

SOUTH AFRICA / JUDGMENT

K.M v Passenger Rail Agency of the Republic of South Africa (68546/14) [2024] ZAGPPHC 1331 (19 December 2024)

[2024] ZAGPPHC 1331

COURT

North Gauteng High Court, Pretoria

BEFORE

Basson

CASE / FILE NUMBER

68546/14

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Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 68546/14

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

19/12/2024

SIGNATURE:

In

the matter between: M[...]
K[...]
S[...]
Plaintiff
and
PASSENGER RAIL AGENCY
OF THE
REPUBLIC
OF SOUTH AFRICA
Defendant

JUDGMENT

BASSON, J

[1] This is an action for damages instituted against the defendant (“Passenger Rail Agency of South Africa”) arising from a train accident which occurred on 6 March 2014. The plaintiff (“Mr. K[...] S[...] M[...]”) was 14 years old at the time. He is now 24 years old. Merits 100% in favour of the plaintiff, and general

damages in the amount of R 500 000 (five hundred thousand rands) were settled on a previous occasion.

[2] It is common cause that the plaintiff was a passenger on a train when he was pushed off the overloaded train whilst it was in motion. The plaintiff fell head-first. It is uncertain how long the plaintiff had lost consciousness. The two neurosurgeons do, however, agree in their joint minute that the plaintiff did lose consciousness. The plaintiff, however, did manage to get up and seek help whereafter he was taken to Thembisa Hospital where he received medical attention.

[3] The hospital records show that the plaintiff was admitted on 06 March 2014, and that he had presented with a deep laceration to his head, as well as a deep laceration to the palm of his right hand. He also presented with a swelling of his right foot (although no orthopaedic surgeon was appointed by either party). A CT brain scan revealed a depressed skull fracture to the parietal bone and an epidural hematoma. I will return to the joint minutes of the two neurosurgeons.

[4] The hospital records also record a Glasgow Coma Scale score of 15/15. It is, however, in dispute when this assessment was done: On the day of admission or the following day. This dispute is, however, in my view, not material. What is significant in this matter is the sequelae resulting from the accident. In any event, the neurosurgeons have deferred to other experts regarding the plaintiff's sequelae. I am of the view that the matter can be resolved based on the reports of the two clinical psychologists and their joint report, which concludes that the plaintiff has experienced a 5% decline in cognitive ability attributable to the sequelae of the accident.

The dispute

[5] The following issues are in dispute between the parties:

- (i) The plaintiff's future medical expenses. Although it is common cause that the plaintiff will incur future medical expenses, the parties differed on the amount that should be awarded. The plaintiff claims an amount of R 2 354 456 (before contingencies), whereas the defendant, in argument and in their heads of argument, submitted that a 50% contingency should be applied and that the plaintiff is only entitled to half of this amount.
- (ii) The plaintiff's loss of earnings. The plaintiff claims an amount of R 3 675 898.00 (future loss of earnings and R 471 778.00 (past loss of earnings) before contingencies,[1] whereas the defendant submitted that the plaintiff is only entitled to an amount of R 1 148 692 (without contingencies).

The parties are therefore roughly about R 2 million apart.

(iii) The plaintiff has abandoned its past medical expenses claim since the plaintiff was treated at Thembisa Hospital, a public health hospital.

- [6] The following issues are not in dispute: (i) The content of the hospital records. (ii) The fact that the plaintiff sustained a depressed skull fracture. The severity of the head injury is, however, in dispute. I will return to the issue. (iii) It is not disputed that the plaintiff suffered sequelae as a result of the injury, although the defendant defers to its expert on this issue. (iv) It is also agreed that the plaintiff has suffered a loss of earning capacity due to the injuries and that the plaintiff's productivity has been adversely affected by the injuries and will continue to be affected in the future. The two occupational therapists and the two industrial psychologists, however, agree that the plaintiff has become unemployable in the open labour market due to the accident and is likely to remain so. The defendant's educational psychologists ("Ms. Clerk") also notes that the plaintiff is practically unemployable and that he will not be able to lead an independent life. She also opines that he will require financial support for the remainder of his life.
- [7] Whilst the parties agree that the plaintiff will suffer a future loss of income, the extent of this loss remains in dispute.

Principles regarding damages

- [8] The principles underlying a claim of damages are trite and need only be referred to briefly: An award for damages is the compensation awarded to a plaintiff and must be assessed so as to place the plaintiff, as far as possible, in the position he would have been in if the wrongful act causing him injury had not been committed.[2]
- [9] It is accepted that the determination of the amount of damages to be awarded to a plaintiff entails a measure of speculation. This was explained as follows in the well-known case of Southern Insurance Association Ltd v Bailey NO:[3]

“The second attack on the judgment of the trial Court was that an actuarial computation was inappropriate in the present case for the reason that it was based on assumptions and hypotheses so speculative, so conjectural, that it did not afford any sound guide

to the damages which should be awarded.

Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future,

without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence.

The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award. See *Hersman v Shapiro & Co* 1926 TPD 367 at 379 per STRATFORD J:

‘Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.’

And in *Anthony and Another v Cape Town Municipality* 1967

(4) SA 445 (A) B HOLMES JA is reported as saying at 451B - C:

‘I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see *Pitt v Economic*

Insurance Co Ltd 1957

(3) SA 284 (N) at 287 and *Turkstra Ltd v Richards* 1926 TPD at 282 in fin

- 283.’

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf *Goldie v City Council of Johannesburg* 1948

(2) SA 913 (W) at 920.)

It is true that, in the case of a young child, the assessment of damages for loss of earnings is speculative in the extreme. Nevertheless I do not think that even in such a case it is wrong in principle to make an assessment on the basis of actuarial calculations."

[10] See also: *Zysset and Others v Santam Ltd*[4] where the court said the following:

"The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed"

The plaintiff (Mr K[...] M[...])

[11] The plaintiff testified that the accident happened on 6 March 2014 at approximately 14h00 when he was returning from school. He confirms that he was taken to the Thembisa Casualty Ward by his brother, and that he was admitted at approximately 15h35. He testified that he had sustained injuries, inter alia, to his head, foot, arm and leg.

[12] The plaintiff testified that, after the incident, he attempted to find work and occasionally worked as a disc jockey at events, earning between R 50 and R 100 per event. He confirmed that the last time he received payment for such work was in 2020. He further stated that he had actively sought employment since then but was unsuccessful. The defendant did not dispute this evidence, nor did it challenge the plaintiff's evidence that he suffers from depression.

Expert evidence

The neurosurgeons

[13] The plaintiff was assessed by two neurosurgeons: Dr Mazwi (for the plaintiff) and Dr Moja (for the defendant). Both experts were impressive. They agreed in the joint minutes that the plaintiff suffered from a depressed skull fracture and an epidural haematoma. Their agreement is based on the reports at their disposal that indicate that the plaintiff had suffered a head trauma, a period of amnesia and a loss of consciousness. They agree that the plaintiff suffers from headaches and forgetfulness. They both, however, defer to the neuropsychologist, the occupational therapist, educational psychologist and industrial psychologist to assess the impact of the head injury on the patient.

- [14] The neurosurgeons, however, disagree on two aspects: Firstly, Dr Mazwi records that the plaintiff's risk of epilepsy has increased whereas Dr Moja disagrees and states that the risk of developing late post-traumatic epilepsy is equivalent to that of the general population. Secondly, Dr Mazwi classifies the head injury as a severe head injury, whereas Dr Moja records a mild diffuse brain injury. Both experts gave extensive evidence on how they have arrived at this classification. However, despite this disagreement, nothing, in my view, turns on this issue. What is important is the fact that the experts agree that the plaintiff had suffered a head injury (although they differ on the severity thereof), a depressed skull fracture and extradural haemorrhage. And, as already pointed out, both experts defer to the experts regarding the fallout or sequelae of the brain injury.
- [15] Dr Moja, for the defendant, conceded under cross-examination, with reference to the clinical psychologists' joint minute (to which I will refer hereunder) that the plaintiff had suffered a 5% decline in cognitive ability as a result of the sequelae of the accident. He also conceded, with reference to the report of Mr Mthimkhulu (the plaintiff's educational psychologist) that, as a result of the 5% cognitive ability decline, the plaintiff could not pass his Abet Level 4 Exams in November 2020. It is thus for this reason that it is, in my view, irrelevant on which scale the neurosurgeons classified the plaintiff's brain injury: The neurosurgeons defer to the relevant experts who concluded that the plaintiff suffered a 5% decline in cognitive ability as a result of the sequelae of the accident, irrespective of how the brain injury is classified.

Educational Psychologists

- [16] Mr. Sipho Mthimkhulu ("Mthimkhulu") – an educational psychologist - testified for the plaintiff. His evidence was impressive in all respects. His report is detailed, and he testified with confidence. He explains in his report the various tests that he had used to arrive at his conclusion. I can find no reason not to accept his expert opinion. He accepts that pre-morbidly, the plaintiff had experienced learning difficulties. An educational psychologist assessed him at the time (before the accident), and he was placed in a special needs school ("Kempton Park Panorama") in 2013.
- [17] The plaintiff left Kempton Park Panorama, and in 2018 enrolled at Kwazine ABET school ("ABET"). Mthimkhulu testified that, notwithstanding his scholastic challenges, he was a resilient student who persevered. He testified that this was partly due to the fact that the plaintiff was brought up in a household that values education and that would have inspired him to better himself academically. His four brothers have all excelled. They all obtained a grade 12 with one graduating with a mining engineering degree and another one working as a manager.
- [18] Mthimkhulu opined that, despite his scholastic challenges he had displayed historically, the plaintiff pre-morbidly would have obtained a NCV 4 (equivalent to an NQF level 4) education. He opined that the accident had exacerbated his problems. He suffered from symptoms of Post Traumatic Stress Disorder and major depressive disorder. Despite all of these

challenges, the plaintiff still managed to obtain a grade 8. In 2016, the plaintiff passed grade 9 and was thereafter removed to ABET where he obtained a level 3 qualification. He attempted three times to pass level 4 but because of the challenges he suffered post-morbidly, he gave up.

- [19] To pass level 4, a candidate must achieve at least 120 credits. The plaintiff did, however, manage to pass 4 out of 5 subjects and managed to obtain an overall credit score of 115/120. He failed because he was unable to pass maths and maths sciences. Mthimkhulu explained that had it not been for the accident, the plaintiff would have managed to pass level 4.
- [20] Mthimkhulu opined that pre-morbidly, the plaintiff would have obtained NCV level 4 which is equivalent to NQF level 4. Post-morbidly he will remain with a level 3, which he obtained at ABET. Mthimkhulu concluded that the plaintiff's functional capacity is severely compromised by the sequelae of the injuries sustained. Moreover, considering his overall physical presentation, cognitive and psychological profile, residual pain symptoms as well as post-concussion headaches, Mthimkhulu was of the view that the plaintiff is not a suitable candidate for open labour market employment or alternative skill training.
- [21] Ms. Megan Clerk testified on behalf of the defendant. During her evidence, it transpired that when she compiled her report, the attorneys had not provided her with other reports. She conceded that she would have altered her report had she been furnished with the reports of the other experts. This is unfortunate and no expert should be placed in this situation. Be it as it may, when confronted with the reports that had not been furnished to her by the defendant's attorneys, she conceded in cross-examination that:
- (i) With reference to the clinical psychologist's joint minute, that the plaintiff had suffered a 5% decline in cognitive ability as a result of the sequelae of the accident under discussion and
 - (ii) With reference to Mthimkhulu's evidence that, as a result of the 5% cognitive ability, the plaintiff could not pass his Abet Level 4 Exams in November 2020.

Clinical psychologists

- [22] Two clinical psychologists gave evidence: Mr Leon Roper (clinical and Neuropsychologist for the defendant) and Mr Oscar Modipa (clinical psychologist for the plaintiff). Both experts were extremely helpful and thorough in their evidence. They record in their joint minute that there are no points of disagreement of fact and no points of disagreement of opinion. More in particular, they agreed that, and both gave extensive evidence that –
- The plaintiff was diagnosed with a depressed skull fracture and with an extradural hematoma.
 - The plaintiff has residual symptoms of Post-Traumatic Stress Disorder and symptoms of a Major Depressive Disorder relating to the accident and its aftermath.

- The plaintiff's pre-existing cognitive vulnerability has been exacerbated, at least somewhat, by the head injury sustained in the train accident under review. The clinical psychologists agreed that a 5% decline in cognitive ability was as a result of the sequelae of the accident. Of importance are the following observations:

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"4.1.1 He also reported concentration difficulties occasioned by the persistent posttraumatic headache and ongoing pain. As the result his premorbid scholastic difficulties were exacerbated until he discontinued schooling in Grade 12.

He has residual symptoms of post-traumatic stress disorder and symptoms of a Major Depressive Disorder related to the accident and its aftermath."

"4.1.3 Points of Agreement of opinion:

having regard to the recorded brief history LOC [loss of consciousness] at the scene, recorded GCS of 15/15 as well as the skull fracture and the extradural haematoma revealed on the CT scan, we agreed that it appears that Mr Monkonyana sustained a mild to moderate concussive brain injury. He also presented with premorbid cognitive difficulties, but we are both of the opinion that his pre-existing cognitive vulnerability has been exacerbated at least somewhat by the head injury sustained in the train accident under review. We estimate about a 05% decline in cognitive ability as a result of the sequelae of the accident under discussion.

We agreed that his performance on neurocognitive assessment tasks seems to be mostly a reflection of his premorbid cognitive potential, albeit also influenced by the head injury and the psychological trauma of the accident under discussion

the experts are of the opinion that at least subtle neurocognitive deficits can be expected as a result of the head injury. His cognitive abilities are thought to have been further compromised by his psychological trauma following the accident under discussion."

"4.3 Regarding emotional outcomes:

4.3.2 Points on Agreement:

the claimant suffers from residual symptoms of PTSD as well as symptoms of the Major Depressive Disorder, occasioned by's involvement in the accident and resultant ongoing sequelae.

His enjoyment and quality of life have been compromised by the injury sustained an ongoing sequela, compared to his other injured counterparts.

4.3.2 Points of Disagreement on Opinion

None."

- [23] Although there are no points of disagreement between the clinical psychologists, it is instructive to briefly refer to the report of Mr Roper (the clinical and neuropsychologist on behalf of the defendant). As already mentioned, his evidence was of great assistance to the court and he was an impressive witness in all respects. Although Mr Roper submitted a detailed medico-legal report, I intend to only highlight a few of the observations made by him. Mr. Roper arrived at his conclusions after having subjected the plaintiff to a range of neuropsychological tests which cover a wide spectrum of cognitive functions, including attention and concentration, memory and learning, visuo-construction ability, reasoning and concept formation, planning ability and verbal fluency ability.
- [24] Mr Roper records that the plaintiff suffers from various neuropsychological complaints: He is irritable; he suffers from decreased memory abilities; his ability to concentrate has decreased after the incident; his ability to plan has decreased; he suffers from a decreased ability to take initiative post-accident. He also finds it difficult to visit new places and meet unfamiliar people. He notes, from the collateral information obtained, that the plaintiff's scholastic performance has declined drastically after the accident. He further notes under "neuropsychological checklist" that the plaintiff experiences, inter alia, balance problems; headaches, forgetting meetings; he is easily distracted; he experiences trouble remembering the right words when talking, and has trouble following conversations. Mr Roper concludes that the plaintiff suffers from symptoms of Post Traumatic Stress Disorder and that he manifests with a "depressive disorder due to traumatic brain injury with mild depressive features" (although he defers to the opinion of the neurosurgeons). He concludes as follows:
- "In terms of Mr M[...]’s Mental Status, Cognition and Highest Integrative Function (MSCHIF) the plaintiff’s impairment rating is calculated as 5%. If his impairment rating of 5% is combined with the 10% for Mood and Behavioral Disorders, the combined impairment rating is 15%."*
- [25] Mr Roper also recommends that any awarded funds should be suitably protected in the form of a trust due to his vulnerability.
- [26] It can, in light of the evidence, safely be concluded that the plaintiff has suffered a 5% decline in cognitive ability as a result of the sequelae from the accident. Regard must then be had to the industrial psychologist and the two actuaries regarding the computation of the loss.

Industrial psychologists

- [27] Ms Chimbetete-Dzamatira (for the plaintiff) states in her report that, but for the accident, the plaintiff would have managed to obtain a NCV level 4 (NQF level 4). The plaintiff would have entered the labour market at an unskilled level, earning around the lower to median A3 level of the Paterson scale. By the time he reached the ceiling of his career, his earnings would have likely reached the median to upper B3/B4 levels, whereafter inflationary increases would have prevailed. Post accident, he tried to work as a DJ but struggled. She records that the plaintiff stopped playing as a DJ around April/May

2023. He has since been unemployed.

[28] The industrial psychologists agree in their joint minute that the plaintiff would have likely entered the open labour market at an unskilled level, either in the formal or informal sectors, earning around the lower median A1 Level of the Paterson Scale. He would have likely progressed to the semiskilled levels as he gained the relevant experience and skills. His earnings would have likely reached the medium B1 Level of the Paterson Scale by the time he reached his career ceiling around the ages of 45 to 50 years. Thereafter, inflationary increases would have prevailed. This forms the basis of the actuarial calculations done on behalf of the plaintiff.

[29] Mr. Lance Marais, representing the defendant, acknowledged that he should defer to the clinical psychologists regarding the plaintiff's cognitive impairments. He further conceded that the plaintiff has experienced an estimated 5% decline in cognitive ability as a result of the sequelae of the accident.

[30] The two industrial psychologists agree that the plaintiff is currently unemployed and that he has been supported by his parents.

Occupational Therapists

[31] The occupational therapists - Ms. Mogoane (for the plaintiff) and Ms. Tom (for the defendant) agree in their joint minutes that the plaintiff would need some assistance post-accident, but could not agree on how many hours were required for occupational therapy. They, however, agreed that a case manager should be appointed for the plaintiff. I will return to their opinions where I consider future medical expenses.

The actuaries

[32] Mr. Mavimbela (actuary for the plaintiff) and Mr. Whittaker (actuary for the defendant) drafted a joint minute on 23 October 2024 at the request of the court. The actuaries agree on the basic actuarial methods for calculating the present capital value of the loss of earnings and future costs. They accept that this method of calculation requires assumptions to be made, inter alia, regarding life expectancy and the net discount rate.

[33] The experts, however, disagreed on two key issues: first, the appropriate table to be used for assessing the plaintiff's life expectancy; and second, the starting date for calculating the plaintiff's income.

Life expectancy

[34] The two experts differ regarding the life expectancy of the plaintiff:

- (i) Mr Whittaker prepared his calculations on the basis of a future life expectancy of 38.5 additional years as at 1 November 2024. He based his calculations on life table 5 per the Quantum yearbook 2024.

(ii) Mr Mavimbela prepared his calculations on the basis of a future life expectancy of 45.01 additional years as at 1 November 2024. He based his calculations on life table 2 per the Quantum yearbook 2024.

[35] Mr Mavimbela explained with reference to the decision by the Supreme Court of Appeal in *Singh v Ebrahim*[5] why table 2 was used and why it is incorrect to use table 5 in the calculation. The court in that matter held:

“[199] As with most things in this matter, the appropriate life tables to be applied to the assessment of Nico’s life expectancy were also in issue. The high court applied the SA white male tables. The appellant contends for the application of the Koch life tables which adds between 2 to 4 years to the various scenarios calculated by Strauss. Koch’s attempt to remove race from the SA life tables is obviously attractive, but the evidence of the assumptions made to compile his life tables does not, in this case, succeed to illustrate their reliability. Although the 1984/1986 SA life tables are out of date, they are still the best available.[6] In the circumstances it seems eminently reasonable to have used the white male tables to exclude any racial component from the

calculation. Consequently the dispute about whether the appellant agreed to the application of the SA life tables only to the actuarial

calculation or also to the assessment of life expectancy is irrelevant.”

[36] Mr. Mavimbela testified that he relied on the SA84/86 table, which has been accepted by the Supreme Court of Appeal. When confronted with this decision, Mr. Whittaker was initially reluctant to concede that this table should be applied. However, he ultimately acknowledged that, in light of the Supreme Court of Appeal ruling, his calculations were incorrect and agreed to amend them. I must point out that the defendant failed to submit a further or amended actuarial calculation.

[37] Having considered the evidence of both experts and the decision of the SCA referred to, I can find no reason to reject the opinion of the plaintiff’s expert regarding the appropriate life table to be used in calculating the plaintiff’s life expectancy.

Starting date of income

[38] Mr Mavimbela used as the date of entry into the labour market pre-accident 1 July 2019 based on his assessment of the plaintiff’s industrial psychologist. It was assumed that the plaintiff would have left school with a grade 9 level education in December 2016. Therefore he would have enrolled for an NQF level 2 course in a TVET college in 2017. From 1 January 2018 – 30 June 2019, he would have remained unemployed for 1.5 years. He would have started his employment on 1 July 2019 on Paterson A1 lower to median quartile, and at the age of 47.5, he would have progressed to a Paterson B1 median quartile. He would then receive salary inflationary increases until a normal retirement age of 65 years. Post-accident, the plaintiff remained unemployed until he occasionally performed as a DJ in 2019/2020. In respect of future loss of earnings, Mr Mavimbela used 1 November 2024 as the basis for his calculations.

- [39] Mr. Whittaker, on the other hand, testified that he used 1 July 2024 as the date of entry in the labour market because he was instructed by the attorneys of the defendant to use this date. As the basis for the future loss, Mr Whitaker used used 1 January 2026 as his basis, again because he was instructed by the attorneys to do so. This is not only unfortunate but also unfair to Mr Whittaker because it tainted, though no fault of his own, his entire calculation.
- [40] I have, in light of this, and in light of the plaintiff's industrial psychologist's reason, with which I agree, little hesitation to accept the date of entry into the labour market as 1 July 2019. I have perused the calculations made by Mr Mavimbela and can find no reason to reject them.

Contingencies

- [41] It is accepted that the application of contingencies falls within the discretion of a court. I consider it far and reasonable to apply, what is considered to be the "normal contingencies", to the pre-and post-loss of earnings. I have applied a 5% on the past loss and a 15 % on the future loss. Counsel on behalf of the defendant submitted that normal contingencies should not be applied. I disagree: Our courts have on numerous occasions applied normal contingencies in matters where damages are claimed for bodily injuries.[7]
- [42] Returning to the calculations made by Mr. Mavimbela, which I accept as accurate and fair, the plaintiff has suffered a loss of earnings in the following amounts:
- (i) Past loss of earnings (less 5% deduction): R 448 189.10
 - (ii) Future loss of earnings (less 15% deduction): R 3 124 513.40

Future medical expenses

- [43] It is common cause, on the evidence before court, that the plaintiff is mobile and that he presently is in a position to take care of himself. The two occupational therapists agree that the plaintiff will need occupational therapy in the future, but disagree on the number of therapy sessions that will be required. With reference to other experts, they further agree that the plaintiff will benefit from an additional healthcare intervention and that he will need treatment from a psychotherapist or biokeneticist to assist with the residual pain that he currently experiences. They further recommend that the plaintiff consults with an orthopaedic surgeon for an assessment of the reported orthopaedic injuries. The clinical psychologists also agree in their joint minute that the plaintiff will benefit from psychotherapeutic intervention with clinical psychologists to resolve the symptoms of his post-traumatic stress disorder. They likewise recommend that the plaintiff consult an orthopaedic surgeon.
- [44] The plaintiff claims an amount of R 2 354 456 for future medical expenses. Although the defendant agreed that the plaintiff would need future medical intervention, it submitted that a 50% contingency deduction must be applied.

[45] Although I agree with the defendant that the amount claimed for future medical expenses is excessive, I do not agree that a 50% deduction is warranted. Bearing in mind what the court held in *Road Accident Fund v Guedes*, [8] namely that this is not a matter of exact mathematical calculation and that the enquiry is at best speculative, I am of the view that a contingency deduction of 30% would be just and fair in the circumstances. Accordingly, an amount of R 1 648 119.20

(after a deduction of 30%) is awarded in respect of future medical expenses.

[46] Costs should follow the result and are awarded on scale C. It is also ordered that the funds awarded to the plaintiff be protected in a trust to be created by the attorneys of the plaintiff within 30 days of the date of this order.

[47] In the event, the following order is made:

1. The Defendant is directed to pay to the Plaintiff the sum of R 5 220 821,60 calculated as follows:

(i) Future med expenses (less 30% contingency): R 1 648 119.20

(ii) Past loss of earnings (less 5% contingency):

R 448 189.10

(iii) Future loss of earnings (less 15%)

R 3 124 513.30

TOTAL:

R 5 220 821.60

2. The said amount is payable by means of direct fund transfer within thirty (30) days from the date hereof, into the trust bank account of the Plaintiff's attorneys: M O Matlala Attorneys, with the following particulars:

Account Holder : M O MATLALA ATTORNEYS

Bank

: FIRST NATIONAL BANK

Branch

: PRETORIA BRANCH

Account Number : 6[...]

Branch Code : 260318

Reference :

MATLALA/PRASA/MKS010

3. No interest will be payable except in the event of default of payment before or on the abovementioned date, in which case interest will be payable at the rate of 10.25% calculated on the capital amount.
4. The defendant is directed to pay the plaintiff's taxed or agreed party and party costs on the High Court scale C up to and including 5 December 2024. Such party and party costs will include but not limited to:
 - 4.1. Costs of Senior Counsel on scale C;
 - 4.2. Costs of the reports, including follow-up, addenda, and joint reports, if any, of:
 - 4.2.1 Dr A B Mazwi;
 - 4.2.2 Mr O T Modipa;
 - 4.2.3 Mr M S Mthimkhulu;
 - 4.2.4 Ms S Mogoane;
 - 4.2.5 Ms M Chimbetete-Dzamatira; and
 - 4.2.6 Manala Actuaries (Mr Mavimbela).
 - 4.3 The reasonable reservation, preparation, and qualifying fees, if any, as the Taxing Master may on taxation determine, of the following experts:
 - 4.3.1 Dr A B Mazwi;
 - 4.3.2 Mr O T Modipa;
 - 4.3.3 Mr M S Mthimkhulu;
 - 4.3.4 Ms S Mogoane;
 - 4.3.5 Ms M Chimbetete-Dzamatira; and
 - 4.3.6 Manala Actuaries (Mr Mavimbela).
 - 4.4. The costs of the preparation of the trial bundles.
5. It is recorded that the plaintiff's attorney and the plaintiff have not concluded a Contingency Fee Agreement.
6. The attorneys acting on behalf of the plaintiff are directed to, within 30 days (thirty) of this order establish a trust for the sole benefit of the plaintiff, Mr M[...] K[...] S[...]. The net amount awarded to the plaintiff, after deduction of agreed fees due to the plaintiff's attorneys and after payment of disbursements, must be paid into the aforesaid trust. The trust will have as its sole object to maintain and support Mr M[...] K[...] S[...] physically and mentally for the remaining part of his life. The trustees may further use the funds to comply

with the medical needs of Mr M[...] K[...] S[...].

A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the judge whose name is reflected and handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 19 December 2024.

Appearances:

For the plaintiff: Adv C A da Silva SC

Instructed by M O Matlala Attorneys.

For the defendant: Adv R Nathambeleni SC

Instructed by Dabishi, Nthambeleni Inc.

Dates of hearing: 21 – 23 October 2024, 25 – 29 October 2024, 2 and 5 December 2024.

[1] As per the amended particulars of claim.

[2] Corbet “The quantum of damages in bodily and fatal injury cases” Vol 1 at p4.

[3] 1984

(1) SA 98 (A) at 113F – 114E.

[4] 1996

(1) SA 273 (C) at 277H.

[5] [2010] ZASCA 145.

[6] My emphasis.

[7] See Visser v Visser 2012 (4) SA 74 (KDZ) at para 14 and Mdzinwa v Minister of Police

[2024] 4 All SA 866 (WCC) at para 168.

[8] 2006

(5) SA 583 SCA at para 8.

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