

SOUTH AFRICA / JUDGMENT

Viller N.O obo Ganenang v Road Accident Fund (RAF 524/2022)

[2025] ZANWHC 63 (20 March 2025)

[2025] ZANWHC 63

COURT

North West High Court, Mafikeng

BEFORE

JT Djaje

CASE / FILE NUMBER

RAF 524/2022

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NO: RAF 524/2022

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:

ADV
VILLER N.O obo TP GANENANG
Plaintiff
AND
ROAD
ACCIDENT
FUND
Defendant
ORDER
The

following order is made:

1.
The Defendant is ordered to pay 100% of Mr Thapelo Prayer Ganenang's ("the Patient") proven damages due to the motor vehicle collision which occurred on 31 January 2015.
2.
The Defendant is to pay to the Plaintiff a Capital Amount of R3 362 151.07 (THREE MILLION THREE HUNDRED AND SIXTY-TWO THOUSAND, ONE HUNDRED AND FIFTY ONE RAND AND SEVEN CENTS) in full and final settlement of the Plaintiff's claim, which amount shall be paid into the trust account of Savage Jooste & Adams, with

banking details:

Nedbank
name
: NEDCOR
– ARCADIA
Account
type
: TRUST
ACCOUNT
Branch
code
:
16-33-45-07
Account
no
: 1[...]
Reference
no
: Mr
Makole/KG49
2.1

The capital amount in prayer one above consists of:

2.1.1 General

damages: R685 700.00 (R1 250 000.00 less R564 300.00);

2.1.2 Past

and Future loss of earnings: R1 251 228.00 (R1 468 862.00 less R217 634.00);

2.1.3 Past

caregiving of R1 423 676.00; and

2.1.4 Past

hospital, medical and related expenditure of R 1 547.07.

2.2

It is ordered that the capital amount be paid into the above-mentioned trust account of Savage Jooste & Adams within 14 (FOURTEEN) days from the date of this order.

2.3

Mora interest on the above amount per annum, calculated from the date of service of the combined summons, being 8 November 2022, up to and including the date of payment thereof.

3.

The award (the capital less costs and less the past caregiving detailed in paragraph

2.1.3) pertaining to the patient shall be

protected by means of a Trust ("the trust"). Attached hereto as annexure

"A" is a copy of the Deed of Trust.

4.

It is hereby ordered that Mr Jean Vosloo of Standard Liberty Trust, is to be

the Trustee of the trust and is to establish and administer the trust of which the patient shall be the sole beneficiary, until the date of the patient's death. The appointment of the Trustee is subject thereto that the Trustee shall furnish security to

the satisfaction of the Master of the High Court. Attached hereto as annexure "B" is a copy of the Trustee's Consent.

5.

The security so furnished will be adjusted from time to time, at least once per

year to reflect the decrease or increase of the capital and income.

6.

The Defendant is to provide the Plaintiff's attorneys of record with an

unlimited Undertaking, as contemplated by Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (as amended), to compensate the patient for the costs of future accommodation of the patient in a hospital and /or nursing home, and /or treatment of or rendering of a

service and /or supplying of goods to the patient, after the costs have been incurred and on proof thereof, resulting from

the injuries
sustained as a result of a motor vehicle accident which took place on
31 January 2015.

7.

The Defendant is ordered to make payment of the Plaintiff's
taxed or agreed
party and party costs, on the High Court Scale in
respect of the action, which costs include but are not limited to the
costs of

29 April 2024, 20 and 21 August 2024,
29 August 2024, 27 and 28 January 2025:

7.1

The fees consequent upon the employment of two Counsel, at Scale C;

7.2

The reasonable taxable transportation, accommodation and other costs
incurred by the Patient,
in attending the medico-legal appointments
and court subject to the discretion of the Taxing Master;

7.3

The costs of the following expert reports, addenda, RAF 4 reports,
the preparation fees
and reservation fees (if any), as the Taxing

master may, upon
taxation, determine:

7.3.1 Dr J J

Du Plessis - Neurosurgeon;

7.3.2 Dr M

Mazabow – Neuropsychologist;

7.3.3 Ms M

Mokgata – Speech and Hearing Therapist;

7.3.4 Dr

Engelbrecht – Orthopaedic Surgeon;

7.3.5 Dr

Enslin – Ear, Nose & Throat Surgeon;

7.3.6 Dr

Smuts – Neurologist – Neurologist;

7.3.7 Dr van

Heerden – Urologist

7.3.8 Dr

Naidoo – Psychiatrist;

7.3.9 Ms

Doran – Occupational Therapist;

7.3.10 Ms R van Zyl –

Industrial Psychologist; and

7.3.11 Mr G Whittaker of

Algorithm Consultants and Actuaries.

7.4

The costs of the curator ad litem, at Scale B, including but not
limited to his appointment (including
the drafting and moving of the
application), attendances at consultations, the compilation of his
report and his day fees for 29 April 2024, 20 and

21 August 2024, 29 August 2024, 27 and 28 January 2025.

7.5

The costs of the Plaintiff's instructing attorney, which includes reasonable travelling costs, costs for preparing for Pre-Trial Conferences, costs for actual attendances at Pre-Trial Conferences, costs of drafting Practice Notes, Pre-Trial Agenda's and Pre-trial minutes, costs for preparation for and attending of a Judicial Case Management Conference, all costs for preparing for trial, costs of preparation for and application for the Case Management Meeting as well as attendance and all Rule 35(9) Notices to date.

7.6

All radiological expenditure, including the obtaining of CT and MR scans as requested by the above medico-legal experts.

7.7

The travelling and accommodation costs of Ms Gomolemo Comfortia Ganabo in attending court and medico-legal appointments. Ms Gomolemo Comfortia Ganabo is hereby declared a necessary witness.

8.

Should the Defendant fail to pay the Plaintiff's party & party costs as taxed or agreed with 7 (seven) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at the applicable prescribed rate per annum, from the date of settlement up to and including the date of final payment thereof.

9.

Ms Anneke Greeff is appointed as Case Manager to the Patient.

10.

There is a Contingency Fee Agreement applicable in this matter.

11.

The reports of the curator ad litem are to be served on the Master of the High Court.

JUDGMENT

DJAJE DJP

- [1] The patient sustained injuries due to a motor vehicle collision on 31 January 2015. The injuries that the patient sustained as described by the experts are a brain injury graded as at least a moderate concussive brain injury, fractures to the right superior and inferior pubic rami, complicated by an injury to his urethra, urethral stricture and a perineal fistula, undisplaced fracture to the medial malleolus of his tibia(ankle), multiple lacerations and abrasions and shock and psychological trauma. The patient approached this court because of the defendant's under-settlement of the claim. On 29 April 2024 a curator ad litem ("Adv DP Viller") was appointed on behalf of the patient who acts on his behalf herein.
- [2] This matter proceeded undefended and an order in terms of Rule 38(2) of the Uniform Rules of Court was granted for admitting the facts, opinions, findings and conclusions in the medico-legal reports by the patient's experts. As merits were already conceded, only the issue of quantum was to be determined.
- [3] Several expert reports were obtained on behalf of the patient as follows:
- Neurosurgeon – Dr JJ du Plessis
 - Neurologist – Dr JA Smuts
 - Clinical Neuropsychologist – Dr M Mazabow
 - Urologist - Dr IJ van Heerden
 - Orthopaedic Surgeon - Dr P Engelbrecht
 - Psychiatrist - Dr M Naidoo
 - Ear, Nose & Throat Surgeon – Dr JS Enslin
 - Speech Therapist and Audiologist – Ms M Mokgata
 - Occupational Therapist – Ms M Doran
 - Industrial Psychologist – Ms R van Zyl
 - Consultant and Actuary – Mr G Whittaker
- [7] The Neurosurgeon noted that the patient still suffers from seizure almost once a month despite taking his medication. Although not severe but during an attack his body becomes stiff, and he becomes confused with a terrible headache. He has a small bladder capacity which restricts his intake of fluid as he needs to frequently empty his bladder. The patient experiences pain on his ankle when he stands for a long period of time or when he runs. He is forgetful and misplaces personal belongings.

[8] According to the Neurologist the patient sustained a significant head injury and was left with a mild to moderate brain injury. He opined that the head injury resulted in brain dysfunction and the olfactory nerve which is responsible for both taste and smell is damaged. Dr Enslin noted that the patient has fluctuating hearing loss which is

attributable to the head injury. In addition, the Psychiatrist, Dr Naidoo diagnosed the patient with a depressive disorder due to the injuries sustained. The patient has limitations in the receptive and expressive cognitive linguistic functioning, particularly his speed of information processing, attention, auditory memory and word retrieval which may impact on his ability to communicate effectively like he used to before the accident.

[9] The Occupational Therapist opined that the patient's ability to execute mental and physical activities has been compromised and he will not be able to participate in daily activities like bathing, dressing and grooming like he used to without assistance.

Future medical expenses

[10] The experts recommended that the patient, due to his injuries will require extensive future hospital and medical related expenses. Both Dr Mazabow and Dr Naidoo recommended psychotherapy and psychotropic medication. The Occupational Therapist opined that the patient would require biokinetics, occupational therapy, case management and special adapted equipment. It is clear from the above that the defendant should have provided the patient with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

General Damages

[11] As stated above the patient was paid an amount of R564 300.00 in respect of general damages. It was argued that the said amount was under settled and an amount of R1 250 000.00 should have been paid. During argument counsel referred to various case law of claimants who suffered similar type of injuries. These were the following:

"5.2.1 Smit v Road Accident Fund 2013 (6A4) QOD 188 (GNP):

In this matter the Plaintiff, a 27-year-old gardener, suffered from a moderate to severe organic brain syndrome with post-traumatic associated frontal lobe symptomology and post-traumatic epilepsy; as well as a fracture of the femur. He suffered from significant difficulties with concentration; impulsivity; distractibility, reduced drive and reduced endurance. He suffered from marked diffuse neuropsychological deficits and difficulties with strong frontal lobe involvement. The fracture femur was treated by open reduction and internal fixation. He had difficulty standing for more than an hour and walking for longer than half an hour. His limb was shortened by 3.5cm and he was rendered unable to work as a gardener. An amount of R650 000.00 was awarded with respect to general damages which equates to a 2024 value of R1 203 000.00 (according to Jutastat Evolve).

52.1. Potgieter v Road Accident Fund 2013 (6A4) QOD 195 (ECP):

In this matter the plaintiff, a 30-year-old semi-skilled male employee sustained a traumatic brain injury with considerable frontal lobe dysfunction. He had an extensive laceration of the scalp as well as a fracture of the parietal region of his skull. He also suffered from soft-tissue injuries to the neck, right wrist, right foot and lumbar sacral spine. He was discharged from hospital six days after the accident and three days later was re-admitted for a cystoscopy where it was determined that he had a rupture of the bladder. He was left with an indwelling Foley's catheter while the bladder injury healed. His brain injury resulted in decreased cognitive abilities, defective memory, impaired concentration and significant change in personality. An amount of R650 000.00 was awarded with respect to general damages which equates to a 2024 figure of R1 203 000.00 in 2024.

52.2. MM v Road Accident Fund 2019 (7B4) QOD 92 (FB):

In this matter, the Plaintiff, a 35-year-old female, sustained a traumatic but moderate brain injury, with compression wedge fracture at L2, L3 and L4, fractured right tibia and fibula; fractured right pubic rami and ischium. The outcome diagnosis was of post-traumatic neurocognitive / neuropsychological disorder, post-concussion dizziness, mechanical back pain, scarring, mood disorder secondary to musculoskeletal syndrome and changes in life circumstances. There had been considerable changes to her physical function, mood and behaviour which impacted on her amenities, life roles and circumstances. After the accident she was treated in casualty and was then transferred to ICU. She remained there for three days, and then in the general ward for 2 ½ weeks. Her treatment included two operations, physiotherapy and occupational therapy. She cannot sit, stand or walk for long and cannot play netball or socialise effectively. She has become irritable and short-tempered. The organic neurological sequelae of her brain injury have stabilised and were opined to have become permanent. With respect to general damages an amount of R850 000.00 was awarded which equates to a 2024 figure of R1 085 000.00."

[12] The court in awarding general damages does not intend to punish the defendant but to compensate the patient as a form of solace for the suffering. In *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 it was held that:

"---it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must certainly be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[13] In determining an appropriate amount for compensation it is important to look at comparable cases and the awards made in those matters.

However, these only serve as a guide as each case should depend on the personal circumstances of the patient, the severity of the

condition and the effect thereof on the life of the plaintiff. The argument on behalf of the patient was that an amount of R1 250 000.00 is justified due to the injuries sustained and the effect thereof in his life. Looking at the comparable cases referred to above by the patient the appropriate amount that should have been awarded is indeed R1 250 000.00 for general damages.

Past caregiving expenses

- [14] The patient's wife testified that at the time of the accident the patient was travelling with some family members and seven of them are deceased. The patient sustained a brain injury which has resulted in him having epilepsy. He had fractures to his right superior and inferior pubic rami, fracture on the ankle and multiple lacerations and abrasions. He was in shock and traumatised. The patient was admitted at Mahikeng Provincial Hospital and thereafter transferred to Kuruman Hospital and discharged after four days. He had to be readmitted after he fell sick and was transferred to Kimberly hospital. He was operated on and spent three weeks in hospital.
- [15] Whilst he was at Mahikeng Hospital he was visited by RAF people who promised to assist him with a claim. They lodged a claim, and he received compensation. She testified that the patient is not the same after the accident. He suffers from epilepsy and cannot travel alone. He is forgetful and she must assist him and go everywhere with him. According to her, the patient is not supposed to drink a lot of water as that causes him to urinate frequently and at times ends up urinating on himself. He is not able to walk unassisted and she has to hold his hand when he walks.
- [16] Prior to the accident, the patient's wife worked as a security officer, and she is currently unemployed as she had to resign from her work to care for the patient. On top of taking care of the patient she must take care of the family and perform her wifely duties at home.
- [17] The evidence by the experts and the patient's wife all point towards the need for caregiving for the patient. The Occupational Therapist opined that the patient's overall functioning is impeded by not only the urological complications but also the moderate brain injury that resulted in neurobehavioral, neurocognitive and neuropsychological sequelae. The patient is said to have episodes of epilepsy which requires constant monitoring.
- [18] As far back as the English Court of Appeal case of *Cunningham v Harrison & Another*
- [1973] 3 All ER 463 CA the principle of past caregiving claim is set out that: "[w]here a person who is seriously injured, and is entitled to damages, it is right and just that if his mother renders a service to him instead of a nurse, he should recover compensation for the value of the services that the mother has rendered". In following the *Cunningham* decision, the Appellate Division in *Klaas v Union & South West Africa Ins Co Ltd* 1981 (4) SA 562 (A) at 566-567 held that: "it seems to me that when a husband is grievously injured and is entitled to damages then it is only right and just that, if his wife Rhonda services to him instead of

a nurse he should recover compensation for the value of the services that his wife has rendered”.

[19] In the matter of BN obo NSN v MEC for Health , Gauteng (213362014)

[2022] ZAGPPHC 251 (22 April 2022) the court emphasized the principle in Cunningham case that: “.....where a person who is seriously injured, and he is entitled to damages (just like N), it is right and just that if his wife (or mother is in the instant case) renders a service to him instead of a nurse, he should recover compensation for the value of the services that the wife or mother has rendered. It is clear from the above that the right to be cared for belongs to the injured person. If the mother becomes the caregiver, she can only be compensated and the value of such caregiving services. N’s loss is the existence for the nursing service the value of which is the proper and reasonable cost of supplying the needs.”

[20] This is a classical case where care giving expenses should be determined and awarded.

Loss of earnings

[21] The Industrial Psychologist noted that the patient before the accident was employed in the informal sector and wanted to secure permanent employment at the mine. She opined that but for the accident, he would have continued to function as an unskilled worker within the non-corporate sector of the labour market until retirement at the age of 65 years. Post accident the patient has never returned to work and is in fact declared medically unfit to work on a mine. He has remained unemployed since the accident. Considering the expert reports the patient has suffered total loss of earning and should be compensated.

[22] The actuarial calculations with 5% contingencies on past loss and 15% on future loss amounted to total loss of R1 468 862.00. This is a just and equitable amount for the patient’s loss of earnings. The direct settlement amount was R217 634.00.

[23] Despite the defendant having paid certain amounts to the patient in settlement of the claim, there was no version, or any argument presented by the defendant. In my view, having considered the expert reports presented for the patient, I find that there was indeed under settlement in relation to the general damages, loss of earning and future medical expenses.

Order

[24] Consequently, the following order is made:

2. The Defendant is to pay to the Plaintiff a Capital Amount of R3 362 151.07 (THREE MILLION THREE HUNDRED AND SIXTY-TWO THOUSAND, ONE HUNDRED AND FIFTY ONE RAND AND SEVEN CENTS) in full and final settlement of the Plaintiff’s claim, which amount shall be paid into the trust account of Savage Jooste & Adams, with banking details:

2.1.4 Past hospital, medical and related expenditure of R 1 547.07.

7.3.11 Mr G Whittaker of Algorithm Consultants and Actuaries.

11. The reports of the curator ad litem are to be served on the Master of the High Court.

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 27 JANUARY 2025

DATE OF JUDGMENT

: 20 MARCH 2025

COUNSEL FOR THE PLAINTIFF : ADV ALBERTS SC with ADV GIANNI

COUNSEL FOR THE DEFENDANT : MS MATHEBULA

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