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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not reportable

CASE NO. 2854/2016

In the matter between:

S[...] D[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

LAING J

[1] This is an action for damages arising from an incident that took place on 11 November 2013 at the village of Zindingi in the Coffee Bay district.

Background and issues for determination

[2] The driver of a tractor lost control of the motor vehicle, resulting in its overturning and trapping the plaintiff's leg. The accident caused severe injuries to his left hip and other parts of his body. The defendant previously conceded liability, only the quantum of damages remained in dispute.

[3] The plaintiff's claim was for payment of R 1 740 000, as well as the provision of an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 ('RAF Act'). The history of the dispute reflected numerous attempts made by the plaintiff to reach settlement with the defendant, but to no avail. At the commencement of trial, the plaintiff submitted a list of issues for determination, noting that he had abandoned his claim for past medical expenses and that his claim for loss of earning capacity had been settled. He persisted in his claim for general damages, in the amount of R 1 000 000, as well as the undertaking. The dispute could be reduced to the determination of a single crisp issue: whether there was a causal *nexus* between the accident and his left hip injury.

Legal framework

[4] In *Lee v Minister for Correctional Services*,¹ the Constitutional Court described the test for causation as follows:

'...Although different theories have developed on causation, the one frequently employed by courts in determining factual causation is the *conditio sine qua non* theory or but-for test. This test is not without problems, especially when determining whether a specific omission caused a certain consequence. According to this test the enquiry to determine a causal link, put in its simplest formulation, is whether "one fact follows from another" . . .'²

[5] The but-for test remains the usual approach when dealing with the issue of causation. In *ZA v Smith and another*,³ the court held that:

¹ 2013 (2) SA 144 (CC).

² Paragraph 40.

³ 2015 (4) SA 574 (SCA).

‘What it essentially lays down is the enquiry — in the case of an omission — as to whether, but for the defendant’s wrongful and negligent failure to take reasonable steps, the plaintiff’s loss would not have ensued. In this regard this court has said on more than one occasion that the application of the “but-for test” is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant’s wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty.’⁴

[6] The question to be answered in the present matter is whether, but for the negligence of the driver of the tractor, the plaintiff’s left hip injury would not have occurred. Was the driver’s conduct a *conditio sine qua non* in relation to the harm suffered? By implication, could the injury be attributed to some other cause, e.g. a tuberculosis-related pathology?

[7] The remaining principles that constitute the applicable legal framework pertain to the evidence of the witnesses, as well as the quantum of general damages that should be awarded if causation is established. These will be dealt with separately in the discussion that follows.

Evidence presented

[8] The court granted the plaintiff’s application, made in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988, for the admission of the discovered medical records and an employer’s certificate, both having been referred to in the affidavit of the plaintiff’s attorney, Ms Linda Willemse. The court also granted an application for the admission of the affidavits of several experts.

[9] The plaintiff testified that he had no formal schooling. Prior to the accident, he used to walk to places of employment, the shops, and church. He stated that he

⁴ Paragraph 30.

never experienced pain in his left hip or foot, he suffered from no illnesses. After the accident, he relied on a wheelchair for two years; currently, he uses crutches. He was diagnosed with tuberculosis (TB) in 2015 but no longer suffers from it. He is also HIV positive, for which he receives medication. The plaintiff experiences seizures and suffers from persistent pain. The accident had a significant impact on his life, such that there was little that he could do for himself. The plaintiff testified how he could not afford school fees for his daughter, and how his peers made fun of him. He earned some income from repairing shoes. Under cross-examination and to the court's questions, he explained that he had been flung off a fast-moving tractor onto a gravel road and that the tractor had fallen on top of him, pinning his leg underneath. He had complained about his injured hip to the medical staff who attended to him. When it was pointed out that there was no indication of this and that the first time that it was recorded was some two to three months after the accident, the plaintiff was adamant that he had mentioned his hip at the time. The pain had become progressively worse.

[10] The next witness was Ms N[...] M[...], who said that she had been in a relationship with the plaintiff since 2010. She described the plaintiff's circumstances prior to the accident, saying that he would work in the garden, attend to the cleaning and the laundry, and cook; he would also take care of his child. The witness added that he had not suffered from any illnesses previously. Ms M[...] went on to say that the plaintiff had sustained injuries to his hip, his knee, and his foot in the accident, resulting in her having to take care of him. There was little that he could do for himself, his hip was too painful. He had suffered from TB, she said, but no longer received treatment.

[11] Dr Pieter Olivier testified in his capacity as an orthopaedic surgeon. He first saw the plaintiff in early 2016. The existing clinical reports, he said, were incomplete; there was no evidence that the plaintiff had been properly examined upon his admission to hospital at the time of the accident. The witness explained that the plaintiff had sustained a severe injury to his left hip, involving a fracture of the acetabulum, which was the 'cup' in which the head of the femur could be found; the latter had also been fractured. A partial amputation had been carried out on two of the toes on his left foot. Dr Olivier noticed, on examination of the plaintiff, that there

was a 2.5 cm leg-length discrepancy, resulting from problems with the hip joint. There was little to no range of movement. The plaintiff had complained of pain in the left groin, which was aggravated when he attempted to walk or stand. He would have endured moderate to severe pain for the first 12 to 16 weeks after the accident, followed by intermittent pain. In his examination of the plaintiff, Dr Olivier referred to numerous x-rays, as well as a CT scan. He agreed with the findings of the radiologist involved, Dr Thina Twetwa, but disagreed with the findings of the defendant's expert, Dr Mahmood Aslam, to the effect that the hip pathology was TB-related. Dr Olivier stated that it was undoubtedly post-traumatic osteoarthritis or wear and tear. There was no indication of TB in the x-rays and the CT scan that he had requested. The fracture of the acetabulum and femoral head required a significant degree of energy, typical of motor vehicle accidents. The type of injuries that the plaintiff sustained were compatible with the incident that gave rise to the plaintiff's claim. Regarding the possibility that the plaintiff's hip had been affected by TB, Dr Olivier said that none of the classic radiological findings in relation to TB was present; there was no loss of calcification, no cavitation, and no joint space narrowing. The witness stated that the plaintiff would require further pain treatment, as well as a total hip replacement. He could only undertake light physical work. His reduced earning capacity was purely the result of the injury to his hip. Dr Olivier confirmed that he had completed an RAF serious injury assessment report, in terms of which he had indicated that the plaintiff qualified for an award of general damages; he had sustained a life-changing injury to his hip. During cross-examination, Dr Olivier admitted that there was no reference to a hip injury in the clinical notes compiled immediately after the accident. He found this odd. The only way to diagnose a hip fracture, however, was with the assistance of x-rays and a CT scan. In the present matter, it was the CT scan that revealed the fracture of the femoral head, which had been missed previously.

[12] The affidavit of a radiologist, Dr Thina Twetwa, incorporating her report, was admitted into evidence under rule 38 (2) of the Uniform Rules of Court (URC). In that regard, she confirmed that she had performed a CT scan on the plaintiff in 2018. The scan revealed that the plaintiff sustained fractures of the left femoral head and left acetabulum.

[13] Similarly, the affidavit of an occupational therapist, Ms Joan Andrews, as well as her report, was admitted into evidence. She prepared an initial medico-legal report in 2016, based on, inter alia, the medico-legal report of Dr Olivier; she supplemented it after considering the further reports of Dr Olivier and Dr Aslam, together with the CT scan of Dr Twetwa. In that regard, she agreed with Dr Olivier that the plaintiff suffered left hip fractures, which appeared to have healed with osteoarthritic changes.

[14] A pulmonologist and specialist physician, Dr Peter Chapman, also prepared a report; this was incorporated into his affidavit, which, like those of the previous experts, was admitted into evidence. The report was prepared in 2025 and was based on Dr Chapman's consideration of the x-rays and the reports done by Dr Olivier and Dr Aslam. In that regard, Dr Chapman believed that the crucial issue was whether the accident was the cause of the injury to the plaintiff's left hip or whether the pathology thereof was TB-related. He was, however, unable to express an opinion in this regard and deferred to the views of an orthopaedic surgeon.

Discussion

[15] It is common cause that the defendant's rejection of the plaintiff's claim for general damages was based on Dr Aslam's view that the left hip injury was TB-related. The dispute was subsequently referred to an appeal tribunal constituted in terms of regulation 3 (8) of the Road Accident Fund Regulations, 2008. The tribunal found, on 8 April 2019, that the injury 'does not appear to be attributable to [the] injury sustained in the accident.'

[16] In *Road Accident Appeal Tribunal and Others v Gouws and Another*,⁵ the Supreme Court of Appeal held that the powers of the tribunal are narrowly circumscribed; it does not have the final say in relation to the issue of causation.⁶

⁵ 2018 (3) SA 413 (SCA).

⁶ Paragraph 36.

Similarly, in *Coughlan NO v Health Professions Council of South Africa and Others*,⁷ the court emphasised that:

‘[t]he Tribunal’s role is narrowly circumscribed to assessing the seriousness of injuries. It is not tasked with determining the cause of the injury, which is a matter reserved for judicial interpretation.’⁸

[17] Considering the above principles, the parties cannot be criticized for having adopted a careful approach regarding the issues in dispute. At a pre-trial conference, they recorded that:

‘ . . . the HPCSA concluded that the injuries have resulted in serious physical long-term impairment provided that there is a causal nexus between the accident and the injuries sustained.’

[18] The court can only determine the issue of causation based on the available evidence. This consisted of the testimonies of the plaintiff and Ms M[...], the expert testimony of Dr Olivier, and the affidavits of Dr Twetwa, Ms Andrews, and Dr Chapman. The defendant did not call Dr Aslam. It presented no evidence at all to challenge the plaintiff’s evidence. In *President of the RSA v South African Rugby Football Union*,⁹ the Constitutional Court reiterated that if a point in dispute is left unchallenged during cross-examination, then the party who called the witness may assume that the unchallenged testimony is accepted as correct.¹⁰ Regarding causation, the courts have consistently held that it is necessary merely for a court to be satisfied on a balance of probabilities that the conduct in question caused the harm. As Keightley AJ remarked in *Matlakala v MEC for Health, Gauteng Provincial Government*,¹¹ ‘civil proceedings are all about probabilities, not absolutes.’¹²

⁷ 2024 JDR 4348 (SCA).

⁸ Paragraph 24.

⁹ 2000 (1) SA 1 (CC).

¹⁰ At paragraph 61.

¹¹ 2015 JDR 2199 (GJ).

¹² Paragraph 31.

[19] The plaintiff, Ms M[...], and Dr Olivier were all reliable and credible witnesses, none of their testimonies was seriously challenged. To the extent that the defendant's legal representative was able to test their evidence against Dr Aslam's views,¹³ the plaintiff was adamant that he had informed the examining medical staff about the pain in his left hip upon his admission to both the clinic and the hospital. He had previously suffered from TB, but only some two years after the accident. This was corroborated by Ms M[...]. Importantly, Dr Olivier believed that the injury had not been detected upon the plaintiff's admission because no CT scan had been carried out. He was certain, too, that the injury could not be attributed to TB because there had been no indication of such in either the x-rays or the CT scan to which he had referred; there was no evidence of calcification loss, cavitation, or joint space narrowing, which would have been typical radiological findings if TB had indeed been present. The nature of the fractures sustained to the acetabulum and femoral head were consistent with those sustained in motor vehicle accidents, involving a high degree of kinetic energy. Dr Olivier stated, without hesitation, that the injury involved post-traumatic osteoarthritis or wear and tear.

[20] In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH*,¹⁴ the erstwhile Appellate Division observed that:

‘...an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.’¹⁵

[21] The premises for Dr Olivier's views consisted primarily of his examination of the plaintiff and the x-rays and CT scan that he subsequently obtained. Based on the findings thereof, he reasoned that: (a) a TB-related pathology should be excluded; and (b) the injury was consistent with those sustained in high energy motor vehicle

¹³ The defendant's legal representative was only instructed at the eleventh hour, so to speak, a few days before trial commenced.

¹⁴ 1976 (3) SA 352 (A).

¹⁵ 371F – G.

accidents. There is no reason to reject the conclusions that Dr Olivier reached. His views must be accepted. The defendant, moreover, called no lay witnesses, medical staff, or specialist to undermine or counter the above evidence. As far as reliance was placed on the medical records, these were, at best, inconclusive. Admittedly no mention is made of the plaintiff's left hip injury in the initial notes, dated 11 November 2013, but this could simply be because the staff in question did not have the benefit of access to a CT scan. What cannot be disputed, however, is the frequent reference to left leg pain in the notes that follow.

[22] Overall, the court finds that the probable cause of the left hip injury was the accident that forms the subject of the plaintiff's claim. A fateful combination of speed, a hard road surface, the type of motor vehicle involved, and how the plaintiff's leg was trapped underneath, led to the harm suffered. But for the accident, it is highly improbable that the injury resulted from TB or anything else. The negligent conduct of the driver was the *conditio sine qua non*.

Relief and order

[23] The plaintiff seeks an undertaking from the defendant in terms of section 17 (4) (a) of the RAF Act. It was Dr Olivier's undisputed testimony that the plaintiff will require a total hip replacement; he will also require ongoing treatment for pain. In *Knoetze and Another v Road Accident Fund*,¹⁶ the court held that the defendant's furnishing of an undertaking provides for an 'as-and-when' payment scheme for actual expenses, avoiding the need for contingency considerations; damages are compensated as they occur.¹⁷ Once a plaintiff has proved his or her claim in terms of section 17 (4) (a), he or she is entitled to an order directing the defendant to furnish such undertaking.¹⁸ The court is satisfied that the plaintiff in the present matter has indeed proved his claim in this regard and that provisions in question permit the relief sought.

¹⁶ 2022 JDR 3206 (GP).

¹⁷ Paragraph 13.

¹⁸ Paragraph 26.

[24] Turning to the issue of general damages, the court has already found that there was a causal *nexus* between the accident and the plaintiff's left hip injury. It was the plaintiff's testimony that such injury was never properly detected; it went untreated for a considerable period, leaving him in great discomfort. He had previously relied on a wheelchair and was still dependent on crutches. He had endured embarrassment and humiliation in not being able to care for himself or his young daughter, relying extensively on Ms M[...]s care. He will require a total hip replacement, which will need to be repeated in due course. The plaintiff had, overall, experienced considerable pain, suffering, and loss of the amenities of life. Dr Olivier confirmed, in this regard, that he had submitted an RAF serious injury assessment report, indicating that the plaintiff qualified for an award of general damages; the left hip injury had been a life-changing event.

[25] Counsel for the plaintiff referred to several authorities in support of the quantum to be awarded for general damages.¹⁹ These must be compared with those mentioned by the defendant's legal representative.²⁰ In that regard, the court is persuaded that an amount of between R 900 000 and R 1 000 000, as sought by the plaintiff in argument, would be excessive. An award of R 750 000 would be consistent with awards made in similar cases, once adjusted to present-day values.

[26] Finally, regarding costs, the general rule must be applied. The plaintiff is entitled to the recovery of his expenses. Considering the nature and complexity of the matter, Scale B would be appropriate.

[27] In the circumstances, an order is made in terms of annexure 'A', attached.

¹⁹ See, inter alia, *Couryer v Rondalia Assurance Corporation of SA Ltd* 1968 (1E9) QOD 813 (E); *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (2E3) QOD 40 (E); *Boshoff v Motor Insurers' Association of Southern Africa* 1969 (2F2) QOD 105 (W); *Mzendana v Road Accident Fund* 2008 JDR 0941 (BHC); *Ncama v Road Accident Fund* 2015 (7E3) QOD 7 (ECP); *Masemola v Road Accident Fund* (53419/2014) [2017] ZAGPPHC 1202 (3 April 2017); and *Mashaba v Road Accident Fund* (866/2016) [2018] ZAGPPHC 443 (4 April 2018).

²⁰ See, inter alia, *Hatley v Union & South West Africa Insurance Co Ltd* 1980 (3E9) QOD 137 (C); *Timakwe v Minister of Posts and Telecommunications* 1983 (3J2) QOD 393 (W); *Turpin v AA Mutual Insurance Association Limited* 1985 (3J2) QOD 628 (E); *Reddy v Santam Limited* 1997 (4F3) QOD 24 (D); and *LA Cock v Padongelukkefonds* 2004 (5J2) QOD 80 (AF).

APPEARANCES

For the plaintiff:	Adv Heerink
Instructed by:	Vanderspuy Cape Town 1 st Floor 56 Shortmarket Street CAPE TOWN (Ref: L Willemse/mn/MAT32885) c/o Neville Borman & Botha Attorneys 22 Hill Street MAKHANDA Ref: Mr Powers
For the defendant:	Mr McCallum
Instructed by:	McCallum Attorneys Office no. 10 Fidelity Building 87 High Street MAKHANDA Ref: Mr McCallum
Date heard:	7 May 2025.
Date delivered:	16 September 2025.

ANNEXURE 'A'

1. CAPITAL

1.1 In full and final settlement of general damages, the defendant shall pay to the attorneys for the plaintiff the sum of **R750 000.00** in a lump sum payment within 180 days of the signed order, by way of electronic transfer to the trust account of VanderSpuy (Cape Town).

1.2 It is recorded that the plaintiff's claim for loss of earnings was settled on 25 April 2025 in the amount of **R680 676.00**. Consequently, the defendant shall pay the above amount to the attorneys for the plaintiff in a lump sum payment within 180 days of the signed discharge form, which is annexed hereto, marked as annexure "SD1", by way of electronic transfer to the trust account of VanderSpuy (Cape Town).

2. UNDERTAKING

2.1 The defendant shall provide an unlimited and unspecified undertaking, free of any limitations, *caveats*, restrictions and specifications, in terms of section 17(4)(a) of the Road Accident Fund, No. 56 of 1996 ("the undertaking") to compensate the plaintiff for 100% of the costs relating to the future medical expenses or accommodation in a hospital or nursing home, or the treatment of the plaintiff or rendering of a service to the plaintiff or supplying of goods for the plaintiff's benefit in respect of such costs, after the costs have been incurred and on proof thereof,

in respect of the injuries sustained during the accident, which occurred on 11 November 2013.

3. COSTS

3.1 The defendant shall pay the plaintiff's reasonable taxed or agreed costs on the High Court scale, including, for the sake of clarity, but not limited, to the costs as set out below:

3.1.1 the reasonable party and party costs on the High Court scale;

3.1.2 the reasonable costs attendant upon obtaining payment of the capital amount; and

3.1.3 the reasonable taxed or agreed fees of the experts, attached to the procurement of the expert reports, including the costs of the plaintiff's attending all medical-legal examinations, inclusive of the reasonable travelling expenses and accommodation expenses incurred, as well as other related costs, to be at the discretion of the Taxing Master, the experts in question being the following:

3.1.3.1 Dr. PA Olivier, an orthopaedic surgeon;

3.1.3.2 Dr. T. Dicker, a radiologist;

3.1.3.3 Dr T Twetwa, a radiologist;

3.1.3.4 Dr D Creamer, a radiologist;

3.1.3.5 Dr P Chapman, a pulmonologist;

3.1.3.6 Ms. Joan Andrews, an occupational therapist;

3.1.3.7 Ms. Anneke Strauss, an industrial psychologist;

3.1.3.8 Mr. Willem Boshoff, an actuary;

3.1.3.9 MVO Assessors.

3.2 The Plaintiff's partner, Ms. N[...] M[...], is declared to be a necessary witness.

3.3 The defendant shall pay the reasonable travel and accommodation costs of the plaintiff and Ms. N[...] M[...].

3.4 The defendant shall pay the reasonable costs of the interpreter, Ms. A. Landu.

3.5 The defendant shall pay the costs of the plaintiff's counsel, including the costs of drafting heads of argument herein and the day fees for 6 and 7 May 2025, on the High Court Scale "B".

4 PAYMENT PROVISIONS

4.1 The payment provisions in respect of the foregoing are agreed as follows:

4.1.1 Payment of the capital amount shall be effected within 180 calendar days from the due date directly to the plaintiff's attorneys of record by means of electronic transfer into the trust account of VanderSpuy (Cape Town), held at NEDBANK, branch code 118602, account number 1[...] and reference number LW/MAT32885.

- 4.1.2 The plaintiff undertakes not to issue a writ in respect of the payment mentioned in paragraph 4.1.1, above, prior to the expiry of the 180-day period.
- 4.1.3 The parties agree that the plaintiff will be entitled to have the costs provided for in this order taxed by the Taxing Master of the High Court. The costs shall be paid within 180 days from the date (“the due date”) of settlement or taxation into the trust account of VanderSpuy (Cape Town).
- 4.1.4 The plaintiff undertakes not to issue a writ in respect of the payment mentioned in paragraph 4.1.3, above, prior to the expiry of the 180-day period.
- 4.1.5 Should the capital or costs not be paid by the relevant due date(s), the defendant will be liable for interest thereon at the prevailing statutory mora rate.

5 CONTINGENCY AGREEMENT

- 5.1 It is recorded that the plaintiff and his attorneys of record have not entered into a contingency fee agreement and that the provisions of the Contingency Fee Act, (Act No. 66 of 1997) are not applicable.