**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**LIMPOPO DIVISION, POLOKWANE**



**CASE NO: 7084/2017**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 30-09-2024

SIGNATURE:

**In the matter between:**

| | |
|---|---|
| **NTSEMI NHLAMULO SETFREE** | **PLAINTIFF** |
| **And** | |
| **ROAD ACCIDENT FUND** | **DEFENDANT** |

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**JUDGEMENT**

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## INTRODUCTION

1. The plaintiff is Ntsemi, Hlamulo (hereinafter referred as "the plaintiff"), an adult male person, born on the 30th January 1995. The plaintiff was 21 (twenty-one) years old when the accident occurred and currently twenty-nine (29) years of age. The plaintiff sues herein in his capacity as a claimant for the damages suffered.

2. The defendant is the Road Accident Fund (hereinafter referred as "the defendant"), a juristic person established in terms of Section 2 of the Road Accident Fund Act 56 of 1996 with legal capacity to institute action and defend action brought against it, having its principal place of business at 38 Ida Street, Menlo Park, Pretoria.

3. On the 16th July 2016, at approximately 19:30, at Bevhula Village, Bevhula gravel road, Malamulele, Limpopo province, an accident occurred when a motor vehicle with registration numbers and letters D[...], lost control, collided with a rock and rolled several times. The plaintiff alleged that the accident was caused by another unknow motor vehicle which was driving in an excessive speed with a bright light which disturbed his vision.

4. The court was of the view that the plaintiff in the circumstances, he contributed to the accident. The court noted that the speed limit in the said gravel road is 60km per hour and the extent of motor vehicle damages as explained by the plaintiff, indicates that the plaintiff's motor vehicle was driving in an excessive speed. The police statement indicate that the plaintiff reported that the car rolled several times. The plaintiff's motor vehicle had no contact with the unknown motor vehicle. The court is of the view that the plaintiff was also negligent, he contributed to the cause of the accident. The court apportioned 10% against the plaintiff.

5. The matter was before court on the 20th August 2024, and the court has made an order that the plaintiff should be compensated 90 % of his proven damages. The court has done so after the viva voce evidence by the plaintiff and considered that the plaintiff was also driving in an excessive speed and contributed to the said accident. The court reserved judgment on issues of the quantum.

6. The Plaintiff has sued the Defendant for a total amount of R 9 000 000,00 (Nine Million) which amount was calculated as follows;

| | |
|---|---|
| 4.1 Past Medical expenses | abandoned |
| 4.2 Future Medical expenses | Undertaking |

4.3 Future Loss of Earning R 9 000 000.00

4.4 General Damages refer to HPCSA

7. The plaintiff abandoned the claim for past medical expenses since there were no proves of invoices and the plaintiff submitted that the Future Medical Expenses should be substituted by a section 17 (4)(a) -(b) of the Road Accident Fund 56 of 1996, as amended, ("the Act") undertaking certificate.

8. The plaintiff submitted that the court should adjudicate the plaintiff's past and future loss of earnings and that the issues of general damages to be referred to HPCSA for determination.

9. The matter was undefended, therefore, the court has given the plaintiff's counsel to proceed with his submissions based on the experts' reports filed before this court.

**PLAINTIFF'S EVIDENCE**

10. The Plaintiff relied on the following medical experts reports to prove his case;

9.1 Dr T.J Enslin (Orthopaedic Surgeon)

9.2 Dr T.P Moja (Neurosurgeon)

9.3 Dr S.S Selahle (Plastic Surgeon)

9.4 Dr P.D Albertyn (ENT Specialist)

9.5 Dr C. Avenant (Audiologist)

9.6 Dr Mphuthi SF (Clinical psychologist)

9.7 Mrs F. Masipa (Educational Psychologist)

9.8 Mrs S.D Mogola (Occupational Therapist)

9.9 Mrs R.L Mayayise (Industrial Psychologist)

9.10 One Pangea (Actuaries)

11. The plaintiff was examined by Dr Enslin, an orthopaedic surgeon, on the 14 September 2017. According to Dr Enslin, the plaintiff was involved in a motor vehicle accident on the 16 July 2016. The plaintiff was taken by an ambulance to Malamulele Hospital where he was evaluated and stabilised, his wounds were cleaned. The plaintiff was discharged the following day. The plaintiff was readmitted to hospital four days later for 1 (one) week due to sepsis over the scalp and left ear. The plaintiff attended physiotherapy for his right shoulder. The plaintiff had difficulty lifting his right arm.

12. The clinical examination on the 14 September 2017 confirmed; multiple scars over both sides of the face and a degloving injury to the left parietal region of the scalp. The plaintiff had a deformed left ear pinna and tenderness over the right glenohumeral joint. The Scratch and Impingement tests are positive. The speed test is negative. Movements in the right shoulder are as follows: flexion is painful, 0-to-130-degree, extension is uncomfortable, 0-to-40-degree, external rotation is not painful, 0-to-50-degree, internal rotation is not painful, 0 to 80 and, abduction is painful, 0-to-90 degrees. The plaintiff occasionally has nightmares. The plaintiff is depressed because of his injuries. The plaintiff has no concentration or memory problems.

13. Radiological examination made on the 14th September 2017 shows right shoulder: subacromial / subdeltoid bursitis. Full thickness tear of the supraspinatus tendon. A supraspinatus tendon tear was noted anteriorly at 10.5mm in length and 9.4 mm in diameter. The plaintiff was diagnosed of head injury, a degloving injury of the right side of his face and left ear and the soft tissue injury of the right shoulder. The calculated WPI is 19% and qualified the plaintiff with narrative test.

14. The plaintiff was examined by Dr Moja, a neurosurgeon, on the 27th June 2019. According to Dr Moja, there is no record of Glasgow Coma Scale at the accident scene and on arrival at the hospital. Dr Moja noted that the plaintiff complains of the headaches, decrease hearing in his right ear, memory loss and right shoulder pain. Dr Moja concluded that the plaintiff sustained a mild concussive brain injury and soft tissue injury. The plaintiff also sustained an ear injury and orthopaedic injuries. The plaintiff has no residual focal neurological deficits. The calculated WPI is 16% and the plaintiff qualifies for general damages.

15. The plaintiff was examined by Dr Selahle, a Plastic surgeon, on the 24th July 2024. According to Dr Selahle, the plaintiff has the following scars; 4cm scar on the left temporal scalp, 2 scars measuring 2c each on the helical rim of the left ear, 3 cm scar on the right eyebrow, 3x2 cm scar on the right zygomatic area and 2cm scar on the right pre-auricular area. The plaintiff also has scars at the right upper limb, 12x4 cm abrasion scar on the lateral aspect of the arm. Dr Moja opined that these scars have no features of scar hypertrophy, but they are cosmetically and disfiguring. The calculated WPI is equal to 9%.

16. The plaintiff was examined by Dr Albertyn, an ENT specialist, on the 20th February 2020. According to Dr Albertyn, the plaintiff complains of a periodic pulsating tinnitus of the right ear. The diagnosis of treating the tinnitus is not applicable and this will not have an effect to plaintiff's life expectancy or on his insurability. WPI is calculated to 1.4 %

17. The plaintiff was examined by Avenant Audiologist, on the 20th February 2020. According to the report the plaintiff did not sustain any permanent injury to his hearing abilities during the accident.

18. The plaintiff was examined by Ms S.D Moja, an Occupational Therapist (OT), on the 02 July 2024. The OT noted that during the date of the accident, the plaintiff was a scholar doing grade 12. The plaintiff resumed back to school after two weeks following the accident. Based on the test results, her workability can be viewed as follows:

1. According to the Dictionary of Occupation Titles, the plaintiff's job as an artisan Assistant falls within medium strength work with the core job demands being the use of arms, forward reaching, standing, walking, lifting and carrying objects of 15kg frequently. The PWPE test findings indicate that he can cope with Mid-range medium strength work frequently (i.e., 2/3 to full day), since he still experiences right shoulder pain when doing elevated work and forward reaching, plus dizziness and constant headache with prolonged walking. Thus, there is no full job march.

2. The OT, concluded that from a physical point of view, the plaintiff has not retained a full physical capacity to cope with his pre- and post-accident job demands and is also disadvantaged in performing all the future jobs that are physically demanding in nature that demand handling heavy weights, prolonged standing and use of arms such as his current job. This was supported by the fact that he was struggling to cope with his job demands and the company managed to reasonably accommodate him by reducing some of work demands such as handling heavy weights.

3. The OT, concludes that from a psycho-emotional perspective point of view, the plaintiff did not present with any major deficits that will affect his work output. However, his unsightly scars might cause some judgmental comments by prospective employees and new colleagues should he go to a new work environment, as scars are usually associated with criminals.

4. The OT, concludes that from neurocognitive point of view, during evaluation, the plaintiff presented with poor abilities to follow verbal instructions and he was forgetful.

19. The plaintiff was examined by S.F Mphuthi, a clinical psychologist (clinical), on the 01 July 2024. The clinical concludes that the plaintiff's overall neurological performance, as indicated by Neurocognition Index (NCI), is very low, denoting likely presence of neurocognitive impairment and deficit. The plaintiff obtained average score for visual memory; low average for composite memory, complex attention, cognitive flexibility, low

average for verbal memory, executive function; the score for the rest of the domains were below average (very low). Applying the principle of broadly average range. The plaintiff well below average (very low) overall performance on the neurocognitive test battery is therefore significantly below his pre-accident capability.

20. Quantitative EEG (qEEG) result indicates that the applicant's absolute power score is characterised by elevated scores for delta, theta, and beta. Elevated delta is associated with poor cognition (difficulty learning new information). Elevated theta is the hallmark of inattention. Elevated beta is associated with tension and anxiety, rendering him vulnerable to slower than normal information processing. Brain connectivity measures show indicators of inefficient information processing (hyper coherence and increased phase), poor integration of information (hypo coherence), as well as inhibitory mechanism problems (decreased phase lag), in turn rendering him vulnerable to diminished social acuity problems, such as irritability and aggression towards others. The clinical opined that the accident acquired neurocognitive impairment is of mild to moderate degree.

21. The clinical opined that the applicant has capacity to manage his own affairs with regards to activities of daily living but will remain psychologically vulnerable before and during the period that he undergoes the recommended psychotherapy. Total calculated WPI= 21%

22. The plaintiff was examined by M. Frieda Masipa, an Educational Psychologist (educational) on the 16 July 2019, the report is dated the 04th August 2024. The educational noted that post accident the plaintiff lost about a month of school time. The plaintiff sat for grade 12 examination for the first time in 2016, The plaintiff wrote 4 subjects, which he passed He sat for remaining 3 subjects in 2017 and passed 2. The plaintiff then passed grade 12 with higher certificate admission with the combined results of 2016 and 2017. The educational opined that the plaintiff could have experienced learning barriers due to the injuries from the accident.

23. Post grade 12, in 2018, the plaintiff enrolled for N4 Public Management in Tshwane City College. Post accident he attained N4 certificate. This makes the plaintiff the only

person in his house hold with highest educational attainment, N4. The plaintiff reported that he found it difficult to study after the accident. The plaintiff said that he was bothered by the pain on the right shoulder, headaches, poor attention and his slowness in grasping the content, hence he left school and begun with job hunting. The educational opined that pre-accident the plaintiff would have attained grade 12 with a Diploma admission. The plaintiff would have been eligible for a NQF level 6 qualification.

24. Post accident as already been established that the plaintiff passed grade 12 with a higher certificate admission and has N4 Certificate in Public Management, irrespective pf his pre-accident vulnerabilities that negatively impacted his learning. The educational noted that the results qualify him to study towards NQF level 5 qualification, his post -accident challenges are likely to further disadvantage him scholastically. The educational opined that it is unlikely for the plaintiff to obtain further qualification post-accident.

LOSS OF PAST AND FUTURE EARNING

25. The plaintiff was re-examined by Ms Lowane Mayayise, an Industrial Psychologist (IP), on the 07th August 202.The IP, considered the opinion of the Educational Psychologist who opined that pre-accident the plaintiff would have attained grade 12 with a Diploma Admission. The plaintiff would have been eligible to enroll for a NQF level 6 qualification. The IP opined that this would have been over a period of 3 years. With such a level of education, due to the high unemployment rate, the plaintiff would have most likely initially suffered a period of unemployment before he would have been able to secure employment. It is accepted that a period of about 1 to 2 years should be a realistic forecast in this regard. With a post-matric diploma qualification, he would have thereafter most probably secured employment within the formal sector of the labour market as a semi-skilled worker on a grade B4/5 median range basic salary earning and thereafter progressed through to a ceiling on grade C4/5 upper quartile total cost to the employer level as his ceiling by the age 45. Thereafter inflationary growth would have been applicable. The retirement age would have been at the approximately 60 and 65.

26. Post-accident, the IP noted that his grade 13 result qualifies him to study towards NQF Level 5 qualification, his post -accident challenges are likely to further disadvantage him scholastically. The IP opined that it is reasonable to accept that the injuries sustained and presenting symptoms have impacted negatively to his scholastic prospects as well as his employability as well as that he will remain unequal competitors within the open labour market. The plaintiff experiences failures and repeats as he progresses through the higher learning institutions.

27. The failures represented a loss of earning suffered by the way of delayed in career entry. Employment feedback obtained from Mr Roman Khoza who is the Supervisor and Artisan at steel Trade is that the plaintiff is not promotable because he will not be able to use a grinder to cut steel. The IP opined that it is reasonable to indicate that the plaintiff is at best case scenario likely to remain in his current position as only an Artisan's assistant or similar wherein wages similar to what he currently earns (R5308.88 basic salary per month) would be applicable with at best annual inflationary increases representing growth. It is herein further noted that such employment would need always be of a sympathetic nature wherein reasonable accommodative allowances are allowed as is currently the case.

28. The Plaintiff used the services of ONE PANGAEA expertise solution and the calculations were done based on the Industrial Psychologist report. The calculations are as follows;

| Loss of earnings | Pre-accident R's | Past-accident R's | Loss R's |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Past | 872,249 | 100,343 | |
| Past contingencies | 10% (87,224) | 5% (5,017) | |
| Net Past Income | 785 025 | 95,326 | 689,699 |
| Future Income | 12,518,369 | 2,411,213 | |
| Future contingencies | 35% (4 381 429) | 45% (1,085,045) | |
| Net Future Income | 8,136,940 | 1,326,167 | 6,810,773 |
| TOTAL LOSS | | | 7,500,472 |
| | | | |

29. The plaintiff submits that the contingencies to be applied is 5% pre- and post-accident pass income and 15% pre-accident future loss and 25% post-accident future loss. This court exercises its discretion on the issues of contingencies. The court considered the plaintiff's pre-accident reports which indicates that the plaintiff had pre-existing challenges which caused the plaintiff to repeat several grades before this motor vehicle accident. The court took note of the accident which took place in 2013, where the plaintiff was hit by astray stone and lost 8 teeth. This injury might have a great effect to his performance at school and might have contributed to his neurological deficits. The educational psychologist finalised her report without the pre-accident school reports of the plaintiff. The Court requested the plaintiff to file the pre-accident school report before the judgement. The plaintiff forwarded the plaintiff's school report and the court noted that the plaintiff had a pre-existing school performance challenge. The court altered contingencies applied in the actuarial calculation and replaced with the contingencies deductions as appear in the actuarial calculation, in *supra*, paragraph 28.

30. The actuarial calculations are useful in that it provides the value of the loss on some logical basis. In Southern Insurance Association Ltd v Bailey NO,[1] the court held:

> *"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (per HOLMES JA in Legal*

[1] 1948 [1] SA 1988 at 1135

*Assurance Co Ltd v Boles* ***1963 (1) SA 608*** *(A} at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may, in the result, have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See Van der Plaats v South African Mutual Fire and General Insurance Co Ltd*[2]*. The rate of the discount cannot of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case".*

31. The court finds that the total amount to compensate the plaintiff for his past and future loss of earnings is in the amount of R 7 500 472.00. The court deducts 10% merits apportionment as indicated in paragraph 3 *supra.* The total amount to compensate the plaintiff after deduction of 10% should be **R 6 750 424.00**

**COSTS**

32. This court should not deviate to the general rule that the cost follows the successful party and as such the court award party and party cost to the plaintiff against the defendant.

33. In the circumstances, the following is the order of the Court;

1. The Defendant shall pay to the Plaintiff the amount of **R 6 750 424.00** (Six Million, Seven hundred and Fifty thousand, Four Hundred and Twenty-four Rand) in relation to the Past future loss of earnings.

2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) of Act 560f 1996 for payment of 90% for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or

[2] ***1980 (3) SA 105*** *(A) at 114 - 5*

supply of goods to her, arising from the injuries sustained by her in the motor vehicle collision on 16th July 2016.

3. The Amount in paragraph 1 above shall be paid into the trust account of the plaintiff's attorneys of record, **Molefe Machaka Attorneys Incorporated**.

*4.* The Defendant shall be liable to pay interest on the aforesaid amounts *tempore morae* at the rate of 7% per annum from 180 days after the date of this order to date of the payment*.*

5. The defendant shall pay the Plaintiff 's taxed or agreed party and party costs until the date of this order including costs of a counsel scale B.

*6.* The costs consequently in the preparation of and obtaining the medico legal and actuary reports that were served on or provided to the Defendant.

7. The reasonable taxable preparation, qualifying and reservation fees, if any of the Plaintiff's experts for trial of whom notice was given to the Defendant.

8. The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the Plaintiff for attending the medico legal examination, subject to the discretion of the taxing master.

9. The reasonable taxable costs of traveling, subsistence, accommodation costs of the Plaintiff for attending court.

10. The Defendant shall be liable to pay interest on the amount of the Plaintiff's costs of suit, as taxed or agreed, at 7 % per annum from 14 (fourteen days) of the allocatur of the taxing master or the date of the agreement, whichever applies, to date of payment.

11. The issues of general damages to be referred to HPCSA.

**MASHAMBA AJ**

**JUDGE OF THE HIGH COURT,**

**POLOKWANE; LIMPOPO DIVISION**

**<u>APPEARANCES</u>**

**FOR THE PLAINTIFF : ADV M.C.S BALOYI**

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**FOR THE DEFENDANT : NO APPEARANCE**

**INSTRUCTED BY :**

**DATE OF HEARING : 20 AUGUST 2024**

**DATE OF JUDGEMENT : 30 SEPTEMBER 2024**