



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 4 April 2025

SIGNATURE:.....

Case No. A21/2024

In the matter between:

DE MEYER, JACO

APPELLANT

And

ROAD ACCIDENT FUND

RESPONDENT

Coram: Khumalo J, et Nyathi & Millar JJ

Heard on: 20 March 2025

Delivered: 04 April 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 04 April 2025.

JUDGMENT

MILLAR J (KHUMALO et NYATHI JJ CONCURRING)

- [1] The only recourse that a person directly injured because of the negligent driving of a motor vehicle has, is to claim damages from the Road Accident Fund.¹ This is an appeal against a judgment of the High Court. Leave to appeal was granted by that court.
- [2] The appellant, a motorcyclist was injured when a collision occurred between the motorcycle he was riding and a motorcar on 17 August 2018, some 7 years ago. The injuries suffered by the appellant included a degloving of the right foot with scarring, lacerations of the right foot, abrasions on the right knee, a compound fracture of the right small toe together with strain injuries to both the neck and the back.
- [3] A claim was lodged with the respondent on 29 August 2019 and thereafter a summons was served on 3 July 2020. The respondent defended the summons

¹ Established in terms of the Road Accident Fund Act 56 of 1996 (as amended). See also *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC) at paras [75], [80] and [103] in which the Constitutional Court confirmed the constitutionality of the abolition of the common law right to claim from the negligent party directly.

and filed a plea. It attended a pre-trial conference² but thereafter, somewhat inexplicably, took no further interest in the conduct of the litigation.

- [4] On 25 May 2023, 5 years after the appellant was injured, the matter came before the court *a quo* for hearing. It is in respect of the judgment of that court delivered on 8 November 2023 that the present appeal has been brought. Leave to appeal was granted by the court *a quo* on some of the issues appealed, but subsequent thereto, the appellant has raised an additional issue. I will return to this later in this judgment.
- [5] The case proceeded before the court *a quo* on the papers only.³ The court *a quo* had before it the evidence on oath of Dr. Williams (Orthopaedic Surgeon), Dr. van Heerden (Plastic and Reconstructive Surgeon), Mr. Ferreira (Clinical Psychologist), Ms. Bekker (Educational Psychologist), Ms. du Plessis (Industrial Psychologist), Ms. Burger (Occupational Therapist) and Mr. Minnaar (Actuary).
- [6] After hearing the appellant, judgment was granted in his favour on the issue of liability⁴ and negligence. However, no order was made in respect of the appellant's claim for future medical, hospital and associated expenses. Additionally, the appellant's claim for loss of income was dismissed and no order for costs was made. It was against the failure to make an order in respect of future medical expenses, dismissal of the loss of income claim and failure to make an order for costs that the appellant appealed.
- [7] When the appeal was called before us, counsel for the appellant moved to amend the grounds and scope of the appeal to include also an appeal against the decision of the court *a quo* to refuse to hear the appellant on the issue of general

² An order was obtained on 27 September 2021 to compel the respondent to attend a pretrial conference.

³ An application was made in terms of rule 38(2) of the Rules to adduce the evidence of both the appellant as well as his expert witnesses by affidavit which was granted.

⁴ The issue of compliance with the provisions of the Road Accident Fund Act was conceded by the respondent at the pretrial conference.

damages. Although not recorded in the order made, it is recorded in the judgment that this issue was to be postponed *sine die* to afford the respondent an opportunity to decide as to the seriousness of the appellant's injuries as provided for in Regulation 3(3)(dA)⁵. This was raised by the appellant in the application for leave to appeal but was refused.

[8] There are 4 questions before us in this appeal. I intend to deal with each of these in turn.

[8.1] Firstly, whether the appellant established his claim for future medical, hospital and associated expenses.

[8.2] Secondly, whether the appellant established his claim for future loss of income.

[8.3] Thirdly, whether the appeal in respect of the claim for general damages can be considered by this Court and if so its determination; and

[8.4] Lastly, whether costs should have been awarded.

FUTURE MEDICAL AND HOSPITAL EXPENSES

[9] It is not in issue that the evidence before the court *a quo* established that the appellant would require treatment in the future for the injuries sustained by him.

⁵ GN R770 of 2008 published in GG 31249 of 21 July 2008. Regulation 3(3)(dA) provides that: "*The Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment.*"

[10] Dr. Williams, the Orthopaedic Surgeon, was of the opinion that the appellant:

[10.1] Will require analgesia for pain.

[10.2] Requires assessment by a podiatrist and for the provision of in-soles which would need to be replaced annually.

[10.3] Will likely (probably) undergo surgery on his right foot which may require more than one procedure; and

[10.4] Is required to undergo initially, a course of at least 10 sessions of physiotherapy for the treatment of his back and thereafter shorter courses of 4 to 5 sessions depending upon his condition over the next 10 years.

[11] Mr. Ferreira-Teixeira, the Clinical Psychologist, was of the opinion that the appellant requires *"psycho-therapeutic assistance with regards to his symptoms of severe depression, moderate anxiety and severe PTSD. 36-40 sessions at the current average rate of R1200,00/session are recommended in this regard."* He also recommended that the appellant consult a psychiatrist.

[12] Ms. Burger, the Occupational Therapist, made extensive recommendations regarding the necessity for and use of assistive devices both in the home and work environment to enable him to better cope with the sequelae of his injuries. Additionally, she also recommended the need for occupational therapy in the future.

[13] Despite accepting that the appellant had suffered the injuries set out in the reports and that the experts had recommended treatment in the future, the court *a quo*,

(once liability had been found in favour of the appellant), overlooked making an award for the future medical and hospital and associated expenses.

- [14] In actions against the respondent, the Act specifically provides that claims for future medical, hospital and associated expenses may be compensated by the provision of an Undertaking in terms of section 17(4)(a). In this regard however, it is an election by the respondent to do so or not.

- [15] *Marine & Trade Insurance Co LTD v Katz* NO⁶ where it was held that:

“By means of the above undertaking, accepted by the claimant or entrenched in the trial Courts order, the insurer is benefited by being relieved of the need to pay the claimant immediately for the estimated or assessed future costs of the categorized items; payment thereof is deferred until the cost of such items is actually incurred in the future; and for various reasons that cost may never be incurred, as where, for example, the claimant suffers early death, when such liability would, of course, cease. On the other hand, the claimant may also benefit in some situations. He may incur costs for hospitalization, services, or goods in the future that were not foreseen and for which no provision would therefore have been made if a lump sum had been awarded....”

- [16] In *Knoetze and Another v Road Accident Fund*, ⁷ a Full Court of this division ordered that:

“It is noted that the Road Accident Fund has, during the course of the hearing of this matter a “blanket election” to furnish an undertaking to compensate plaintiffs claiming compensation in terms of section 17 of the Act, in respect of costs for the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying goods to him or her, after such costs have

⁶ 1979 (4) SA 961 (A) at 972H-973A.

⁷ 2022 JDR 3206 (GP) delivered on 2 November 2022.

been incurred and on proof thereof or to the provider of such service or treatment directly, and the Road Accident Fund has tendered that Courts can take judicial notice of this election."

- [17] Accordingly, the court *a quo* ought to have found that the appellant, having established that he would require medical treatment in the future, was entitled to the award of an Undertaking in terms of section 17(4)(a) in respect of his future medical, hospital and associated expenses.

LOSS OF INCOME

- [18] Besides the injuries referred to in paragraph [3] above which are primarily of an orthopaedic nature, the appellant was found by Ms Burger, the Occupational Therapist, to be "*considered vulnerable from a cognitive and psychological perspective*" pre-collision and that he is "*reliant on his physical abilities to offer prospective employers.*"
- [19] Dr Williams, the Orthopaedic Surgeon, expressed the view that the appellant's productivity for physical work would in consequence of his injuries be decreased of 5% over the course of his working life and that he may in addition retire 3 or 4 years earlier than he would otherwise have had at the age of 65.
- [20] In consequence of his pre-injury circumstances, the case presented for the appellant was that both his pre-injury and post-injury earning potential, from an educational and career perspective, was the same. The difference between the two would manifest in consequence of the orthopaedic injuries and early retirement opined by Dr Williams. This view was supported by Ms Burger.

- [21] The evidence clearly establishes a loss of earning capacity. What is the loss of earning capacity? It is well established that there are two ways in which to determine loss of earnings and earning capacity.⁸
- [22] The first is where there is a definite loss between two different pre-accident and post-accident scenarios. Both are actuarially calculated considering the hazards of life and other contingencies that may find application in a particular case. The difference between the two separate scenarios is then the loss. The more obvious and simpler situation where this method applies is where there is a total loss and then it is a matter of calculating the value with reference to the pre-injury scenario.
- [23] There is also a more nuanced approach, such as in the present case. This is where the two scenarios are the same but there are factors which increase the post injury contingencies and then bring about a difference. The permutations in this first approach all rely upon actuarial calculations as their basis and starting point.
- [24] The second approach is one where actuarial calculations are either not available or are of little or no assistance in determining the loss. In such situations, a court may find itself, where the evidence establishes a loss, but it does not lend itself to determination with reference to an actuarial calculation. This is a situation where a "lump sum" may be awarded.
- [25] In the present matter, the actuarial calculations were prepared with reference to the evidence of the medical experts and thus there is no reason to depart from the first scenario in calculating the loss of income. A general hazards of life contingency of 15% usually finds application. In this case given the appellants age and pre-existing situation this was increased to 25%.

⁸ *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A).

- [26] Several different calculations were made available to the court *a quo*. The first, was predicated upon an early retirement at the age of 61.5 years together with a pre-injury contingency of 25% and a post-injury contingency of 50%. Two further sets of calculations were made available, both of which reflect substantially higher figures but neither of which sit squarely with the evidence and are thus not of any relevance in the determination of this appeal.
- [27] The result of the first calculation, representative of an early retirement and additional 5% contingency, was a loss of R235 452.00.⁹ This fairly reflects the appellant's loss of income.

GENERAL DAMAGES

- [28] When the appeal was called, counsel for the appellant moved for an order to include, as an additional ground of appeal, the refusal of the court *a quo* to hear or make an award in respect of general damages.
- [29] Before the court *a quo*, the question arose whether the respondent had decided to accept or reject the seriousness of the appellant's injuries in terms of Regulation 3(3)(dA). The court *a quo* was informed that while no formal communication of a decision had occurred, the respondent had on the eve of the hearing made an offer which contained general damages. The court *a quo* was unmoved by this and proceeded to rule that the general damages would be postponed *sine die*.

⁹ The pre collision loss scenario with the additional contingency of 10% over and above the general hazards contingency of 15% gave a total figure of R1 993 263.00 as a value of the appellants working life. The same basis with a post collision scenario where the contingency deducted is 30% - the 25% plus the additional 5 % found by Dr. Williams is R1 757 452.00. The difference between the two is R235 452.00.

- [30] Despite the ruling made during the hearing, the court *a quo* failed to make an order in this regard. When application for leave to appeal was heard, this issue was raised by the appellant and the court *a quo*, presumably taking the view that the postponement of the issue was not appealable then proceeded to refuse leave to appeal on this ground.
- [31] Before this court, the appellant applied for leave to appeal against the refusal to consider the issue of general damages or to grant leave to appeal in respect thereof. Supplementary heads of argument were furnished to the court before the hearing which were considered.
- [32] The argument on this aspect was that while it is accepted that leave to appeal may be granted generally against the whole of an order, it may also be limited to specific grounds.¹⁰ In the present instance, since leave to appeal had only been granted on specific grounds, it required the order of this court before the appellant could pursue this ground.¹¹
- [33] It was decided that leave to appeal, in respect of general damages, should be granted for the following reasons:
- [32.1] Despite the fact that the appellant had sought leave to appeal in respect of the issue of general damages, the court *a quo* refused such leave. The course of action open to the appellant was to apply for special leave to appeal to the Supreme Court of Appeal or alternatively, to apply for a new trial date for the adjudication of general damages.

¹⁰ *S v Safatsa and Others* 1988 (1) 868 (A) at 877B-D.

¹¹ *Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 246D-247D. See also s 19(d) of the Superior Courts Act 10 of 2013 and *Octagon Chartered Accountants v Additional Magistrate, Johannesburg, and Others* 2018 (4) SA 498 (GJ).

- [32.2] Both of these courses of action would require the appellant to incur further costs and would have had the effect of delaying the determination of the issue of general damages. If the application for leave to appeal to the Supreme Court of Appeal were successful then this would mean another appeal on the same evidence that is before this Court in a year or two's time and if not, a further trial, again on the same evidence before this Court but in 5 years' time.
- [32.3] Since the evidence upon which general damages was to be determined was already before the court *a quo*, there is no reason why this issue should be delayed. It is in the interests of justice that litigation is finalized in as expeditious a manner as is possible. It is incumbent upon the court to ensure that this occurs.
- [32.3] Since 7 years have passed from the time that the appellant was injured and since none of the delays in bringing the matter before the court can be attributed to him, it is neither in his interests nor in the interests of justice that a decision on the question of general damages be delayed either by the bringing of a further application to the Supreme Court of Appeal or by having to wait for a new trial date.
- [32.4] It is in the circumstances apposite that this court hear the appeal regarding general damages.
- [34] Turning now to the issue of general damages. It is a jurisdictional requirement that the respondent must have made an election in favour of the appellant in terms of regulation 3(3)(dA). Ordinarily one would expect that such election would be conveyed to the appellant formally. In the present case however, the election was conveyed through the mechanism of a tender for general damages.

[35] It is axiomatic that the decision¹² to accept the seriousness of the appellants injuries for purposes of general damages must precede any decision to offer compensation for this head of damages. The fact of the existence of the tender for general damages, is evidence that the decision to accept the seriousness was made in the appellant's favour.

[36] Turning to the question of whether it is permissible to have regard to the tender, even on the limited issue of its existence, in *Masemola v Road Accident Fund*¹³ the Court correctly reasoned that:

[51] *Does the without prejudice nature of the offer detract from the conclusions reached above? In my view, not.*

[52] *Firstly, the incantation that a missive is sent "without prejudice", contains "... no particular magic ...". If an offer forms part of the compromise of a dispute, it will be privileged, even if the words have not been used. By parity of reasoning, the opposite must, however, be equally true.*

[53] *The reason for this, as explained in Ward v Steenberg (Ward) quoting Wigmore, is as follows " the true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversary's claim is well-founded, but rather a belief that the further prosecution of that claim, whether well-founded or not, would cause such annoyance as is preferably avoided by the payment of the sum offered."*

¹² Such decision is an administrative one as provided for in the Promotion of Administrative Justice Act 3 of 2000. See *Road Accident Fund v Duma and Three Similar Cases* 2013 (6) SA 9 (SCA).

¹³ 2025 JDR 0456 (GP).

[54] *The position of the RAF is, however, different from that of an ordinary litigant to which the above proposition would apply. It is statutorily obliged to recompence plaintiffs who had suffered damages in motor vehicle collisions, but it is also not authorised to pay compensation where plaintiffs do not qualify to claim damages. There is therefore no “nuisance” to be avoided – a plaintiff qualifies or not, but the extent of the damages, i.e the quantum of what his qualifying claim may be worth, is what may be proven, or, as is most often the case, be settled by negotiation.*

[55] *In my view, the approach adopted in Ward, is the correct one, namely that although “an offer to pay money in settlement or compromise” is generally inadmissible, in some “. . . cases the conduct may be relevant and, in such cases, the evidence should be regarded as admissible, and its value should be considered. . . “[footnotes omitted].*

[37] For these reasons, I find that the respondent accepted the seriousness of the appellant’s injuries. This being the case, the court *a quo* ought to have permitted the appellant to argue both this issue as well as the quantum of general damages.

[38] It was argued by the appellant that the interests of justice militate in favour of this court, making an award for general damages. It was argued that the appellant was injured 7 years ago and has had to navigate the judicial process to finalization of his case for some 5 years. Additionally, referring this issue for determination back to the court *a quo* would serve no other purpose than to delay the finalization of the whole of the appellant’s case – possibly for years.

[39] Judicial notice can and should be taken of the fact that in cases such as the present against the respondent, even applications for default judgment take many years before they are set down for hearing. If a matter proceeds to trial, a litigant may have to wait even longer.

- [40] The evidence before the court *a quo* was that set out in the reports of the experts. There is no other evidence, and it was not argued for the appellant that any other evidence would be presented. Accordingly, this court can consider and make an award for general damages based on the evidence that was before the court *a quo*.
- [41] It was argued for the appellant, having regard to the injuries suffered by him, that an appropriate award for general damages was R400 000.00. The Court was referred to various cases including *Sabodien v RAF*,¹⁴ *Alla v RAF*,¹⁵ and *Van Dyk v RAF*.¹⁶ These cases relating to awards made in 2020, 2012 and 2003 respectively, range in present day value from R283 000.00 to R458 000.00. Comparative cases are useful as a guide to determine general damages but since no two injured persons suffer identical injuries and sequelae, the determination of general damages cannot be made solely on this basis.
- [42] The appellant has been disfigured and is likely to require surgery in the future to his foot. In my view, while the disfigurement of the appellant is on his foot, its visibility with those with whom he would interact and effect on him in such interactions is mitigated. Having said that, an injury to a foot of the nature suffered by the appellant will no doubt be felt, and its sequelae will span the entirety of his life. In my view, on consideration of the matter as a whole, an appropriate award for general damages is R325 000.00.

COSTS OF THE ACTION

- [43] It is well accepted that a successful party is entitled to an award for costs. Generally, because an award for costs is a matter within the discretion of the court, no appeal lies against this. In the present case however the court *a quo*

¹⁴ 2020 JDR 2203 (WCC).

¹⁵ 2012 JDR 2481 (ECP).

¹⁶ 2003 5 QOD E8-1 (CA).

granted leave to appeal against the failure to award costs.¹⁷ Considering the finding of the court *a quo* regarding liability, it ought on that aspect alone, to have awarded costs to the appellant. There was nothing before the court *a quo*, or this court for that matter, to indicate any basis for the exercise of the discretion against the appellant and for that reason alone the appeal in respect of costs must also succeed.

[44] The costs of this appeal will follow the result. Given the nature of the matter and its obvious importance to the appellant, it is appropriate that the costs of the appeal be awarded on scale C.

[45] In the circumstances I propose the following order:

[44.1] The appellant is granted leave to appeal in respect of general damages.

[44.2] The appeal is upheld with costs, which costs include the costs of counsel on scale C.

[44.3] Paragraphs 2 and 3 of the Order of the court *a quo* dated 8 November 2023 is set aside and replaced with the following:

“2 *The Defendant is ordered to furnish to the Plaintiff, an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of future medical, hospital and associated expenses incurred by him in consequence of injuries sustained in a motor vehicle collision on 17 August 2018. This Undertaking is to be furnished to the Plaintiff within 30 (thirty) days of date of delivery of the Order to the Defendant.*

¹⁷ *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69.

3. *The Defendant is ordered to pay to the Plaintiff, the sum of R560 452.00 made up as follows:*

3.1 *Loss of earnings – R235 452.00.*

3.2 *General damages - R325 000.00.*

4. *The Defendant is ordered to pay the Plaintiff's costs of suit as between party and party which costs are to include the costs of the plaintiff's application in terms of Rule 38(2) together with the costs of counsel as well as the experts."*

[44.4] Save as aforesaid, paragraph 1 of the order dated 8 November 2023 remains extant.



A MILLAR

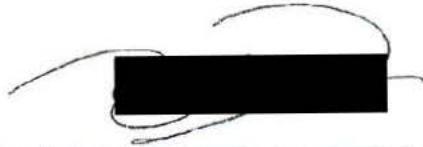
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED



N KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE,



J S NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

20 MARCH 2025

JUDGMENT DELIVERED ON:

04 APRIL 2025

COUNSEL FOR THE APPELLANTS:

ADV. P VAN RYNEVELDT SC

INSTRUCTED BY:

HW THERON INC.

REFERENCE:

MS. J VAN DEVENTER

NO APPEARANCE FOR THE RESPONDENT