

SOUTH AFRICA / JUDGMENT

Halstead v Member of the Executive Council for Public Transport and Road Infrastructure of the Gauteng Provincial Government (039776/2022) [2023] ZAGPJHC 581 (26 May 2023)

[2023] ZAGPJHC 581

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strijdom

CASE / FILE NUMBER

039776/2022

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IN THE HIGH COURT OF
SOUTH AFRICA

(GAUTENG DIVISION,
JOHANNESBURG)

Case No: 039776/2022

Date of Hearing: 13-03-23

Date of Judgment: 26-05-23
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
IN

THE MATTER BETWEEN: HALSTEAD,
MICHAEL ROBERT
APPLICANT
and
THE
MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC TRANSPORT
AND
ROAD INFRASTRUCTURE OF THE GAUTENG PROVINCIAL GOVERNMENT
RESPONDENT
Neutral
Citation: Halstead, Michael Robert v The
Member of the Executive Council for Public Transport and Road
Infrastructure of the Gauteng Provincial
Government (Case No: 039776/2022) [2023] ZAGPJHC 581 (26 May 2023)

JUDGMENT

Strijdom AJ

1. This is an interim payment application in terms of Rule 34A of the Uniform Rules of Court for past medical and hospital expenses and past loss of earnings.
2. The applicant has instituted an action against the respondent based on delict for the recovery of damages suffered by the applicant

consequent upon injuries sustained by the applicant in an accident which had been caused by the respondent's negligence.[1]

3. On 30 August 2021 this Court granted an order in terms of which the respondent is liable to pay 100% of the applicant's proven

damages.[2]

4. On 17 October 2022 an order was granted in terms of which paragraphs 1, 3, 4, 5 and 9 of the respondent's plea dated 8 July 2022 under case no 40162/2019 were struck out.[3]
5. On 6 December 2022 an order was granted compelling the respondent, inter alia, to attend a Pre-Trial Conference, to provide suitable

dates for holding of a Pre-Trial Conference to the applicant's attorney and to draft and sign a Minute of the Pre-Trial Conference.

It was further ordered that if the respondent fails to comply with prayers 1, 2 and 4 of the order, the respondent's defence to the applicant's claim on quantum is struck out. Judicial authorisation was granted to the applicant to apply for default

judgment. The respondent failed to comply with the Court order.

6. The interim payment application has been previously enrolled on the unopposed motion Court Roll on 12 January 2023 and was removed from the roll to be enrolled on the Civil Trial Roll.
7. The Honourable Deputy Judge President directed that the interim payment application should be enrolled as a default judgment on the Civil Trial Court Roll and granted a preferential date for the application.
8. The respondent filed a belated answering affidavit in the interim payment application on 10 March 2023, as well as a condonation application for the late filing of the answering affidavit. [4] The applicant filed a replying affidavit on 12 March 2023.[5]
9. At the commencement of the application for interim payment, the respondent requested a postponement in order to file an amended

answering affidavit. Counsel for the respondent contended that the respondent is not ready to proceed with the application for interim payment and need to consult with his client. I dismissed the application for a postponement and for leave to file a supplementary affidavit. I reserved the reasons for my refusal.

10. Condonation for the late filing of the answering affidavit in the interim payment application was conceded by the applicant.

A. The Postponement Application:

11. Save in exceptional circumstances a formal application on notice supported by affidavit should be made for a postponement.[6]
12. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused, and that discretion must be exercised judicially.
13. It is trite that an application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant.
14. An application for a postponement seeks an indulgence from the Court, which will not be granted unless the Court is satisfied that it is in the interest of justice to do so.
15. In this matter no formal application on notice, supported by affidavit, was filed by the respondent. The application was orally argued before me.
16. The interim payment application was served on the respondent on 31 October 2022.
17. No reasons were furnished for the delay in bringing the postponement application. The respondent has not given any reason why the applicant will not be prejudiced in granting the postponement.

18. No reasonable explanations were given by the respondent why it need to file a supplementary answering affidavit and why Council for the respondent need to consult with his client. The application was also not made timeously as the interim payment application was already served on 31 October 2022.
19. The true reason for the respondent's non-preparedness to proceed with the interim payment application has not been fully explained. In my view the unreadiness to proceed is due to delaying tactics.
20. I concluded that the application for a postponement is not bona fide and that the applicant will suffer prejudice by such postponement. To grant a postponement will not be in the interest of justice.

B. The Interim Payment Application:

21. On 4 April 2019, at between 21h00 and 21h15, the applicant was involved in a collision along the R114/P39/1 between Diepsloot / Northern Farms area and Heronsbridge College ('the collision').
22. Immediately prior to the collision the applicant was travelling in a southerly direction in a white Toyota Hilux pick-up with registration letters and numbers [...]('the vehicle'). The applicant was the driver of the vehicle and not accompanied by any passengers.
23. The collision was caused by the sole negligence on the part of the respondent who failed to maintain the road.[7] No other vehicle was involved in the collision.
24. Shortly after the collision, the applicant was found trapped in the driver's seat of the vehicle, where it came to a standstill after it collided with a tree on the side of the road.
25. The applicant was rendered comatose upon impact. He was airlifted to hospital where he remained in a coma until 29 July 2019, whereafter he has undergone rehabilitation until December 2019.
26. The applicant sustained serious bodily injuries as a direct result of the accident, and subarachnoid haemorrhage, resulting in a serious, complicated, traumatic brain injury, as well as homonymous hemianopia ('the injuries'). The injuries and its sequelae involve serious neurocognitive, behavioural and psychological deficits.[8]
27. The Expert Reports confirm that the applicant did not suffer from any pre-existing condition and that he has reached maximum medical improvement. The injuries and sequelae are accordingly permanent.[9]
28. The applicant has been practicing as an advocate for 33 months at the time of the collision. Prior to that, the applicant also practiced as an attorney.

29. Post morbidly, the applicant returned to practice on 2 February 2020. Between the period 5 April 2019 and his return to practice, certain of his colleagues took over his existing briefs. The income derived therefrom are fully accounted for in the forensic auditor's

report prepared by Ms A Nel.[10]

30. Although the applicant returned to practice on 21 February 2020, the applicant has on all accounts been rendered unemployable in the formal and informal sectors of the open labour market.[11]

C. Relief Sought:

31. On 31 October 2022 the applicant launched this application for interim payment in an amount of R 5 575 580,00 in respect

of the applicant's past loss of income, and past medical expenses in an amount of R 1 305 883,03.

D. Expert Evidence:

32. Affidavits deposed to by each of the applicant's Experts and confirmatory affidavits deposed to by Ms Cari du Toit and the applicant have been obtained and attached to the founding affidavit.

33. The applicant has obtained reports from the following experts:

33.1 Medical-legal report, prepared by Dr H J Edeling (Neurosurgeon);

33.2 Medical-legal report, prepared by Ms Brenda Pillay (Occupational Therapist);

33.3 Medical-legal report, prepared by Dr Annalie Pauw (Clinical Psychologist);

33.4 Medical-legal report, prepared by Dr Karin Levin (Speech Therapist);

33.5 Medical-legal report, prepared by Dr Stoler (Ophthalmologist);

33.6 Medical-legal report, prepared by Ms Riana de Villiers (Psychomotor Expert);

33.7 Adv M Kriegler SC (Senior Advocate);

33.8 A forensic auditor's report prepared by Ms Anneke Nel (Forensic Auditor);

33.9 Industrial Psycho-Legal Report prepared by Ms Reneé van Zyl (Industrial Psychologist);

33.10 Actuarial reports prepared by Mrs Michelle Barnard of GRS Quantum Actuarial Services CC.

34. The respondent has failed to appoint any experts.

E. Past Hospital and Medical Expenses:

35. The applicant's accident related past hospital and medical expenses amounts to R 1 305 883,03. A copy of a breakdown of the past hospital and medical expenses is attached to the founding affidavit and marked Annexure 'MH2'. [12]

Discovery Health has paid the amount of R 1 186 689,69 and the applicant the amount of R 113 132,73. Inspection of the available vouchers have been tendered to the respondent.

F. Past Loss of Income:

36. The medico-legal report prepared by Dr H J Edeling (Neurosurgeon) contains a diagnosis and prognosis of the applicant as follows: [13]

36.1 Complicated Traumatic Brain Injury of Severe Degree, with Cerebral Contusion, Subarachnoid Haemorrhage, and Intraventricular Haemorrhage.

36.2 Post-Traumatic Organic Brain Syndrome, with Neuro-physical -, Communication -, Cognitive -, Executive - and Neuro-behavioural Disorders and Strabismus of the Right Eye.

36.3 The accident is reported to have marked a watershed change in his

life, with persistence since that time of impaired balance, strabismus, weakness of his right upper limb and right lower limb, increased sensitivity to the effects of alcohol, mental fatigue, slowed thought process and impairments of memory, reading, writing, speech, and task performance, as well as alterations of personality, moods and behaviour.

36.4 On clinical neurological examination, one found a very mild residual right hemiparesis and significant impairments of a mental function and communication. These included adynamia, somewhat sluggish thought processes, word-finding difficulties, losing track in conversation, underreporting of problems of which he is aware, a tendency to understate the seriousness of impairments and exaggerate residual abilities impaired clerical skills, and barely legible handwriting with failure to complete all words. Taking into account the above, it is concluded, on the basis of the Outcome Method of Classification, that the degree of his complicated traumatic brain injury was severe.

36.5 No evidence was found of any pre-existing neurological pathological condition or disability.

36.6 The organic neurological sequelae of his brain injury have stabilised and become permanent.

36.7 The brain injury has resulted in an increased risk of late post-traumatic epilepsy, estimated at 5% - 10% lifetime risk.

36.8 The neurological sequelae of his brain injury have jeopardised his mental capacity for independent management of his personal, financial and legal affairs.

36.9 The sequelae of his injuries are considered to have resulted in permanent serious losses of the learning capacity, employment capacity, independence, amenities and enjoyment of life.

37. Ms B Pillay (Occupational Therapist) recommended immediate retirement as a result of the severity of the injuries sustained by the applicant.[14] She opined that the ‘symptoms’, and the other neurological impairments reported by Dr Edeling and Dr Levin effectively precluded the applicant from practicing as an advocate on her understanding of the demands and requirements of the advocacy profession.

38. Dr K Levin (Speech Therapist) concluded that:[15]

38.1 The applicant presents with several impairments relating to speech production, the understanding of language, the use of language, and cognitive communication. The communication impairments include: Dysarthria characterised by impaired DDK, rapid speech, slurred consonants, deterioration in narratives, breathy voice quality, and irregular speech breathing patterns. Cognitive communication impairment including, but not limited to, impaired attention and focus, excessive function, significant auditory memory difficulties, slow and ineffectual processing of auditory information, and variable verbal reasoning.

39. Dr D C Stoler (Ophthalmologist) is of the opinion that the applicant’s visual field testing reveals a dense right homonymous hemianopia with loss of much of the right hemifield, including within five degrees of central fixation bilaterally. This implies severe damage to the axons within the visual pathways around the left posterior parieto-occipital lobes within the left optic radiation, which is consistent with the traumatic brain injury. The resultant loss of visual field is severe, with continuous tracking and head movement required to make up for lost hemifield. This is considered a class 4 impairment of the visual field as per the Classification of Visual Field-based Vision Loss within the A M A guide’s vision chapter (pp.16-17).

40. Dr A Pauw (Neuropsychologist) assessed the applicant from a neuropsychological perspective to determine the applicant’s ‘occupational

prospects’ as an advocate. I refer to the material findings and opinions as follows:[16]

40.1 ‘With regards to Mr Halstead’s occupational prospects, the accident has resulted in significant occupational vulnerability to perform in his premorbid work as an Advocate. From a neuropsychological perspective, the following factors would play a major role in his occupational functioning:

40.1.1 An overall decline in his memory functioning has rendered him much more vulnerable in the work context and less able to manage large volumes of information and facts.

40.1.2 Deficits in the area of attention and concentration, complex scanning and tracking, and psychomotor and mental processing speeds, which could result in slower work speed, reduces efficiency, reduced accuracy, and error proneness.

40.1.3 Communication problems with continued word-finding difficulties, together with observations of his monotonous and dysarthric speech, which would hamper efficient communication when appearing in court and when consulting with clients.

40.1.4 Deficits in verbal reasoning may impede his capacity to argue and reason effectively, especially under pressure.

40.1.5 His emotional presentation, particularly when considering the frontal lobe component of his brain injury sustained, could impede his capacity to manage himself efficiently in work contexts, and interpersonal relationships, also in terms of his capacity to understand others and respond to their interpersonal cues in an appropriate way.'

40.2 'His neuro-cognitive, neuro-behavioural deficits have rendered him very vulnerable, and he is no longer able to function on the same level that he did prior to the accident. His current work activities (which are reported to involve a lower level of complexity, volume, demand, and stress than his prior work) requires more time, more effort, and more strain.'

40.3 'When the neuropsychological profile, medical history and clinical presentation of Advocate Halstead are considered, protection of funds is advised, and a trust should suffice in this regard.'[17]

41. Ms R De Villiers (Counselling Psychologist) with a specific interest in psychomotor research, development and assessments, assessed the applicant's ability to drive, and concluded as follows:[18]

41.1 'As per definition, psychomotor performance includes the following three steps to be intact: (i) Perceiving (visual and auditory) information from one's surroundings; (ii) Cognitively processing information and deciding how and when to react; (iii) Reacting on the information by using one's limbs. An impairment affecting any of these 3 steps will result in impaired driving abilities.

41.2 Two of the three basic tasks underlying psychomotor performance (i.e., perceiving and processing) seem to be impacted, and consequently, Advocate Halstead's driving abilities are negatively influenced.

41.3 An impairment of psychomotor skills will have a negative effect on his abilities to perform the various driving tasks safely and competently.

41.4 He presents with an elevated risk as a driver of a vehicle on public roads. Added to this, is also visual impairment identified by Dr Stoler that can further increase his risk as a driver on the road.'

42. Adv M Kriegler SC expressed an opinion in his report, as follows:[19]

42.1 Each of the experts referred to him in his report 'has demonstrated that they have a fair and accurate understanding of the advocacy profession and of the fundamental skills, attributes, values, demands and responsibilities required of every advocate in practice at the Bar' and that '... each expert has fairly concluded, based on their findings regarding his permanent disabilities, that the plaintiff is unable to resume or sustain a practice as an advocate.'

43. Ms van Zyl (Industrial Psychologist) concluded as follows:[20]

43.1 ‘The Applicant’...would probably have continued functioning as an advocate while growing in terms of skills and knowledge, with successful progression towards Senior Counsel during the span of his career, functioning in the latter capacity, until his retirement.’ The applicant ‘would have continued to work until seventy years of age.’

43.2 ‘Advocate Halstead’s career impediments will not just affect his ability to cope with the work of an Advocate, but will, in most cases, impact negatively on any level of work, regardless of the complexity level or physical requirements.’

43.3 Ms van Zyl referred to the report of Ms Nel (Forensic Auditor) in relation to the applicant’s actual pre-morbid income, as follows:[21]

23.3.1 15 July 2016 to 28 February 2017

= R 424 959,00 (8 months);

23.3.2 1 March 2017 to 28 February 2018

= R 1 076 410,00 (54% year on year increase);

23.3.3 1 March 2018 to 28 February 2019

= R 1 370 393,00 (27% year on year increase);

23.3.4 1 March 2019 to 4 April 2019 (date of accident)

= R 110 595,00

44. Ms Nel divided the amount of R 424 959,00 by the number of workdays for that period, being one hundred and forty-five (145) days and multiplied the result (income per day) with the number of working days in a normal year, being two hundred and thirty-eight

(238) days, giving R 697 519,00 income the financial year ending 28 February 2017.

45. Ms Van Zyl noted that Ms Nel determined the applicant’s actual post morbid income, as follows:

45.1 5 April 2019 to 29 February 2020 = R 33 460,00;

45.2 1 March 2020 to 28 February 2021 = R 228 716,00;

45.3 1 March 2021 to 28 February 2022 = R 551 816,00.

46. According to Ms Van Zyl, the applicant’s actual post-morbid earnings of R 551 816,00 per annum for the period 1 March 2021 to 28 February 2022

‘will probably gradually decline until advocate Halstead becomes unemployable.’

47. Ms Van Zyl noted that, according to Ms Nel, the applicant’s post-morbid projected loss of earnings is, as follows:

47.1 1 March 2019 to 29 February 2020 = R 1 600 612,00;

47.2 1 March 2020 to 28 February 2021 = R 1 992 445,00;

47.3 1 March 2021 to 28 February 2022 = R 2 275 975,00;

47.4 5 April 2019 to 28 February 2022 = R 5 869 032,00.

48. Mrs Barnard (actuary) has performed an actuarial calculation and applied a general contingency deduction of 5% on the applicant's past loss of income. Mrs Barnard deducted the amount of R 293 452,00 from the applicant's past loss of income as determined by Mrs Anneke Nel. The applicant's actuarially calculated past loss of income amounts to R 5 575 580,00 (being R 5 869 032,00 [the amount determined by Mrs Anneke Nel], less a contingency deduction of 5% in an amount of R 293 452,00.[22]

49. The expert reports by the applicant covers the fields of expertise relevant to the injuries sustained by the applicant and deals in depth with the nature and extent of the injuries and the sequelae thereof.

50. On a conspectus of all the expert evidence, I concluded that the applicant, from a functional and practical perspective, has been rendered unemployable in the formal and informal sectors of the open labour market.

51. In my view, a factual and legal nexus have accordingly been established between the collision, the injuries and the applicant's

claim under each head of damages.

52. The answering affidavit filed by the respondent contains no defence to the relief sought in the interim payment application.

53. The applicant complied with the following requirements of Rule 34A, which provides as follows:

'(4) If at the hearing of such an application the court is satisfied that –

(a) the defendant against whom the order is sought, has in writing admitted liability for the plaintiff's damages; or (b) the plaintiff has obtained judgment against the respondent for damages to be determined, the court may, if it thinks fit, but subject to the provisions of subrule (5), order the respondent to make an interim payment of such amount as it thinks just, which amount shall not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff, taking into account any contributory negligence, set off or counterclaim (5). No order shall be made under subrule (4) unless it appears to the court that the defendant is insured in respect of the plaintiff's claim, or that he has the means at his disposal to enable him to make such a payment.'

54. In my view the amount claimed by the applicant as an interim payment does not exceed a reasonable proportion of damages which are likely to be recovered by the applicant. The respondent is liable to the applicant in accordance with the State Liability Act, which makes provision for the compulsory payment of any amount.

55. In the result the draft order marked 'X' is made an order of Court.

STRIJDOM JJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION JOHANNESBURG

Appearances:

For the applicant: Adv Basil Joseph and Adv De Waal Nigrini Instructed by: Rooseboom Attorneys

For the respondent: Adv M Ramaiti Instructed by: State Attorney

[1] Case Lines: notice of motion: Case no: 40162/2019 p 015 – 1 to 8

[2] Case Lines: Court order p 017 - 5

[3] Case Lines: Court order p 017 - 3

[4] Case Lines: AA p 021 - 1

[5] Case Lines: RA p 022 - 1

[6]

[7] Case Lines: Order of Court, Annexure MH1, p 005 - 64

[8] Case Lines: FA, 004 – 9 – 004 – 11, para 30 – 30.3 and Case Lines: 004 – 14 - 004 - 16

[9] Case Lines: FA, 004 – 27 para 42

[10] Case Lines: FA, 004 – 24, 004 16 and 004 - 29

[11] Case Lines: FA, 004 – 17, para 32.3. para 33 and 38.2, 004 - 21

[12] Case Lines: p005 - 65

[13] Case Lines: p004 – 9 – 004-11 FA

[14] Case Lines: p 004 - 17

[15] Case Lines: FA p 004 – 11 - --4 - 14

[16] Case Lines: FA: 004 – 17 to 004 - 19

[17] Case Lines: 004 – 19 FA

[18] Case Lines: 004 – 19 to 21 FA

[19] Case Lines: 004 – 21 FA

[20] Case Lines: 004 – 23 to 26 FA

[21] Case Lines: 014 – 289 to -14 – 290 FA 004 – 25 to –4

- 26

[21] Case Lines: 014 – 289 to -14 – 290

FA 004 – 25 to –4

- 26

[22] Case Lines: 004 – 31 FA

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