

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13348/16

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
DATE	 SIGNATURE

In the matter between:

MHLONGO SIBONISE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PIENAAR, AJ

Introduction

1. The Plaintiff is Sibonise Mhlongo, an adult male born on 30 April 1994 and who was 21 years of age when the accident occurred. He is currently 30 years of age. At the time of the accident he was a pedestrian. A security witness, however saw the accident and said that the young man had been struck and thrown about ten meters across after hitting the windscreen.
2. This matter came before me on the basis of that two expert witnesses would testify, These witnesses were namely Zaheera Sedate, an Educational Psychologist and Shuaib Jeewa, an Industrial Psychologist.
3. The body of the evidence before me consists of a number of medico legal reports of the experts on behalf of the Plaintiff. The experts had prior to the trial deposed to affidavits in terms of which they confirmed their qualifications and the opinions or contents of their medico legal reports filed on behalf of the Plaintiff. Ms Mhlanga, on behalf of the Defendant, conceded to the validity of the medico-legal reports except the Educational Psychologist's report and Industrial Psychologist's report. This prompted the Plaintiff to call two witnesses, Ms Zaheera Seedat (Educational Psychologist) and Mr Shuaib Jeewa (Industrial Psychologist) on the day of trial, Friday, 30th August 2024.
4. Both parties agreed that the merits in terms of the offer dated 29th August 2024 were settled on the basis 75% in favour of the Plaintiff. The Road Accident Fund also tendered an amount for general damages and loss of earnings which was not deposed to the court.
5. This means that the only issues which remain unresolved between the parties and which I am required to adjudicate are that of the quantum of the Plaintiff's general damages and the Plaintiff's past and future loss of earnings/loss of income earning capacity.

6. According to the particulars of claim the Plaintiff, paragraph 11, the Plaintiff has suffered damages for loss of earnings R15 000 000,00 and general damages for the amount of R1 500 000,00. The Plaintiff served the amended particulars of claim on the Defendant on 23rd of August 2024 wherein the general damages amount was amended to R2 000 000,00.

The issue of quantum

7. The Plaintiff was brought in by paramedics and the Glasgow Coma Scale (GCS) given was 4/15. The fractured tibia and fibula were identified and on arrival in hospital Glasgow Coma Scale was 15/15. Further injuries were a contusion of the lung on the right side and a complication of fat embolism. The main problem is the brain injury which Dr Earle (neurosurgeon) reported as being of a moderately severe degree. He also reported that the plaintiff was not functioning at his excellent pre-normal intellectual level and this may be permanent.
8. He further sustained a right tibia and fibula fracture which was complicated with fat embolism syndrome.

Current complaints:

Dr Jaap Earle - Neurosurgeon

9. Sibonise suffered from headaches, regularly curing by his temples, front of his head and at the back of his head. He feels tired all the time sleeping a lot in a day.
10. At times he feels dizzy, and that his head tickles and itches. His right leg also hurts and increases in severity in cold weather causing much him much discomfort.
11. He feels that he is very forgetful and had difficulty concentrating. At times he feels that he is struggling to solve problems and finds that he is unable to plan like before.

His father is also concerned over Sibonise's current emotional state, especially his anger as he feels it is becoming worse.

Dr S L Biddulph - Orthopaedic Surgeon

12. He developed fat embolism following his fractured tibia. X-rays taken to the right tibia on the 2nd of February 2016 showed a well-healed fracture tibia in 8 degrees of valgus deformity.

Dr Saul Braun - Plastic and Reconstructive Surgeon

13. The scarring is unsightly and conspicuous and will present a permanent serious disfigurement.

Bev van Zyl – Neuropsychologist

14. Given the time lapsed post-accident the majority of spontaneous recovery from head injury has occurred and the Plaintiff must be regarded as having reached a ceiling as far as neuro-cognitive function is concerned. No further improvement in neuropsychological function can reasonably be expected.

Megan Spavins - Occupational Therapist

15. The Plaintiff works as a miner for Impala Platinum and is working in an underground environment. He continues, however, to have limitations related to his physical, cognitive and psychosocial impairments that appear to adversely affect his work quality. The occupational therapist reported that his cognitive and socio emotional limitations affect his engagement in daily life living tasks.

Zaheera Seedat - Educational Psychologist

16. Ms Seedat testified that the Plaintiff is not functioning at his most optimum level. She is concerned about his difficulties with being able to use his higher cognitive functions such as attention, working memory and short term and long-term memory since the accident. She is also concerned around his mood as he still seems to present with multiple symptoms of depression.
17. Ms Seedat reported that Sibonise would have been able to pursue at least a degree and possibly further his studies to complete his honors, Masters and Phd degrees if he so wished.
18. She further testified that the accident had affected his cognitive abilities so much so that he would not be able to obtain a degree as he would not be able to keep up with the demands of the course. The accident has therefore reduced Sibonise's chances of obtaining a degree (NQF 7) in his choice of study and has rendered his academic capabilities to only being able to obtain a diploma (NQF Level 6).
19. Finally, since the accident, Sibonise present with persistent symptoms of depression such as poor concentration, anger, poor appetite, low energy levels irritability and anger. Whilst he is able to work, it is believed that the accident has affected his cognitive and emotional functioning. Ms Seedat remained steadfast in her position during cross-examination, with regards to the pre-morbid postulation.

20. Shuaib Jeewa - Industrial Psychologist

Mr Jeewa testified that the Plaintiff had, in September 2022, secured employment with Impala Platinum in the capacity of an underground miner. He outlined, in the capacity of a miner, that the Plaintiff earns an average income of approximately R35 000 per month. Due to his limitations, that he was often absent from work and had received

a workplace-related warning due to his high level of absenteeism. It was further noted that he forgets to complete certain tasks.

21. Mr Jeewa further testified that in the absence of the accident in question, that the Plaintiff's minimum academic attainment would have been a degree (NQF level 7) qualification, followed by at least an honours degree (NQF level 8). Mr Jeewa testified under cross-examination that his report is based on the Educational Psychologist's report.
22. As has occurred post-accident, and as of February 2024, the Plaintiff's level of income earned may have equated to R554 291,24 in keeping with earnings reported for skilled workers in the formal labour market, just below the median of the Paterson C2 level (total package).
23. With at least 3-5 years of sustained employment, the Plaintiff's level of income earned by the onset of 2028, may have progressed to the median of the Paterson C3 level (total package).
24. By the onset of 2036, and with further training, the Plaintiff is expected to have progressed to the role of a mining / shift manager. Upon progression to this role, the Plaintiff's level of income earned may have progressed to and peaked at the median of the Paterson C5 level (total package).
25. Annual inflationary related increases are expected with the Plaintiff's level of income earned until he retired from the labour market at the age of 65.

G A Whittaker - Actuary

<u>Past loss</u>			
Value of income uninjured:		R	858,942
Less contingency deduction:	5.00%	R	<u>42,947</u>
		R	815,995
Value of income injured:		R	858,942
Less contingency deduction:	5.00%	R	<u>42,947</u>
		R	815,995
Net past loss:			R -
<u>Future loss</u>			
Value of income uninjured:		R	13,272,584
Less contingency deduction:	17.50%	R	<u>2,322,702</u>
		R	10,949,882
Value of income injured:		R	11,981,449
Less contingency deduction:	37.50%	R	<u>4,493,043</u>
		R	7,488,406
Net future loss:			R <u>3,461,476</u>
Total net loss:			R <u>3,461,476</u>
<u>Loss after the application of the limit</u>			
Net past loss:		R	-
Net future loss:		R	<u>3,461,476</u>
Total net loss:		R	<u>3,461,476</u>

26. Mr Whittaker amended calculations is based on the updated Industrial Psychologist report dated 23rd August 2024.

27. Counsel for the Plaintiff, Mr Khan's submissions were based on Scenario 1 of the calculations of the pre-accident ceiling at the median total package of the Paterson C5 level. Mr Khan submitted that it would be fair and reasonable to apply 17,50% in respect of the pre-morbid projected income and 37,50% on the post morbid earnings.

28. State Attorney for the Defendant, Ms Mhlanga, was of the view that higher-than-normal contingencies should be applied to the pre-morbid projected income when calculating the loss of earnings. She suggested 25% in respect of the past pre-morbid projected earnings and 10% in relation to the future pre-morbid income.

Contingencies

29. Normally, an appropriate allowance for contingencies in respect of the past loss would be 5%, which is suggested by both parties. As regards to the future loss of income, the standard to be applied in respect of the pre-morbid future income would be 15%. According to the Plaintiff's family background, his siblings obtained a degree in Civil Engineering.

30. Having regard to the above factors, my view is that a contingency of 18,50% in respect of future pre-morbid earnings would be justified. For post-morbid future earnings, the 37,50% contingency is fair and reasonable based on the evidence above.

31. *General Damages*

32. I turn to the general damages suffered by the Plaintiff.

33. The Plaintiff's counsel suggested that a sum of R1 700 000,00 (pre-apportionment) should be awarded to the Plaintiff. He relied on two cases for comparative purposes: *Kruger v Road Accident Fund*¹ where for moderate to severe traumatic brain injury, the court awarded general damages of R1 400 000,00. Also, *Classes v Road Accident Fund*² where a moderate to severe brain injury with rib fractures, memory loss and spinal aches attracted an award of general damages of R1 900 000,00 with a current value of R2 414 000,00 to a 27-year-old stock clerk at the time of the accident and 30 years of age at the time of the judgment. His GCS was 9/15 and this dropped further. He presented with

¹ *Kruger v Road Accident Fund* (27383/2009) [2022] ZAGPPHC 641.

² *Claassens v Road Accident Fund* 2019 JDR 1575 (GP).

significant physical limitations, cognitive defects, emotional difficulties, limitations in speech and language skills. He should for all practical purposes, be regarded as unemployable.

34. The State Attorney, Ms Mhlanga suggested R1 200 000,00 (pre-apportionment) should be awarded to the Plaintiff. Ms Mhlanga referred the court to the case of *Sithole A A*³, where the Plaintiff's GCS was 13/15 brain injury with severe injury to the right arm and neck injury. The court awarded an amount of R750 000,00. The State Attorney also referred the court to the matter of *Schutte v Road Accident Fund*⁴, where the Plaintiff was a 68-year-old male, was injured in a motor vehicle accident on 05 August 2020, he sustained a head injury, open wound on the right side of the head, open fracture on the left elbow, a neck and back injury. The court awarded an amount of R1 400 000,00 for general damages.
35. The award in previous comparable cases is but one of the considerations which a court should take into account when considering the amount of damages to be awarded. I have summarised the injuries and *sequelae* of the claimant herein before.
36. Having regard to the injuries suffered by the plaintiff *in casu*, the aforementioned comparable case law, which all find application and inflation, this court finds that the amount of R1 400 000,00 for general damages would be fair and reasonable under the circumstances.

³ *Sithole v Road Accident Fund* 2023 JDR 1176 (GP).

⁴ *Schutte v Road Accident Fund* (2159/2022) [2023] ZAFSHC 391.

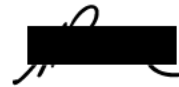
Order

Consequently, I make the following order:

1. The Defendant is liable for payment of 75% of the Plaintiff's proved or agreed damages.
2. The Defendant shall furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1956, in respect of future medical, hospital and related expenses limited to 75% undertaking.
3. The Defendant shall pay the Plaintiff an amount of R3 461 476.00 for loss of earnings.
4. The Defendant shall pay the Plaintiff an amount of R1 500 000.00 for general damages.
5. To this total, the 75/25% (in favour of the Plaintiff) apportionment in respect of the liability issue, which means that the said total will be reduced by 25% resulting in the final amount of the judgment to be granted in favour of the Plaintiff of R3 721 107.00.
6. The Defendant to pay the costs for the preparation, and attendance of the respective trial by the Plaintiff's representatives on the 28th August 2024, 29th August 2024 and 30th of August 2024.
7. Plaintiff is ordered to serve the notice of taxation of Plaintiff's party-and-party bill of costs on Defendant's attorneys of record;
8. The Defendant is ordered to pay the Plaintiff's taxed and/or agreed party-and-party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties.
9. The Plaintiff entered into a contingency fee agreement with his legal representative.

10. At the hearing of the matter, the Draft Order was uploaded onto Caselines at Section 030: Draft Order.

11. I have considered the draft order and have amended it and marked it as 'X'.



M PIENAAR
ACTING JUDGE OF THE HIGH
COURT, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to Court Online and by release to SAFLII. The date and time for hand- down is deemed to be 20 September 2024.

APPEARANCES:

For the Plaintiff: Adv Z Khan
Instructed by: RA Seedat Attorneys

For the Defendant: Ms J Mhlanga – State Attorney
Instructed by: The Road Accident Fund

Date of hearing: 30 August 2024

Date of judgment: 20 September 2024