and medical expert evidence. Mr. Madavha centered his contingency argument on the basis that Plaintiff is still employable post-morbid, and thus normal contingencies should be applied, with a zero loss of past loss of income.

[30] Mr. Magagula submitted that Plaintiff is entitled to past loss of earnings and future loss of earnings with a higher-than-normal contingency application for Plaintiff's future loss of income post-accident, of about 55%. This is a 40% contingency split for future loss of income.

[31] Contingencies include any conceivable relevant future occurrence that may produce harm or a portion thereof, or which may otherwise impact the level of the plaintiff's damage³⁰.

[32] The adjudication of contingencies deductions in calculating the quantum of an amount for past and future loss of earning ability is multidimensional and in all probability at times conjecture.

[33] Although the Court has broad discretion when it comes to contingency application such discretion should consider all pertinent facts and circumstances of any case, thus contingencies should be based on proven facts³¹.

²⁸ Trial Bundle page 227

²⁹ Trial Bundle page 228

³⁰ Erdmann v SANTAM Insurance Co Ltd 1985 (3) SA 402 (C) and Burns v National Employers General Insurance Co Ltd 1988 (3) SA 355 (C).

³¹ AA Mutual Insurance v van Jaarsveld 1974 (4) SA 729 (A).

[34] I am of the respective view that the following contingencies should be applied in this case:

34.1 For past loss- uninjured earnings, a 5% contingency deduction should apply to R524 700,00 which equates to R498 465,00.

34.2 For injured earnings, 50% contingency deduction should apply R524 700,00 which equates to R262 350,00, which gives a total past loss of R236 115,00.

34.3 Future loss of income- uninjured earnings, 20% contingency deduction should apply to R4 707 700,00 which equates to R3 766 160,00.

34.4 Injured earnings, 50% contingency deduction should apply 4 707 700,00 which equates to R2 353 850 loss, which gives a total future loss of R1 412 310,00: and

34.5 The total loss of earnings past and future is R1 648,425,00.

[35] Costs should follow suit.

ORDER

The Defendant is ordered to:

1. Pay the Plaintiff an amount of R500 000,00 (five hundred thousand rand), made up of General Damages and R1 648 425,00 (one million six hundred and forty-eight thousand four hundred and twenty-five rand) as compensation for future Loss of Earnings. In total an amount of **R2 148 425,00** (two million one hundred and forty-eight thousand, four hundred and twenty-five rand).
2. Provide the Plaintiff with a Section 17(4)(a) undertaking for as far as it has not been done already.

3. Pay the Plaintiff's agreed or taxed party and party costs, scale A, subject to the discretion of the taxing master, inclusive of the costs and expenses occasioned by the consultations with the experts and their reports:

Dr. Sibanyoni Specialist Orthopaedic Surgeon – Report dated 20 July 2022

Dr Mazwi, Specialist Neurosurgeon – Report dated 19 July 2022

Mr. Mashaba, Occupational Therapist – Report dated 22 February 2023

Ms. Chamisa-Maulana, Industrial Psychologist – Report dated 14 May 2023

Mr. Mphuti, Clinical Psychologist & Neuropsychologist – Report dated 8 February 2023

Munroe Actuaries – Report dated 18 May 2023

4. Pay Interest to Plaintiff at 11,75 % per annum should payment not be made within 180 days from the date of this Court Order.

RYNEVELDT, AJ
Acting Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

APPEARANCES:

For the Plaintiff:

Mr. Magagula

Instructed by:

MH Mkhabela Attorneys

For the Defendants:

Mr. Madavha

Instructed by:

State Attorneys- Mbombela-Nelspruit

Date of hearing:

22 May 2024

Date of judgment:

09 July 2024