

SOUTH AFRICA / JUDGMENT

## Nxopo v RAF (49944/2014) [2017] ZAGPPHC 1094 (24 October 2017) [2017] ZAGPPHC 1094

COURT

North Gauteng High Court, Pretoria

BEFORE

Brand

CASE / FILE NUMBER

49944/2014

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**Policy**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**Case number: 49944/2014**

**24/10/2017**

**In the matter**

between:

THAPELO PRINCE  
NXOPO  
Plaintiff  
and  
THE ROAD ACCIDENT  
FUND  
Defendant

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**JUDGEMENT****BRAND AJ**

[1] The Plaintiff, Mr Thapelo Prince Nxopo claims from the Defendant, the Road Accident Fund, damages emanating from injuries (a head injury and injuries to both knees) that he sustained as a passenger in a motor vehicle accident on 25 June 2011.

[2] By the time this matter came before me, the merits had been settled 100% in favour of the Plaintiff. Determination of general damages had been referred to the Health Professions Council of South Africa. The only remaining issue was that of loss of earnings and of earning capacity.

[3] On this the parties were diametrically opposed. While the Plaintiff claimed that his injuries resulted in significant loss of earnings and earning capacity and proposed a specific amount in this respect, the Defendant maintained throughout that there was instead neither and if there were, the contingencies to be applied were different from those proposed by the plaintiff.

[4] Accordingly I have to decide first whether there was indeed loss of earnings caused by the Plaintiffs injuries; and if so, second, what amount in total to award for that loss.

[5] The parties agreed that the matter shall be decided on the papers and I decided to proceed in that manner. Mr Lusenga for the Plaintiff and Mr Bokaba for the Defendant made oral submissions and then both at my request filed written heads of argument which I found helpful and thank them for.

Was there loss of earnings?

[6] The Plaintiff obtained expert reports from an orthopaedic surgeon (Dr Lukele,) a neurosurgeon (Prof Mokgokong), a clinical psychologist (Dr Mureriwa,) an educational psychologist (Dr Kekana), an occupational therapist (N Ndzungu,) an industrial psychologist (RT Ntsieni) and, of course, an actuary (Munro Consulting).

[7] The Defendant acquired reports from an orthopaedic surgeon (Dr Sibonyani,) a neurosurgeon (Dr Ntimbane,) a clinical psychologist (E Tromp) and an industrial psychologist (C Cilliers).

[8] The Plaintiff sustained injuries to his head and both knees. The reports of the Plaintiff's and Defendant's clinical psychologist list as consequences of these injuries headaches, dizziness, memory problems,

poor concentration, fatigue, drowsiness and pain and stiffness in both knees that prevents him from running, squatting and lifting

heavy objects. Significantly, Dr Mureriwa (Plaintiffs psychologist) concludes that the Plaintiff post-accident exhibited significant

brain slowing and slower than normal speed of information processing. Although deferring to the occupational therapists in this respect, he further concludes that because of the consequences of the injuries, the Plaintiff is 'currently unemployable and untrainable for a career'.

[9] Ms Tromp, the clinical psychologist for the defendant, after listing similar test results to Dr Mureriwa, concludes that the Plaintiff 'demonstrate[s] deficits in most areas of cognitive functioning' and that these difficulties 'will most probably have a negative impact on his occupational functioning'.

[10] In the uncontested report of the educational psychologist appointed for the Plaintiff, Dr Kekana (no

counterpart for the Defendant), it is stated that the Plaintiff's executive functioning capacity had been significantly impaired:

although he could set goals for himself, he could not plan to reach those goals or execute any plan made and 'was not able to monitor and correct his mistakes and performance'. These problems, Dr Kekana concludes 'will influence his ability to perform at a high level in a work situation'.

[9] Both neurosurgeons found no neuro-physical consequences, but (although recommending that this be confirmed through a neuro-psychological report) report serious neuro-psychological consequences, including memory problems, behaviour and personality changes and emotional problems.

[10] The Plaintiff's occupational therapist, N Ndzungu, concludes that the Plaintiff, due to his cognitive

limitations post-accident will experience limitations in further study, which in turn will impact on his career options and ability to compete in the labour market, and so his earning capacity in future. She further states that the Plaintiff is likely only to be able to secure an unskilled manual job, but will not be able to cope with 'heavy occupations' or duties that require high cognitive ability. She also notes that the Plaintiff is demotivated due to the accident and its consequences and then concluded that he will 'always be an unequal competitor in the open labour market'. This report also stands uncontested, as the Defendant did not appoint an occupational therapist.

[11] The industrial psychologists for both parties prepared a joint minute that was handed up in court on the first day of trial. In this minute Ms Ntsieni for the Plaintiff postulates that, but for the accident, had the Plaintiff as anticipated by her obtained a post-matric diploma, he would have entered the labour market as a semi-skilled worker at a Paterson 83 level,

progressing at age 45 to a grade C1/C2 median quintile, with only inflationary increases after that. Ms C Cilliers for the Defendant agrees with the general quantification table proposed by Ms Ntisieni, but thinks it unlikely that the Plaintiff would obtain any tertiary qualification given the financial means of his family to support further study. In thf's light she estimates instead that he would have entered the labour market at level A3 and progressed at age 45 to 83/84.

[12] Post-accident the two industrial psychologists diverge even more. While Ms Ntsieni reports that the

Plaintiff is post-accident no longer an equal competitor in the open labour market and that he may struggle to secure and keep employment

due to the consequences of the injuries sustained in the accident - his career has been 'practically restricted' by the accident's

impact. She further notes that without a matric, he will be restricted to physically demanding work, but that his condition post-accident will limit him to light and sedentary work. This clearly impacts on his ability to obtain and retain employment. She notes in particular the conclusion of the clinical psychologist, Dr Mureriwa, that the Plaintiff has been rendered unemployable and untrainable. His earnings will range from the lower to between the lower and median quartile of the unskilled labourer scale, with no further anticipated growth.

[13] Ms Cilliers instead concludes that the Plaintiff has suffered neither a loss of earning capacity nor a shortened work life. She bases this conclusion primarily on what she presents in the minute as a fact, that the Plaintiff had passed matric; that the delays in graduating from school were occasioned not by consequences of the accident but by pre-existing learning difficulties; and that the Plaintiff was able to obtained employment once post-accident, which he left voluntarily after several months.

[14] It is on this conclusion of Ms Cilliers that Mr 8okaba for the Defendant primarily based his submissions that there was no future loss of earning capacity for the Plaintiff and it is her conclusions that must therefore be assessed.

[15] Ms Cilliers' conclusion in this respect is called into question first by the fact that it seems to have been reached partly on the basis of incorrect information. Although the Plaintiff had told Ms Cilliers that he had sat for his supplementary exam and obtained his matric (so that she postulated on that basis), it emerged on the second day of trial that he had in fact not obtained the matric and had not attempted to do so since.

[16] Second, Mr Lusenga for the Plaintiff submitted that Ms Cilliers had no regard to the possibility that the employment secured by the Plaintiff was sympathy employment and that he had not left voluntarily , but because he was not coping and lacked motivation.

[17] Third, Ms Cilliers' conclusion that the injuries caused no disabilities to prevent employment, which she bases solely on the report of the neurosurgeon for the Defendant, Dr Ntimbane , does not accord with the agreement between the clinical psychologists that his cognitive deficits will have a negative impact on his occupational functioning; the agreement

between the neurosurgeons that he suffered serious neuro-psychological impairment; and the uncontested conclusions by the Plaintiffs educational psychologist and occupational therapist that his capacity and prospects for employment were negatively affected.

[18] Accordingly I find that the opinions of Ms Ntsieni as expressed in her report and in the joint minute with respect to loss of earning capacity must be preferred, so that the Plaintiff indeed suffered loss of earning capacity along the lines of her conclusions.

[19] Mr Bokaba urged me to find that the Plaintiff had suffered no past loss of earnings, as at the date of the accident he was still a scholar, and in line with his pre-accident record of failing and then repeating years of schooling

would have passed matric only at the end of 2013; would then have enrolled for a certificate course in 2014, which he would also

repeat, so as to graduate from that only at the end of 2015, so that he would, in some manner, 'still be a scholar ... during 2017'. Apart from the fact that on Mr Bokaba's own timeline the Plaintiff would in fact have entered the labour market in 2016 and not 2017, the timeline is at the extreme end of speculation: the possibilities of repeating school years on which it is based are best dealt with through the application of contingencies - that is, there is loss of earnings, which must be reduced according to determined

contingencies.

Contingencies

[20] On the basis of the above, I find no reason to deviate from the amounts proposed by the Plaintiff on the basis of its actuarial report for both past loss of earnings and loss of future earning capacity, and indeed, Mr Bokaba, apart from disputing the fact of loss of earnings, did not dispute those amounts. Instead he focussed on the contingencies to be applied and it remains for me to exercise my discretion with respect to those.

[21] The Plaintiff proposed an amount for past loss of R235 300.00 (this is the figure on the 'uninjured' scenario - the actuary calculated a figure of 0 for past loss on the injured scenario, so that this need not be considered).

For this amount Mr Lusenga submitted that the normal contingency of 5% might be too low in this respect, as both assumptions on the basis of which the actuarial report was calculated, namely that the Plaintiff would have passed matric in 2012 and would immediately upon doing so have found employment, are too optimistic, given that the Plaintiff had to repeat two years of study already before the accident. On this basis he proposed a contingency for past loss of 20 to

30%. Mr Bokaba discounted loss of earnings and so proposed no contingencies. Although I agree that these considerations should persuade one to depart from the normal contingency, 30% would be too drastic. I find that a contingency of 20% should be applied to loss of earnings.

[22] For loss of earning capacity, the amount proposed for the 'injured' scenario is R239 200.00. Mr Lusenga submitted that, given that the Plaintiff has earned some income for a period post accident already, although the normal

contingency applied to the 'injured' scenario is 15%, this is an appropriate case, in line with the decision in *Reynolds v Road Accident Fund 2005 5 QOD D3-1* for a 0% contingency deduction. Mr Bokaba instead proposed 10%, which would favour the Plaintiff. I find Mr Lusenga's concession in this respect prudent - the Plaintiff clearly has some employment capacity remaining that should be taken into account. I apply a 0% contingency to the 'injured' scenario.

[23] The amount proposed for loss of earning capacity 'uninjured' is R5 209 800.00.. Although the normal contingency, taking account of the Plaintiff's remaining years of work would here be 20.5%, Mr Lusenga proposed a contingency of between 20 and 30%. Mr Bokaba did not diverge by much, proposing also 30%. In support of his proposition, Mr Lusenga reminds that the same considerations that applied to the 'injured' figure should apply here and that the actuary had not used the 'staggered' method of calculating salary increases up to age 45, but had increased only for inflation. Although these considerations require a departure from the 'normal' rate of 20.5%, and in light of the previous cases Mr Lusenga referred me to in this respect (*Samantha Francken v Road Accident Fund (2854/2012) [2014] ZAKZDHC 43 (22 October 2014)*; *Pietersen obo J St Iv Road Accident Fund 2012 (6A4) QOD 88 (GSJ)*; *Mahlangu Elizabeth v Road Accident Fund (038823/14) [2016] ZAGPJHC 193 (21 July 2016)*; *Kgomo v Road Accident Fund 2011 (6A4) QOD 62 (GSJ)*; and *Cordeira v Road Accident Fund 2011 (6A4) QOD 45 (GP)*) they are not so weighty as to require 30%. I find that a contingency of 25% should be applied to the uninjured loss of capacity.

[24] On this basis the amount to be awarded for loss of earnings on the 20% contingency is R188 240.00. The amount for injured earning capacity remains R239 200. The amount for uninjured earning capacity at the 25% contingency is R3 907 350.00. The total amount to be awarded is then R3 856 390.00.

[25] The parties handed up a draft order with the amount for loss of earnings and earnings capacity left blank. I have filled in the amount to award in that draft order, which is attached to this judgment and hereby make the draft order, marked "B", the order of this court.

JFD BRAND

Acting Judge of the High Court

[GAUTENG DIVISION, PRETORIA]

Case No: 49944/2014

On the 24th of October 2017, before the Honourable Brand AJ

In the matter between:

THAPELLO PRINCE NXOPO

Plaintiff

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

Having read the papers filed on record, having heard submissions from both parties and having considered the matter, the Court orders that:

1. The Defendant shall pay to the Plaintiff an amount of R 3 856 390.00 (Three million Eight Hundred and Fifty Six Thousand and Three Hundred and Ninety Rand) in respect of the Plaintiff's loss of income claim.
2. The amount in paragraph 1, shall be paid into a trust account of the Plaintiffs

Attorneys, B Dlova Attorneys, of 522 Bank Towers 190 Thabo Sehume Street, Pretoria for the sole benefit of the Plaintiff pending the formation of a trust to be formed as contemplated in paragraph 5 hereunder.

3. The Defendant will not be liable for interest on the above amount provided that it is paid within fourteen (14) days from the date of this order, failing which interest at a rate of 10.25% per annum will be payable calculated from the date on which this order was made up to and including the date of payment thereof.
4. Defendant shall pay the Plaintiff's taxed or agreed party and party costs on a High Court scale. In the event that the costs are not agreed:

4.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record;

4.2 The Plaintiff shall allow the Defendant Fourteen (14) court days to make the said payment of the taxed costs.

4.3 Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10.25 % on the taxed or agreed costs from date of allocatur to date of final payment.

5. The above costs shall also be paid into the above trust account, which costs shall include the following:

5.1 Plaintiff's reasonable transportation costs for attending consultations with experts, court proceedings;

5.2 Costs of obtaining reports, reservation and reasonable taxable preparation fees if any for the following experts:

5.2.1 Dr LT KEKANA (EDUCATIONAL PSYCHOLOGIST);

5.2.2 MS NCUMISA NDZUNGU (OCCUPATIONAL THERAPIST)

5.2.3 MS TALIFHANI NSTIENI (INDUSTRIAL PSYCHOLOGIST)

5.2.4 MUNRO (ACTUARY)

5.3 Reasonable costs for the creation of the Trust contemplated in paragraph 5 below and the appointment of the Trustee;

5.4 A trust for and on behalf of Thapello Prince Nxopo is to be registered ;

5.5 ABSA Trust Limited represented by Phillip Robinson is appointed as trustee of the trust mentioned in paragraph 5.4

5.6 Reasonable costs of the furnishing of security by the Trustee;

5.7 The costs of the Trustee in administering the Plaintiff's estate, as determined by Section 84(1) (b) of the Administration of Estates Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators;

5.8 Any costs attendant upon obtaining payment of the capital amount referred to in paragraph 1 above and costs in this matter.

5.9 Counsel's full fees;

6. The attorneys of the Plaintiff, B Dlova Attorneys, are directed:

6.1 to establish or facilitate the establishment of a trust ("the Trust") in

accordance with the Trust Property Control Act No. 57 of 1998;

6.2 to pay all monies held in trust by them for the benefit of the Plaintiff, to the Trust, after:

6.2.1 deduction of their fees and disbursements, in accordance with their mandate and free agreement;

6.2.2 paying to the Plaintiff as assisted by his mother an advance in the amount of R300 000.00 (three hundred thousand rands).

7. The Trust instrument contemplated in paragraph 5 above shall make provision for the following

7.1 That the Plaintiff is to be the sole beneficiary of the Trust;

7.2 That the trustee(s) is/are to provide security to the satisfaction of the Master;

7.3 That the ownership of the trust property vests in the trustee(s) in their capacities as Trustees;

7.4 That the powers of the trustee(s) shall specifically include the power to make payment from the capital and income for the reasonable maintenance of the Plaintiff, or for any other purpose which the trustee(s) may decide to be the Plaintiff's interest, and if the income is not sufficient for the aforesaid purpose, that the trustee(s) may utilise capital;

7.5 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;

7.6 The exclusion of any community of property in the event of the Plaintiff's marriage;

7.7 The suspension of the Plaintiff's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the Plaintiff;

7.8 That the amendment and or dissolution of the trust instrument be subject to the leave of this Honourable Court;

7.9 The termination of the Trust upon the death of Plaintiff, in which event the trust assets shall pass to the his state;

7.10 In the event of the death of the Plaintiff, the trust assets be paid to the estate of the Plaintiff;

7.11 That the trust property and the administration thereof fall under the authority of the Master of the High Court, Pretoria, and is subject to an annual audit.

8. The trustee shall have the following powers:

8.1 to receive, take care of and administer the award and Plaintiff's legal costs paid by the Defendant to the Plaintiff in this matter;

8.2 to let, exchange, partition, alienate, and for any lawful purpose, to mortgage or pledge any property belonging to the Plaintiff, or in which he has an interest;

8.3 to carry on or discontinue, subject to any law which may be applicable, any trade, business or undertaking of the Plaintiff to acquire, whether by purchase or otherwise, any property, movable or immovable, for the benefit of the Plaintiff;

8.4 to perform any contract relating to the property of the Plaintiff, entered into by him;

8.5 to exercise any power, or give any consent required for the exercise of such power, where the power is vested in the Plaintiff for his own benefit, or is in the nature of a beneficial interest to him;

8.6 to apply any money for the maintenance, support and for the benefit of the Plaintiff;

8.7 to incur expenditure in respect of the improvement of any property of the Plaintiff by means of building or otherwise;

8.8 to expend any monies belonging to the Plaintiff, on the maintenance, education or

advancement of any descent of the Plaintiff or spouse, wholly or partially dependent on him;

8.9 to continue such other acts of bounty or charity exercised by him, as the Master, having regard to the circumstances and the value of the estate of the Plaintiff considers proper and reasonable;

8.10 to invest or re-invest any monies of the Plaintiff which become available from time to time for

investment, and which are not immediately required for the purposes defined in Section 82(c) of the Administration Estates Act, No 66 of 1955 (as amended);

8.11 to institute or defend proceedings which may be necessary in the interest of the Plaintiff, or for the due and proper administration of his estate;

9. The aforementioned appointment and the exercising by the Trustee of his aforementioned powers as set out above, is subject to the control of the Master of the High Court by virtue of the provisions of Act 66 of 1965.

10. The amount referred to in paragraph 1 together with the costs shall be paid into the trust account of B Dlova Attorneys

Name of Attorneys B Dlova Attorneys Name of Bank Nedbank Account Number [...] Account Type Trust account Branch Code 16044500 REF. NO. MS.DLOVA/M VA 18/13/ NXOPO

11. The issue of Generals is referred to the HPCSA.

12. The contingency fee agreement complies with the law.

BY ORDER

THE REGISTRAR

Counsel for Plaintiff: Adv. W.I.H. Lusenga

Counsel for the Defendant: Adv. Bokaba

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