

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 59188/13

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	
SIGNATURE	DATE
	<u>3/9/2015</u>

3/9/2015

In the matter between:

BHEKISISA SIMON DLAMINI

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

MALI AJ

- [1] The plaintiff herein instituted action against the defendant herein, the Road Accident Fund as a result of the motor vehicle accident which occurred on 1 September 2012. The merits of the matter were settled with the defendant accepting liability for 100% of the plaintiff's proven damages.

[2] In the particulars of claim at paragraph 6 and 7 the plaintiff alleged as follows:

"6. In and a result of the said accident, Plaintiff sustained, inter alia, the following severe injuries;

6.1 a severe brain injury with intracranial bleeding and multiple contusions;

6.2 a comminuted fracture of the mandible; and

6.3 facial injuries.

7. The sequelae of the injuries sustained by the Plaintiff are and were the following:

7.1 he received hospital and medical treatment;

7.2 he incurred hospital and medical expenses and will in the future incur further such expenses;

7.3 he suffers from ataxia;

7.4 he suffers from a diminution in his cognitive capacity;

7.5 he suffered shock, pain, suffering, discomfort and disability and will in the future suffer further pain, discomfort and disability;

7.6 he has in the past and will in the future suffer a loss of the amenities of life; and

7.7 he has in the past and will in the future suffer a loss of earnings."

[3] The issues to be determined are the following:

- (a) The amount to be awarded to the plaintiff in respect of his claim for general damages;
- (b) The amount to be awarded to the plaintiff in respect of his past loss of income and
- (c) The amount to be awarded in respect of future loss of income.
- (d) Undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996("section 17(4)(a)).

[4] The defendant admitted the following reports :

- 4.1 RAF 4 Serious Injury Assessment Report;
- 4.2 Report by Dr DA Ramogale Sports Physician;
- 4.3 Report by M. J Adan, Clinical Neuropsychologist;
- 4.4 Report by Dr D. De Klerk, Neurosurgeon;
- 4.5 Report by Dr GA Versfeld, Orthopaedic Surgeon;
- 4.6 Reports by A. Jamotte, Industrial Psychologist;
- 4.7 Report by Dr M Close, Psychiatrist;
- 4.8 Report by Roos & Du Preez, Occupational Therapist and
- 4.9 Report by M. Cartwright, Industrial Psychologist

- [5] The parties agreed that no oral evidence was to be led, and that issues in dispute were to be determined by the court solely on the evidence contained in the various experts' reports filed by the plaintiff. The defendant did not file any medico-legal reports.

GENERAL DAMAGES

- [6] The plaintiff has claimed an amount of R1, 500 000 in respect of general damages. In **PROTEA INSURANCE COMPANY v LAMB 1971(1) SA 530 (A) at 534H and ROAD ACCIDENT FUND V MARUNGA 2003(5) SA 164 (SCA) at 23** it was stated that a claim of general damages comprise of pain and suffering, disfigurement, permanent disability and loss of amenities of life.
- [7] In **SOUTHERN INSURANCE ASSOCIATION LIMITED V BAILEY N.O. 1984(1) at 99H** the following was stated:

"The AD has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached. The accepted approach is the flexible one described in Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 AT 199, namely: "The amount to be awarded as a compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending upon the Judge's view of what is fair in all the circumstances of the case". To adopt a different approach (in casu, it was contended that the "functional approach" should be adopted, ie the approach according to which damages for non-pecuniary loss may be justified only to the extent that they might effectively be employed to provide the plaintiff with a reasonable solace for his misfortunes) might result in injustice of the kind referred to in Lim Pooh Choo v Camden and Islington Area Health Authority

[1979] 2 ALL ER 910 [HL] at 919. This does not mean, of course that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account together with all the other circumstances"

- [8] In assessing the amount to be awarded to the plaintiff for general damages, the following reports were considered:

THE EVIDENCE OF DR G.A. VERSFELD –ORTHOPAEDIC SURGEON

- [9] **Dr G.A. Versfeld** stated that the plaintiff suffered injury in the right foot resulting to him having problems in wearing shoes. In his report he further noted that radiological there was evidence of dislocation of the MP joint of the second toe ; and that the above features suggest that he sustained a severe right foot injury, with dislocation of his second metarsophalangeal joint and damage to the navicular cuneiform joint and inter-cuneiform joint. He remarked as follows:

"He has suffered serious loss of physical activities and social amenities. I find no reason to suspect that his life expectancy has been altered by the orthopaedic injuries sustained in this accident".

THE EVIDENCE OF DR D.A. RAMAGOLE- SPORTS PHYSICIAN

- [10] According to the report of **Dr D A. Ramagole**, the plaintiff sustained severe injuries to the head and face with intracranial bleeding and a mandible fracture. He was kept ventilated and sedated and when his condition was

stabilised, burr holes were done to drain the bleeding from the brain. The conclusion reached by Dr Ramagole is that the plaintiff is deemed to have suffered irreversible brain damage which renders him unsafe to himself and to others especially in a working environment. He is not suitable to work especially in the mining sector where safety is of paramount importance.

THE EVIDENCE OF DR DE KLERK- NEUROSURGEON

[11] **Dr De Klerk** , in his final opinion reported as follows:

“The claimant sustained a serious diffuse traumatic brain injury with focal components. An injury of this severity is expected to cause significant neurocognitive and even psycho- organic abnormalities and these will be permanent and irreversible”.

THE EVIDENCE OF DR M CLOSE- PSYCHIATRIST

[12] **Dr M Close** *inter alia* made the following recommendations:

“Mr Dhlamini would not be able to engage in the legal process adequately on the basis of his neurocognitive and neuropsychiatric sequelae. A Curator-ad-litem is therefore recommended. Should funds be awarded to Mr Dhlamini, these should be protected and a Curator – bonis appointed.... As a result of the significant impairments present, placement in a suitable facility that will offer ongoing care and supervision would need to be considered”.

THE EVIDENCE OF MS A DE LANGE –OCCUPATIONAL THERAPIST

[13] **Ms A de Lange of Adri roos & du Preez Occupational Therapists** opined that the preferred option would be for the plaintiff to live in his home with supervision and support. A support worker should be appointed. The support worker should be a qualified facilitator and provision should be made for such an individual's travelling costs.

[14] The plaintiff's counsel referred to the following cases in support of an award of R1,5 million:

14.1. **MEGALINE V ROAD ACCIDENT FUND [2007] 3 ALL SA 531 (W)** ("Megaline") wherein the court awarded the plaintiff a sum of R1000 000 for general damages. The said amount updated is equivalent to R1, 700 000. The plaintiff an 11 year old boy then, got injured whilst travelling with his parents. He suffered a head injury which led to his having to be in a nursing home. He had profound neurological impairments and prominent irreversible disfigurement. The court held that his loss of amenities was profound. Prior to the accident, he was able to use the computer, read and write and enjoyed sport.

Defendant's counter argument is that the plaintiff in Megalane, due to his age lost the enjoyment of amenities at a very younger age and would suffer for a longer period of time. This is not the case *in casu*. Plaintiff has at least had a fair opportunity for the enjoyment of amenities.

14.2. **MNGUNI v ROAD ACCIDENT FUND (unreported 810/2005)**

In this matter the plaintiff was awarded the amount of R700 000 for general damages. The plaintiff a 39 year old suffered a severe brain

injury and his right lower leg was amputated. He experienced headaches, pain in the neck, shoulder, knee and ankle. He was ambulant with one crutch. Although he suffered memory, concentration and attention difficulties he returned to his pre-accident employer within 9 weeks following the accident. The amount of R700 000 updated is equivalent to R1, 2 million.

- [15] Counsel for the defendant submitted that the court should award the plaintiff an amount of R1, 1 to R1,2 million in respect of general damages. She relied on the following cases:

15.1. VAN ZYL v ROAD ACCIDENT FUND 2012 (6A4) QOD 138 (WCC)

In this matter the injured a 19 year old male part-time law student; sustained a severe head injury with multiple craniofacial impacts on a severe traumatic brain injury. He also sustained serious orthopaedic injuries with bilateral severe tibia/fibula fractures and multiple abrasions and bruises. A vegetative state persisted for weeks. He underwent treatment and rehabilitation of seven months after the collision. The court awarded the injured for general damages the amount of R850.000. The amount updated is equivalent to R960 000.

15.2. OLIVIER V ROAD ACCIDENT FUND 2013 (6A4) QOD 216 (GNP)

The plaintiff who was 43 years at the time of the accident sustained a head injury, an injury to the vertebra and nerve damage in the left arm. Due to the head/brain injury, plaintiff subsequently developed seizures and was readmitted to the hospital for such problem. He suffered from focal epileptic seizures and loses consciousness. The report of the expert further noted that attacks occur once a week or

every two weeks, are brief but he is sleepy afterwards. Due to medication the attacks are partially controlled.

- [16] *In casu* the nature and extent of the plaintiff's pain and suffering; and loss of amenities of life are well documented in the various medical reports. It is unequivocally stated that the plaintiff's injuries exacerbated by brain damage are irreversible. In the cases referred to above by the Counsel for the defendant, both the injured are not permanently impaired notwithstanding the seriousness of their injuries. It appears that their respective situation could either be controlled or the injured can be rehabilitated.
- [17] The above having been said, I am mindful of the caution in ***DE JONG V DU PISANIE N.O. 2005 (5) SA 547 (SCA)*** at paragraph 60 wherein the court after noting the tendency towards increased awards in respect of general damages, in recent times was readily perceptible, the court re-affirmed conservatism as one of the multiple factors to be taken into account in awarding damages. The court concluded that the principle remained that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense, as pointed out in ***PITT V ECONOMIC INSURANCE CO LTD 1975 (3) SA 264 (N) at 267.***
- [18] On the issue of awarding quantum, a court has a wide discretion to award what it considers to be fair and adequate compensation to the injured part. It has been said that there is no hard and fast rule of general application requiring a court to consider past awards. It is generally accepted that it would be difficult to find a case on all fours with the one being heard and that awards in decided cases should be considered only as a guide of how other courts arrived at an award. See ***PROTEA INSURANCE COMPANY v LAMB*** above at **535 H** and ***ROAD ACCIDENT FUND v MARUNGA*** above at paragraph [24]

THE EVIDENCE OF MS ADAN- CLINICAL NEUROPSYCHOLOGIST

[19] **Ms Adan's** report shows that the plaintiff sustained head/brain injuries. It further states the following:

"According to the RAF form 1 and 4 and the available hospital records, CT scan and medical reports as well as information obtained from Mr Matheus it seems Mr Dlamini sustained the following head and brain injuries:

- *Laceration to the chin and left ear.*
- *Comminuted fracture of the mandible right.*
- *Loss of a tooth which has been replaced.*
- *Multiple brain contusions involving the right temporal lobe and cerebral peduncle and the high parietal regions bilaterally.*
- *Subarachnoid haemorrhage in the interpeduncular cistern.*
- *Suspected subdural haemorrhage along the falx.*
- *A severe primary diffuse axonal/concussive brain injury associated with coma and very prolonged posttraumatic confusion and amnesia lasting more than 3 months.*
- *Secondary micro damage due to pressure build-up in the brain from haemorrhage.*

- *Patchy opacity in the left lung seen on CT scan requires medical comment as pulmonary congestion was ticked on admission to the Netcare Krugersdorp Hospital.*
- *Problems with the right shoulder since the accident."*

[20] In conclusion Ms Adan stated that the plaintiff is unemployable and unable to fulfil the roles of husband to his wife and father to his children. He cannot cope with household duties or take part in sport. He is dependent on others and in need of care and supervision. Because he cannot follow conversations he has been left socially isolated. Both physically and mentally Mr Dlamini is unemployable in any capacity.

[21] There is no doubt that the plaintiff sustained fatal and irreversible injuries as a result of the accident. Furthermore the pain and loss of amenities suffered by the plaintiff are overwhelmingly stated. Plaintiff was hospitalised for a period of more than a year; his past medical expenses are enormous amounting to R250 000.00 Due to the injuries sustained in the collision, the plaintiff cannot even manage and take care of his personal affairs a situation resulting to the appointment of a curator ad litem. He has to be placed in a suitable facility for specialised health care. Having regard to the above in my opinion an award of **R1, 350 000** would be fair compensation in relation to the general damages.

PAST LOSS EARNINGS

[22] The plaintiff's loss of earnings since the collision and his future loss of earning capacity have been calculated by Mary Cartwright Consultant CC as at 29 July 2015. The basis of the calculation and the assumptions made were undisputed and not counter- attacked. The value of past income uninjured is R461 400. The Actuary applied a contingency deduction of 5%

and that result to the net value of past income being R 438 300. The value of past income injured has been calculated at R259 300. Taking into consideration the two figures above, the net loss in respect of past income is R179 000.

FUTURE LOSS OF INCOME

- [23] The plaintiff must prove that he will probably suffer financial loss or diminution of his income. In ***Sandler v Wholesale Coal Suppliers Ltd 1941 (A) 194*** it was stated that:

"It is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the Court of the duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African Courts".

- [24] In ***Rudman v Road Accident Fund 2003 (2) SA 234 (SCA)*** a para [11], the Court said:

"There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss."

THE EVIDENCE OF MS A JAMOTTE –INDUSTRIAL PSYCHOLOGIST

- [25] **Ms A Jamotte** reported as follows:

"Post- accident Mr Dhlamini was off work for a considerable period of time and effectively has never returned to work..... It is perceived that he has been rendered functionally unemployable and will never

generate any meaningful income in the future. He has sustained a devastating and permanent loss of earnings for which he should be compensated...."

[26] At the time of his accident the plaintiff was employed as a winch operator at Bafokeng Platinum Mine with basic earnings of R5 940.00 per month. He also received a number of fringe benefits and worked overtime.

[27] According to the calculation by Mary Cartwright Consultant CC the plaintiff's gross prospective value of income uninjured is R1, 959 700 whereas having regard to the accident it has been reduced to R916, 000.00. The actuary having applied contingency deduction but for the accident at 15% and nil contingency having regard to the accident because the plaintiff will never be employed again due to the irreversible state of brain damage. The net loss is therefore R1043 700.

[28] Contingencies have been described as the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned. **AA MUTUAL INSURANCE v VAN JAARSVELD 1974(4) SA 729 (A).**

[29] In his book *The Quantum Yearbook*, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of employment, promotion prospect, divorce etc.

[30] Koch refers to the following as some of the guidelines a regards contingencies:

- "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.
- Sliding scale: 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on **Goodall v President Insurance.1978 (1) SA 389.**
- Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[31] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[32] In this matter, there are no opposing expert reports from the defendant. I did not understand counsel for the defendant to be arguing that the actuarial calculations were wrong, biased and unfair or based on incorrect principles. Furthermore due to the plaintiff's permanent brain injury he is unemployable

and the experts have strongly advised that he be kept at facility of care. There are no foreseeable risks warranting the application of contingencies.

[33] Under the circumstances therefore, I am of the view that the actuarial calculations as depicted above are fair and equitable and will serve to balance the interests of both parties.

[34] The plaintiff's claim is calculated as follows:

General Damages	R1, 350 000
Past Loss of Earnings	R 179.000
Future Loss of Earnings	R 1, 043 700

[35] Accordingly I make the following order:

- i) The defendant shall pay the plaintiff the sum of R2,572 700
- ii) Interest on the above amounts at the rate of 15,5% per annum from a date fourteen (14) days after judgment to the date of final payment.
- iii) The defendant shall furnish the plaintiff an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 in respect of future medical expenses.
- ii) The defendant shall pay the plaintiff his taxed or agreed party and party costs including the following experts:
 - RAF 4 Serious Injury Assessment Report by Dr DA Ramogale

- | | |
|----------------------------------|---------------------------------------|
| - Dr DA Ramogale | Medico- Legal Report Sports Physician |
| - MJ Adan | Clinical Neuropsychologist; |
| - Dr D. De Klerk, | Neurosurgeon; |
| - Dr GA Versfeld, | Orthopaedic Surgeon |
| - A. Jamotte, | Industrial Psychologist |
| - Dr M Close, | Psychiatrist; |
| - Roos & Du Preez, | Occupational Therapist |
| - Mary Cartwright Consultants CC | Actuary |

APPEARANCES: