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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: 611/2023

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE: 04/06/2025

SIGNATURE

In the matter between:

**ADVOCATE STADLER KOK
OBO LE ROY JACOBUS SMUTS**

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 04 June 2025 at 10:00.

JUDGMENT

Mashile J

Introduction

[1] On 19 September 2014 at approximately 16:40 at Cnr Piet Retief Street and Madiba Drive, Mbombela, Province of Mpumalanga, a multiple motor vehicle accident involving Le Roy Jacobus Smuts (“Smuts”), represented by the Plaintiff, a *curator ad litem* (“Advocate Kok”), in these proceedings, occurred. The motor vehicles involved in the accident respectively bore registration letters and numbers F[...] (“the first insured vehicle”) driven by R Mnisi, D[...] (“the second insured vehicle”), driven by J Grobler, an unidentified motor vehicle (“the third insured vehicle”) and a motorcycle ridden by Smuts. In consequence of this accident, Smuts sustained serious bodily injuries for which he instituted this personal injury claim for damages against the Defendant (the Fund”).

[2] At the start of the proceedings, Counsel for the parties advised this Court that they had on 11 September 2019 resolved liability on the understanding that the Fund would pay 20% of Smuts’ proven or agreed damages. Smuts, obviously with the assistance of Advocate Kok, accepted this offer. The position is therefore that this Court would adjudicate on the following issues:

- 2.1 Future medical, hospital and related expenses;
- 2.2 Past medical, hospital and related expenses;
- 2.3 Loss of past and future earnings; and
- 2.4 General damages.

[3] I do not regard the issues listed under paragraphs 2.1 and 2.2 as being insurmountable of resolution. I say this because the parties have already determined

liability at 80%/20% in favour of the Fund. As such, I would imagine that if there is a link between the injuries sustained by Smuts and the loss that ensued as a result of the accident, the Fund will furnish a certificate in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, limited to 20% in respect of future medical, hospital and related expenses. Equally, insofar as past medical expenses are concerned, it is now settled that the Fund is liable to pay such expenses regardless of whether ordinarily, and in any other circumstances, they would be paid for by medical aid.

[4] To prove his loss, Smuts filed the following medico-legal reports:

- 4.1 Dr WE Williams (Orthopaedic Surgeon);
- 4.2 Dr JA Smuts (Neurologist);
- 4.3 Dr M Vorster (Forensic Psychiatrist);
- 4.4 Ms A Cramer (Clinical Psychologist); and
- 4.5 Ms L Taylor (Occupational Therapist).

[5] On perusal of the bundles, I could not find the reports of Drs De Klerk (Neurosurgeon) and Booyse (Orthopaedic Surgeon notwithstanding that the other experts have extensively referred to them). On enquiring about their reports, attorneys for ADV. Kok advised my office that they were not available in word format. The two reports could not be provided because the two experts would not be available to support their contents in Court. Dr de Klerk died prior to the matter coming to Court while Dr Booyse closed his practice before the case was heard. The two reports are therefore valueless to this Court despite that they have now been made available in PDF Format.

[6] In this respect, Dr Williams whom I was advised stepped into the shoes of Dr Booyse, refers to certain aspects of Dr Booyse's report especially injuries that he had observed. It was against that backdrop that I requested their reports. That said, I have been told that their reports will not be forthcoming. Besides the reports of Drs De Klerk and Booyse, Advocate Kok's Counsel specifically refers to the report of both these

doctors without mentioning that one of them has died and that the other closed his practice. Everything said, the reports are not before this Court.

Documentary Evidential Material

[7] It is apparent from the medical records and medico-legal reports compiled by some of the experts that there exist important discrepancies on the injuries that Smuts sustained during the accident. The injuries will have a significant weight not only on general damages but also on loss of earnings. It is therefore crucial to outline these injuries for this Court to know which of them to consider when assessing the amounts to be rewarded under the different heads of damages. Dr W E Williams, who completed the Serious Injury Assessment Report, RAF4 Form, states the following at paragraph 4.4 of the RAF4:

- “(i) According to the patient and his mother, he sustained an impact on the head, with loss of consciousness. The patient now recalls that he was first conscious, aware and clear about his circumstances and surroundings, approximately three weeks after the accident. According to Dr Booyse’s report, there was an intracranial haemorrhage, but no details is available. The available nursing notes record that on 20/09/14, at 24:00, the patient was admitted from casualty, with Glasgow Coma Scale score of 15/15. The initial nursing notes do not record a head injury. A further note dated 20/9/14, at 07:30, records that the patient was awake, orientated and cooperative;
- (ii) Impact injury of the chest, with possible haemo-pneumothorax. However, scarring over the patient’s chest wall is not typical of the scars that would be expected from treatment of a pneumothorax, with intercostal drain/s;
- (iii) Fractures of the left radius and ulna;
- (iv) Pelvic injury, involving the left sacroiliac joint and fracture of the left iliac blade;
- (v) Penetrating injury of the left upper thigh;
- (vi) Fracture of the distal shaft of the left femur;

(vii) Disruption of the anterior cruciate and lateral collateral ligaments at the left knee.”

[8] At Paragraph 6 of the particulars of claim, Advocate Kok’s attorneys record the injuries of Smuts as follows:

“As a result of the aforesaid collision, the Plaintiff suffered inter alia the following serious injuries as contemplated by section 17(1) of the Act.

- 8.1 Fracture of the left arm;
- 8.2 Severe damage to the left leg and knee;
- 8.3 Damage to the main artery of the left leg;
- 8.4 Skin grafts on the left leg.”

Paragraph 6 then concludes by stating that the nature of the injuries will follow in due course in a medico-legal report.

[9] Counsel for Advocate Kok records the injuries of Smuts as being:

- 9.1 According to the Neurologist and Neurosurgeon: Moderate diffuse traumatic brain injury;
- 9.2 According to the Psychiatrist: Moderate to Severe diffuse traumatic brain injury;
- 9.3 Frontal brain dysfunction;
- 9.4 Significant neuro-psychiatric abnormalities;
- 9.5 Neuropsychological deficits;
- 9.6 Shaft fractures of the left radius and ulna;
- 9.7 Pelvic injury, involving the left sacroiliac joint and fracture of the left iliac blade;
- 9.8 Penetrating injury of the left upper thigh;
- 9.9 Fracture of the distal shaft of the left femur; and
- 9.10 Chest injury, lung injury and lung contusion.

[10] Counsel for Advocate Kok then proceeds to briefly list the following as the sequelae flowing directly from the injuries sustained by Smuts:

- 10.1 Smuts' right leg has shortened by 1 centimetre when compared to the left;
- 10.2 Scarring;
- 10.3 Severe depressions;
- 10.4 Emotional shock and trauma; and
- 10.5 Psychological trauma.

[11] Dr Smuts did not only compile a medico-legal report on behalf of Smuts, but she also testified at the trial. According to her report, she examined Smuts on 16 April 2024. As such, the examination only happened nine years and 7 months following the accident. The injuries that she lists in her report as having been sustained by Smuts on 19 September 2014, as per the hospital records, are: (i) fractured radius and ulna; (ii) dislocated and very painful left knee; (iii) bruises on both sides of abdomen L&R lateral towards back; and (iv) a lung contusion. As is evident, there is no mention of a head injury at all.

[12] What is strange, and disquieting is that, without any source and evidence, Dr Smuts then proceeds to state that Smuts was unconscious and only recovered and awoke three weeks following the accident. As pointed out by Counsel for the Fund, even if one were to accept that Smuts could have been unconscious, it could not have been for three weeks. This is because he was admitted on 19 September 2014 and released ten days later, on 29 September 2014. Dr Williams, in the RAF4 that he completed, records that according to the nursing notes, Smuts was "awake and orientated" the following day, 20 September 2019, at 7:30.

[13] Smuts' father told the clinical psychologist that when the accident occurred, he was nearby, and he quickly went to the scene. According to the Clinical Psychologist, the father observed that Smuts was unconscious. Ironically, Smuts was able to provide

the paramedics with his parents' contact information. Smuts told the Clinical Psychologist that he was unconscious until three to 5 days after the accident. This information to the Clinical Psychologist is head-to-head with the notes from Dr Williams, which I have recorded supra, and they state that Smuts and his mother told him that he only became aware of his surroundings three weeks after the date of the accident. This, of course, is bound to raise doubts about whether Smuts sustained a head injury on that day, especially with the nursing notes recording that he was awake the following day at 7:30.

[14] Additionally, the record of the nursing notes that Smuts was fighting and trying to pull all the connections on 24 September 2014 at 20:30 suggest that he must have been obviously conscious. Thus, the allegations by Smuts and his mother that he only became aware of his surroundings three weeks into his hospital stay are not only aberrant but are also imaginary. It was therefore incorrect for Dr Smuts to place any weight on this dubious information. It is also staggering that she lists the injuries as captured in the medical records and still accepts the information levied by Smuts and his mother without reconciling it with the medical records. All this, coupled with the report that Smuts was able to furnish his parents' contact particulars at the scene of accident should have raised red flags because it negates the contention that Smuts was unconscious.

[15] The conclusion by Dr Smuts that, "it is my opinion that he sustained a significant head injury and was left with moderate mainly frontal brain injury", must be fallacious as there are no sufficient grounds on which to establish any causal link between those injuries and the accident that occurred on 19 September 2014. I agree with Counsel for the Fund that it is plausible that since the examination occurred almost ten years after the accident, the probability that the brain injury, if any, could have been caused by a different occurrence cannot be excluded. It is not only the possibility of a prior event but also one post the accident that could have caused his head injury because the medico-legal reports were compiled years after the accident. During the cross examination, Dr

Smuts admitted that the severity of the head injury is such that it could not have been misdiagnosed on admission in Hospital.

[16] The Hospital records indicate that he was intubated due to his restlessness. It is also true that there is no record in his history in Hospital where he complained of a headache. This, of course, enhances and is consistent with the contention that he did not sustain any head injury. The evidence levied in the documentary evidence and in Court suggests that the head injury did not arise from the accident. It would be foolish to accept the head injury in circumstances where there is no connection between it and the accident. This Court will disregard it in its entirety due to the lack of evidence to demonstrate a connection.

[17] Turning to the other Orthopaedic injuries sustained by Smuts that are not recorded in the Hospital records, the fracture of the left femur, which was treated by external fixation, the pelvic injury treated conservatively and torn ligaments around the left knee. It is true that Dr Williams conceded that it would not be easy to miss an injury as major as fractures of the femur and the pelvis. That said, he was nonetheless prepared to accept that these injuries were probably sustained during that accident on 19 September 2014.

[18] This Court agrees with Dr Williams' opinion that these injuries were likely caused by the accident. I must immediately point out that doing so is somewhat odd because it goes against Dr Williams' testimony that it would have been hard to miss injuries as seriously as fractures of the femur and pelvis. I do so because there is mention of injuries to the femur and pelvis in the nursing notes albeit with little detail. For example, the notes are silent on the nature of those injuries and type of treatment administered.

[19] However, the fact that all these injuries are on the left leg, on a scale of probabilities, tends to support the approach of Dr Williams and this Court. Besides, it is also possible that the more painful and visible injuries like the knee and the left arm respectively could have numbed the fracture of the femur and pelvis injuries. In any

event, the most conspicuous to the medical personnel that attended Smuts would have been the obvious, the knee and the left arm. At this juncture, therefore, I part ways with Counsel for the Fund who submitted that the Court should only have regard to those mentioned in the medical records.

Evidence

[20] According to Dr Williams, in addition to those injuries referred to in the medical records, Smuts probably had injuries to his left knee ligaments, pelvis and fracture of the femur. This is notwithstanding that he could not with certainty confirm that they were sustained during the accident. In short, this Court is satisfied that on a balance of probabilities, a connection between the accident and these injuries has been established.

[21] To the extent that the reports of Drs Smuts, Vorster, and Mesdames Cramer, L Taylor and Rautembach have all assumed that there was a moderate to severe head injury caused by the accident, I regard their reports as immaterial. I therefore have no reason to consider them except insofar as they may discuss the orthopaedic injuries, how they have affected Smuts psycho-neurologically and to a limited degree, the way they contradicted themselves.

[22] The inconsistencies between Drs Vorster and Smuts are disquieting and, as such, require a thorough examination. Dr Vorster's opinion is that Smuts presents with "organic brain syndrome with a depressed mood associated with a moderate brain injury". She described an organic brain disorder as a disorder, which would have been triggered by a traumatic brain injury. Asked whether such injury could manifest itself at a later stage or whether it could be felt on impact. Dr Vorster testified that it would be felt immediately on impact by either a concussion, loss of consciousness, injury to the head or a headache.

[23] During her testimony in Court, Dr Smuts stated that a head injury may be progressive, and its effect may not be felt on impact but only develop fully later. Dr Smuts stated that on the second day of hospitalization, Smuts' GCS fell to 8/9 out of 15. This sudden drop in the GCS reading is confounding, especially in the absence of any reference to a head injury anywhere in the medical records and that Smuts was fully awake and co-operative the following day at 7:30. To assert that there was a head injury caused by this accident could be attempting to communicate it into existence hoping that it will eventually come to life.

[24] I have also considered the reports of Drs de Klerk and Booyse even though their reports are technically not before this Court insofar as they did not testify. In my opinion, their reports do not solve the difficulty that confronts this Court with the head injury. The evidence of it having occurred during the accident is overwhelmingly negated when tested against the nursing notes, Dr Williams' report, and the evidence by Smuts himself and his mother. Moreover, while it could be true that a GCS of 15/15 does not define the severity of a head injury, in this instance it must play a significant role given the contradictory nature of evidence of whether Smuts' head injury is attributable to this accident.

[25] The opinion of this Court should not be perceived to be insensitive towards the situation of Smuts. The Court's difficulty is in reconciling the evidence before it because it is mutually exclusive. Smuts cannot be declared to have been unconscious for three weeks when the nurses stated that he was awake at 7:30 the following day and that three days later he was restless. His agitation on that day prompted the medical personnel to intubate him. Moreover, it must be remembered that no mention of this injury is included in the medical records or nursing notes. In contrast, insofar as the knee and pelvis are concerned, there is an indication in the nurses' notes, albeit skimpily, which for this Court is reassuring. Against that backdrop, I will assess Smuts' loss under the relevant heads of damages on the assumption that he did not have a head injury.

General Damages

[26] Excluding the head injury and its sequelae, the injuries suffered by Smuts during the accident of 19 September 2014 are the following:

- 26.1 Shaft fractures of the left radius and ulna;
- 26.2 Pelvic injury, involving the left sacroiliac joint and fracture of the left iliac blade;
- 26.3 Penetrating injury of the left upper thigh;
- 26.4 Fracture of the distal shaft of the left femur; and
- 26.5 Chest injury, lung injury and lung contusion.

[27] I am accepting the above injuries despite the following remarks of Dr Williams, indicating that some of these injuries are not categorically supported by the clinical notes:

“The available copies of clinical records are quite scanty and do not contain a comprehensive description of the patient’s injuries or treatment. The only injury that is clearly recorded is the fracture of the left radius and ulna, and the consent forms refer to treatment of the left lower limb, without a description of the acute pathology.

i) The patient associates the onset of the headaches with the injuries he sustained in the accident;

The patient’s Neurocognitive and Psychological status should be assessed by appropriate experts, including a Neurologist or Neurosurgeon, who can consider the impairment related to mental-and behavioural disorder and its possible nexus with the accident.

ii) According to the patient, he was treated by insertion of tubes into his chest, but the scarring does not have the appearance of the scars that are usually associated with intercostal drains. The clinical and Radiological appearance of the patient’s chest is normal. From the available information, it

does not appear that the patient had sustained haemo-pneumothorax or visceral injury of the thorax;

iii) The condition of the patient's left radius and ulna, including the presence of Orthopaedic implants and the overlying surgical scarring, as well as the associated symptoms, can be attributed to an injury the patient was recorded to have sustained in the accident on 19 September 2014;

iv) The available copies of clinical records do not record an injury of the pelvis, but it would be reasonable to accept that the pelvic injury may have occurred at the time of the accident on 19 September 2014;

v) The available copies of clinical records do not record a penetrating injury of the left thigh, but it would be reasonable to accept that the pelvic injury may have occurred at the time of the accident on 19 September 2014;

vi) The available copies of clinical records do not record a fracture of the left femur, but the reference to external fixation would be compatible with a fracture of the femur;

vii) The available copies of clinical records do not record disruption of the ligaments of the left knee, but the reference to external fixation would be compatible with initial treatment of complex ligamentous disruption.”

[28] It is trite that only the general award and not a comparison of every detail is considered to determine an amount and that comparison to previous awards is not the technique of evaluating non-patrimonial damages and only serves as a trend. It cannot be used in such a way to prohibit or restrain the discretion of the Court. Thus, both parties have referred this Court to cases which they think are appropriate when deciding what award to make under general damages. Of all the cases, I found the two that I discuss below to be instructive.

[29] Insofar as the injuries to the upper left arm of Smuts are concerned, I find the matter of *Ngomane v Road Accident Fund*¹ to which the Fund referred this Court, closely analogous and therefore helpful. The injuries in the *Ngomane* matter were

¹ *Ngomane v Road Accident Fund* [2017] ZAGPPHC 401.

severe fractures of the right humerus, radius and ulna. Those injuries had left the injured practically with a dysfunctional right arm and scarring. He also could not carry heavy objects. The Court in the *Ngomane* matter awarded R600 000.00 in the 2024 rate.

[30] I found the injuries to Smuts' left leg to be closer to what the injured in *Litseo v Road Accident Fund*,² a case to which Advocate Kok referred this Court, suffered. The injuries in the *Litseo* matter were to the right upper leg, knee, the right lower leg, ankle and the left knee and lower leg. The only difference between the two, it would appear, is that Smuts' right leg was not affected by the accident at all whereas in *Litseo* the injured was. In 2019, the Court awarded an amount of R700 000.00, which in the 2024 value was R854 910.00.

[31] Having perused these two cases, I have concluded that a total award of R1 500 000.00 is appropriate for these injuries. This amount obviously excludes the head injury, which was previously regarded as part of the injuries sustained by Smuts.

Loss of Earnings

[32] As I understand it, the main injury that will continuously stand in the way of Smuts is the knee injury. I say this because Dr Williams has said that the ulna, radius pelvis and femur have all cured without significant result. That, of course, should not be understood to mean that Smuts has been restored to his pre-accident condition in respect of those injuries. All that it means is that he remains relatively functional.

[33] Before proceeding with this part of the claim, it is useful to preface the discussion that will follow with the passage below, which I have uplifted from the report of Ms Rautembach:

² *Litseo v Road Accident Fund* [2019] ZAFSHC 52.

“There are factors that place the claimant’s ultimate earnings potential at risk, which cannot be quantified, therefore, it is recommended a higher-than-normal post-accident contingency can be applied to account for the following:

“His continued employment in this capacity would be dependent on his parents’ ability to continue to manage their business enterprises profitably and contingent on his neuropsychological difficulties not impacting negatively on the family business’s operations and profitability, as opined by the Clinical Psychologist. Further, the claimant will require surgical intervention in the future and any time off from work will translate into a direct loss of income if his sick leave is depleted. Furthermore, the Clinical Psychologist states that the claimant had major depression symptoms and matched the requirements for post-traumatic stress disorder. This can lead to decreased work performance, increased absenteeism, safety concerns and reduced job satisfaction, which ultimately impact his overall functioning and earnings potential. Because of his executive deficits, increased irritability and short temper, low self-esteem, loss of social interest, socially inappropriate behaviour, lack of drive and motivation, depressive symptoms, and increased levels of anxiety, the profitability of the farm may be compromised as the claimant may fail to manage the farm and staff adequately. Additionally, petit mal seizures as noted by the Clinical Psychologist, are confirmed. As such, due to the physical risk that this pose, the claimant’s occupational choices will be further reduced and he may be precluded from the ability to safely drive, work at heights or with heavy machinery, or operate other farm-related machinery. All these factors may result in his parents opting to preserve the profitability of the farm and no longer employ the claimant, which will result in a direct loss of income. Furthermore, if his parents decide to sell their business interests, it is unlikely that the claimant will be able to secure alternative sympathetic employment in the open labour market. He would have received profit share and a percentage of hunts on top of his salary. As partner/entrepreneur in the open labour market of the game farm, hunting and other business interests he could have earned more than the postulated career

ceiling. The writer recommends a higher-than-normal post-accident contingency be applied to account for this possibility which will result in future loss of income”.

[34] The only difficulty that I have with Ms Rautembach’s report is that she makes the success of the business enterprise of Smuts’ parents dependent on him. This approach is misguided because as a business, it should be at liberty to employ any other person whose qualifications meet the requirements of the business. In fact, such a plan will benefit Smuts due to the testimony that his parents would want him to take over the business when they retire or inherit their estate on their death.

[35] While the knee injury is serious and will continue to bother him, it will not preclude him from doing sedentary work and limited supervisory work as an owner. All that I am saying is that once his parents retire or die, he will surround himself with qualified and competent people to ensure that the business survives. I say this mindful that he may not achieve all these because of his cognitive deficits but the Fund cannot be liable for challenges attendant upon his head injury and any loss that flows therefrom. It is quite evident from the reports of the various experts that the head injury has had significant impact on his work career.

[36] In the opinion of this Court, without the head injury Smuts would still be working and probably earning more than he did prior to the accident. In the circumstances, a claim for loss of earnings on the facts of this matter is improper.

Past Hospital and Medical Expenses

[37] The Fund’s rejection of Smuts’ claim under this heading has been superseded by developments in the law. The argument of the Fund for rejecting past Hospital and medical expenses on the basis that medical aid schemes cannot recover from it have been comprehensively dealt with previously by High Courts, the Supreme Court of Appeal and the Constitutional Court. I have no reason to entertain it because of the

principle of *stare decisis*. The less said about the reasons for the Fund rejecting the claim, the better.

[38] In the result, I make the following order:

1. The claim for loss of earnings is dismissed.
2. The Fund is liable to Adv. Kok in the sum of R431 004.49 made up as follows:
 - 2.1 Past medical, hospital and related expenses (R 655 022.46 less 80%):
R131 004.49;
 - 2.2 Future medical and hospital expenses limited to 20%: Undertaking;
 - 2.3 General damages (R1 500 000.00 Less 80%): R300
000.00;
- Total Damages Suffered: R431
004.49.
3. Interest at the prescribed legal rate per annum calculated from a date 14 days from date of judgment to date of payment;
4. The Fund is directed to pay the costs of Adv. Smuts occasioned by this action.

B A MASHILE
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Plaintiff:	Adv S Kok
Instructed by:	Du Toit-Smuts Attorneys
Counsel for the Defendant:	Adv T Malope
Instructed by:	The State Attorney, Mbombela
Date of Judgment:	04 June 2025