REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 04643/2010

DATE:08/09/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

MNGOMEZULU, ZAMOKWAKHE COMFORT Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] On or about 8 August 2009 at approximately 18h30, along Kgotso Street, Katlehong near Germiston within Ekurhuleni Municipality in Gauteng, the Plaintiff was hit from behind by a motor vehicle, suffering various injuries.

[2] Following up on the above motor vehicle collision or accident the Plaintiff instituted action in this Court against the Defendant in respect of the damages suffered in the abovementioned collision on 8 February 2010.

[3] The Defendant is opposing the action. In addition to the normal plea to the particulars of claim, the Defendant also served and filed a special plea on 21 June 2010.

[4] The Plaintiff's damages were computed and set out under the following heads of damages:

- Estimated past hospital and medical expenses R1 000,00

- Estimated future medical expenses R800 000,00

- Estimated past and future loss of earnings or
  Loss of earning capacity or loss of employability R200 000,00

- General damages R800 000,00

[5] The total amount for the damages claimed is R3 701 000,00.

STATUTORY PREREQUISITES

[6] For a claimant to succeed in its claim for damages, it must aver and prove that it has complied with section 24 and Regulation 3 of the Road Accident Fund Act 1996 (Act 56 of 1996) as amended.

[7] In terms of the Road Accident Fund Amendment Act 2005 (Act 19 of 2005) which was assented to on 23 December 2005 and became effective from 1 August 2008, the legislature introduced limitations in respect of claims under the various heads of damages. The legislature introduced new or additional measures to regulate the Road Accident Fund's (Fund) obligations to compensate third parties for non-pecuniary loss, certain hospital or medical expenses and for loss of income and support. The Regulations promulgated in terms of the Act have survived a constitutional challenge in the Constitutional Court where a challenge to their constitutionality was mounted, albeit unsuccessfully, by The Law Society of South Africa and others under Case No. 10654/2009.

[8] In his particulars of claim the Plaintiff summed up his possible limitations as follows:

> "- *In respect of estimated future hospital, medical and ancillary expenses, in accordance with the tariff contemplated in sub-section 4B of the Act;*
>
> - *In respect of the Plaintiff's claim for loss of income, limited to the amounts specified in section 17(4)(c) of the Act;*

- *In respect of non-pecuniary loss, the Plaintiff's claim does not constitute a serious injury as contemplated in section 1A of the Act and the Plaintiff shall thus not be entitled to general damages.*"

Vide: Paragraphs 15(15.1-15.3) of Plaintiff's Particulars of Claim dated 2 February 2010.

ISSUES IN DISPUTE

[9] The Plaintiff is expected to prove its claim that the Defendant is liable 100% for the damages he suffered and whether the insured driver's actions were the cause thereof.

[10] On the issue of quantum of damages counsel for the plaintiff submitted that both parties had agreed that the Plaintiff's medico-legal reports and other applicable expert reports were admitted and accepted as containing or representing the truth of what is contained therein thus disposing of two heads of damages, namely, future medical expenses for which an undertaking in terms of section 17 was to be provided and also past medical expenses: Plaintiff's counsel also submitted that it was agreed between the parties earlier and before the present counsel for the defendant was engaged, that the quantum for general damages was to be argued on the papers filed without leading *viva voce* evidence.

[11] While admitting that issues relating to past and future medical expenses as well as issues having to do with liability were as set out by

Plaintiff's counsel, the Defendant's counsel stated that the agreement on general damages as set out by the Plaintiff's counsel was arrived at without prejudice, which situation meant that the latter has the right to change its mind, albeit at the 11th hour here at court as they were then doing, persisting that they were reneging from that agreement. The above meant, according to Defendant's counsel, that all issues relating to general damages must also be proven in the normal manner and that the Defendant's submission was that the Plaintiff did not suffer any loss for general damages or loss of earnings.

[12] With the above scenario in place, the stage was set for evidence for and/or against the grant of the prayers sought to be led.

EVIDENCE IN SUBSTANTIATION

[13] The Plaintiff called only one witness, the injured person himself. According to him he was a resident of Vosloorus Township near Boksburg. On 8 August 2009 he had attended a house party at Katlehong Township which neighbours on Vosloorus. He was walking along Kgotso Street's pavement on the left-hand side. It was around 16h30. He was surprised to be hit by a motor vehicle from behind as he was walking there on the pavement, outside the roadway used by motor vehicles.

[14] Kgotso Street was a tarred road with pavements on both sides sloping upwards and levelling where pedestrians should walk. The pavements are paved.

[15] After he was struck or hit from behind he fell down. He had no time or opportunity to see the car that hit him or its driver, because he lost consciousness after the collision.

[16] Under cross-examination the Plaintiff insisted that he was not walking right next to the tarmac but well inside the pavement. He only regained consciousness in hospital. He conceded that he had imbibed some liquor but was adamant he was not intoxicated. He said although he stayed in Vosloorus he was familiar with Katlehong. The area where he was hit is a built up area.

[17] He had passed matric at school and thereafter did a diploma in Tourism Management. He was, as at the date of the accident, working for Labour Supply Chain which was sub-contracted to DHL, as an administration clerk.

[18] The only other point relevant to liability raised by the Defendant during cross-examination was that by walking on the left pavement on a street in a built up area of a Township was contributory to the accident occurring. At this point the Plaintiff closed his case.

[19] I will deal with this aspect later.

[20] The Defendant closed its case without leading any *viva voce* evidence.

[21] The two parties' counsels then addressed this Court fully on the merits and on quantum, the Plaintiff asking for his claim to succeed and the Defendant arguing that the Plaintiff's general damages and loss of earnings should fail.

ON THE MERITS

[22] On the merits, the Plaintiff's evidence stands uncontradicted that the insured vehicle left its line of travel on the tarmac, climbed the pavement and collided with the unsuspecting Plaintiff. This is a built up area in a Township. It is my considered view and finding that in a town or township there is no obligation for a pedestrian to walk on the right side of the street or facing on-coming traffic. Therefore there is no adverse finding in respect of where the Plaintiff was walking along this street in Katlehong Township. The actions of the insured driver were entirely, i.e. 100% responsible for the collision that ensued or happened on 8 August 2009 involving the Plaintiff.

ON QUANTUM

[23] As stated above, apart from its plea on the merits to the Plaintiff's particulars of claim the Defendant also filed a special plea thereto which reads as follows:

"*NON-COMPLIANCE*

The defendant pleads that the Plaintiff's claim is in terms of the Road Accident Fund Act No. 56 of 1996 [the Act] *as amended by Act 19 of 2005. In the case of any claim for compensation brought under the aforesaid Act, the third party shall comply with Regulation 3 made under Section 26 of the Act.*

In the premises, the Plaintiff has failed and/or neglected to comply with Regulation 3. Therefore, the Plaintiff's claim is under the circumstances unenforceable."

[24] As regards the main plea on the merits the Defendant's plea details that are relevant to the issues in dispute herein relate to paragraphs 3 and 15 of the Plaintiff's particulars of claim which are repeated hereunder for ease of reference and convenience:

"*3. At all relevant and material times hereto, the Defendant is liable in terms of the Act and its Regulations to compensate the Plaintiff in respect of the damages sustained by him as a result of the accident referred to in paragraph 4 below.*"

"*15.*

15.3 In respect of non-pecuniary loss, the Plaintiff's claim does not constitute a serious injury as contemplated by section 17(1A)(a) read with Regulation 3(1)(b)(ii) as supported by the serious injury assessment of the Act, which serious injury assessment report has not been rejected by the Defendant in terms of Regulation 3(3)(d)(i) nor [sic] *rejected by direction in terms of Regulation 3(3)(d)(ii).*

15.3.1 As per the serious injury assessment report the Plaintiff presents the following in terms of Regulation 3(1)(b)(iii):-

(aa) serious long term impairment or loss of body function;

(bb) permanent serious disfigurement;

(cc) severe long term mental or severe long term behavioural disturbances or disorder.

15.3.23 The Plaintiff shall thus be entitled to general damages."

[25] The Defendant's plea on the above quoted paragraphs read as follows:

"*3.*

AD PARAGRAPH 3 THEREOF

Save to admit its liability in terms of Section 17 of the Road Accident Fund Act No. 56 of 1996 [the Act] *the Defendant has no knowledge of the balance of the allegations contained herein and accordingly does not admit same and puts the Plaintiff to the proof thereof.*"

"*8.*

AD PARAGRAPHS 10, 11, 12, 13, 14, 15 & 16 THEREOF

The Defendant has no knowledge of the allegations herein contained and accordingly does not admit same and puts the Plaintiff to the proof thereof."

[26] Section 17(1A)(a) of the Act provides that an agreement of a serious injury shall be based on a prescribed method adopted after a consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to circumstances of a third party.

[27] The material portions of Regulation 3 promulgated in terms of or in line with Act 19 of 2005 (Road Accident Fund Amendment Act 19 of 2005) read as follows:

- "*3(1)(a) A third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations.*

(b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method -

(i) The Minister may publish in the Gazette, after consultation with the Minister of Health, a list of injuries which are for purposes of section 17 of the Act not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury which appears on the list.

(ii) *If the injury resulted in a 30% or more impairment of the whole person (WPI) as provided in the AMA Guide (6th Edition), the injury shall be assessed as serious.*

(iii) An injury which does not result in 30% or more impairment of the Whole Person may only be assessed as serious if that injury:

(aa) resulted in a serious, long term impairment or loss of a body function;

(bb) constitutes permanent serious disfigurement;

(cc) *resulted in severe long term mental or severe long term behavioural disturbance or disorder.*"

- "*3(3)(c) The Fund or an agent shall only be obliged to compensate a third party for pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these regulations*."

- "*3(3)(d) If the Fund or an agent is not satisfied that an injury has been correctly assessed, the Fund or an agent must:*

(i) *reject the serious injury assessment report and furnish the third party with reasons; or*

(ii) direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these regulations by a medical practitioner designated by the Fund or an agent."

- "*3(4) If a third party wishes to dispute the rejection of the serious injury assessment report, or in the event of either the third party or the Fund or the agent disputing the assessment performed by the medical practitioner in terms of these Regulations shall:*

(a) within 90 days of being informed of the rejection of the assessment, notify the Registrar that the rejection or the assessment is disputed by lodging a dispute resolution form with the registrar;

(b) in such notification set out the grounds upon which the rejection or the assessment is disputed and include such submissions, medical reports and opinions as the disputant wishes to rely upon …"

[28] In terms of Regulation 3 and section 17 of the Act there are two tests that can be used to assess the injury of a claimant. There is the Whole Person Impairment test (WPI) as per Regulation 3(1)(b)(ii) and the so-called narrative test as per Regulation 3(1)(b)(iii)(aa)-(dd).

[29] In whatever process the parties in a bodily injury case are or may be involved or busy with the golden thread going through everything is that they must ensure speedy and effective compensation.

See: *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (ECD).

[30] In the above case Plasket J said the following at 406D-E paragraph 16:

> "*16. Organs of state are not free to litigate as they please. The Constitution has subordinated them to what Cameron J, in Van Niekerk v Pretoria City Council (1997 (3) SA 839 (T) at 850B-C) called 'a new regimen of openness and fair dealing with the public'. The very purpose of their existence is to further the public interest, and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust.*"

[31] The court therein further held that the Fund or its employees should refrain from interfering with claimant's fundamental rights. That they should act in a way that realises their fundamental rights. The court further held that the habit of raising spurious, unpleaded and unsubstantiated defences to claims for compensation are untenable.

[32] In this case, when the Plaintiff lodged his claim for compensation with the Defendant on 21 September 2009, he also served an RAF 4 form depicting serious injury assessment compiled by Dr Morare. The Defendant was obliged in terms of section 24(5) of the Act to object to the validity of the claim if it needed to. It should have done so within 60 days from 21 September 2009. That *status quo* prevailed until plaintiff served his summons on the Defendant on 8 February 2010 in which general damages were computed at R800 000,00.

[33] The narrative test calls for an enquiry into various components of the *persona* including the physical, bodily, mental, psychological and even aesthetic features of an injured Plaintiff. It is inappropriate for a single

medical expert to express himself or herself with any authority to the point of a finding in terms of the narrative test on all such facets of diminished capacity. On the contrary, it is appropriate and desirable if not proper that an RAF 4 form be produced with regard to every particular and applicable medical discipline that is called for by Regulation 3(1)(b)(iii) in respect of each claimant individually detailing his specific and individual injuries and/or complaints.

[34] Regulation 3(1)(b)(iii)(aa) speaks of long term impairment or loss of body function, typically falling within the area of expertise of an Orthopaedic Surgeon or an Occupational Therapist. Regulation 3(1)(b)(iii)(bb) speaks to serious disfigurement typically falling under the area of expertise of a Plastic Surgeon. Regulation 3(1)(b)(iii)(cc) speaks to long term or severely long term behavioural disturbance or disorder typically falling within the area of expertise of a Psychiatrist, a Psychologist or a Neuropsychologist.

[35] According to the papers filed of record herein RAF 4 forms were specifically procured on behalf of the Plaintiff by various specialists because each and every ground for the narrative test as required or reflected in Regulation 3(1)(b)(iii)(aa)-(dd) contemplate different fields of discipline. On 21 September 2009 Dr Morare provided his report as stated above, Dr Shevell a Psychiatrist provided his on 13 June 2011, Ms Stipinovich, a Speech and Hearing Therapist provided hers on 14 June 2011, Dr Scher, an Orthopaedic Surgeon on 23 June 2011, Dr Scheltema, a Neurosurgeon on 15 July 2011, Ms Doran, an Occupational Therapist and Mr Mostert, a Neuropsychologist on 18 July 2011. All confirmed that the injuries sustained by the Plaintiff in the

abovementioned collision had been assessed as serious in terms of the narrative test.

[36] The Defendant procured or relied on only one expert report – that of an Occupational Therapist, Ms E Malan. In a joint report between the two opposing Occupational Therapists dated 1 August 2011 the two opposing experts agree that –

- the Plaintiff's identified difficulties superimposed by fatigue make him a more compromised and vulnerable individual in the workplace;

- these identified difficulties have an on-going severe impairment on his ability to secure tertiary qualifications which in turn would impair him or have a severe impairment on his career functioning and promotional prospects.

[37] Up to this moment, the RAF 4 forms of the Plaintiff's Neurosurgeon, Neuropsychologist and Occupational Therapist were never rejected by the Defendant. Initially the Defendant rejected the Plaintiff's Plastic Surgeon's report but this has since been withdrawn.

[38] On 9 March 2011 the Defendant, for the first time since the claim was lodged in September 2009, purported to object to Dr Morare's RAF 4 form on the basis that maximum medical improvement (MMI) had not been reached at the time of the completion of the RAF 4 form.

[39] On 24 June 2011 the Defendant raised the following purported objections:

- Ms Stipinovich's report : the basis being that she had failed to complete the RAF 4 form correctly by failing to evaluate the percentage of the WPI and instead chose to rely on the narrative test;

- Dr Braun : the basis being that the Plaintiff's injury did not result in 30% or more WPI;

- Dr Shevell : the basis being that the Defendant is not satisfied that the injury had been correctly assessed in the RAF 4 form and thus directed that the Plaintiff be further assessed by Dr Osman, a Neurosurgeon;

- Dr Scher : on the basis that the Defendant is not satisfied that the injury has been correctly assessed in the RAF 4 form, directing that Plaintiff present himself to further assessment with Dr Morule, an Orthopaedic Surgeon.

[40] When one looks at the pre-trial minutes of the parties, especially paragraph 7.4.1 thereof, the Defendant is of the view that once an objection is raised, the Plaintiff must of necessity or *per se* refer that issue or that subjective view by the Defendant of doubting the seriousness of the injury to the Tribunal to be established under Regulation 3(4).

[41] I specifically enquired from the Defendant's counsel during arguments whether and if such a Tribunal in fact already exists. My enquiry was literally evaded despite I repeating it more than once. I put that question in the light of the Plaintiff's counsel's submissions that such a Tribunal is not yet in existence or nominations therefore are still in the process of being called.

[42] It is my considered view and finding that the Tribunal to which objectionable cases are to be referred is not yet operational. In the circumstances any directive that a matter be referred to it (the Tribunal) is as academic as it is impossible and an exercise in futility tantamount to a delaying tactic or waste of time.

[43] In a definitive recent judgment that was delivered by Claassen J of this Court on 29 April 2011 under Case Number 47697/09, namely, *Smit (as curator ad litem to Duduzile Ngobeni) v RAF* the learned judge held among others that mere objections were not good enough. The objector should advance relevant, rational and substantial reasons why it is of the view that the injury had not been correctly assessed. Such objection must be genuine,

rational and logical and should not be an objection which is either arbitrary or has no medical or legal basis, as such the objection being purely obstructive.

OBJECTIONS AMPLIFIED

[44] In terms of Regulation 3(3)(c) and (d) if the Fund or agent is not satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations, the Fund or an agent must reject the serious injury assessment report and furnish the third party with reasons for the rejection; or direct that the third party submit himself or herself to a further assessment.

[45] As stated above, the Defendant never rejected the RAF 4 forms of the Plaintiff's Neurosurgeon, Neuropsychologist, and Occupational Therapist. It later withdrew its purported rejection of the Plaintiff's Plastic Surgeon.

[46] A failure to so object there and then establishes the Defendant's duty to compensate the Plaintiff for any non-pecuniary loss as contemplated in Regulation 3(3)(c). In the circumstances as are evidenced by facts in this matter, a failure to object brings an immediate end to the questions whether the Plaintiff had suffered a serious injury or not. In other words, the absence of the Defendant's objection there and then nullifies the special plea.

[47] As regards the purported rejection of the Plaintiff's remaining RAF 4 forms, the question is whether such "*rejection*" occurred in the prescribed manner. For the rejecttion to have occurred in the prescribed manner the Defendant must be seen to have done so substantiated by relevant, rational and sustainable reasons. When a Defendant, as in this case, furnishes generalised, vague and non-descript reasons, such rejection will not meet the requirements of Regulation 3 and therefore may not amount to a proper rejection or objection.

[48] The Plaintiff argued and submitted that the requirements under Regulation 3(3)(d)(ii) are relevant for comparative purposes when the Defendant elects to exercise its rights in terms of Regulation 3(3)(d)(i) as opposed to Regulation 3(3)(d)(ii). He further submitted that it must be assumed that a rejection in terms of Regulation 3(3)(d)(i) is favoured in circumstances where the Defendant is able to furnish relevant, rational and substantial reasons why it is of the view that the injury has not been correctly assessed outside the requirements of Regulation 3(3)(d)(ii) where further medical opinion is called for by means of a further assessment.

[49] The above scenario, in my view, brings about untenable a mutually contradictory or destructive consequences. The only or reasonable interpretation which avoids such an absurd result would be that the machinery of Regulation 3(3)(d)(i) should be available to the Defendant where it seeks to reject the serious injury assessment report on procedural but rational grounds, for e.g.

- that the report has been completed by a person who is not qualified to do so; or

- that the assessment has not been conducted in the method prescribed; or

- that the impairment evaluation reports for a specific body part were not attached as required; or

- that the report has not been completed in all particularity.

[50] A closer scrutiny of the present objections or rejections by the Defendant show that they cannot be said to be sound, relevant, rational or sustainable. As a result, the Plaintiff's RAF 4 forms cannot be said to have been duly or properly objected to. As pointed out above, the dispute resolving Tribunal in terms of the Act is still a phantom body or has not been proven as already existing. To refer the issue to such a mystical tribunal in my view would amount to an unnecessary or unjustifiable delay of the case finalisation. Having elected to reject or object to the assessment reports in terms of Regulation 3(3)(d)(i) and then failing to supply genuine reasons therefore as required, the purported rejections or objections do not amount to a rejection or objection "*in the prescribed manner*". The Defendant is thus found to have been duty bound to compensate the Plaintiff for non-pecuniary loss also.

[51] The first, second and third objections thus stand to fail because the Plaintiff's case is not based on 30% WPI but, as a matter of medical fact and medical opinion, which is based on the narrative test. I therefore find that the Defendant's objection that the RAF 4 forms by the Plaintiff's experts do not establish 30% WPI is misplaced, immaterial and inconsequential as this is not the basis of the Plaintiff's claim. Furthermore, there is nothing in the Regulations which prevents the Plaintiff from being assessed in terms of the narrative test as opposed to WPI. A Plaintiff is not obliged to first be assessed in terms of WPI before the narrative test can be applied.

[52] The fourth and fifth objections are no more than a catch-all, all encompassing or inclusive approach which can never be said to have been what was intended to mean by "*sufficient reasons*" that must be given.

[53] Furthermore, the first, fourth and fifth objections in my view do not amount to rightful challenges in terms of Regulation 3(3)(d)(i) as these objections go to medical findings. For the Defendant to succeed, the Defendant was obliged to make use of Regulation 3(3)(d)(ii) by obtaining dissenting medical opinion. This was not done.

[54] I find the concept of MMI irrelevant to the assessment of the Plaintiff's injuries in terms of the narrative test for the following reasons:

- The concept of MMI is a concept peculiar to the assessment of impairment in terms of the AMA Guidelines. In this matter the Plaintiff's injuries have been assessed as serious in terms of the narrative test to which the concept of MMI has no bearing.

- The narrative test calls for an enquiry into various components of the *persona* including the physical, bodily, mental, psychological and aesthetic features of an injured Plaintiff which may also take into consideration the likelihood of further surgery, lengthy rehabilitation treatment, future deterioration and complications as well as the risk of relapse.

- By its definition the narrative test contemplates future medical *sequelae*. In contrast, the AMA Guides seek to assess the injury and assign a WPI rating to it at a point in time w hen patients are as good as they are going to be from the medical and surgical point treatment available to them.

- The AMA Guides are clear in the definition of MMI that the guides, however, do not permit the rating of future impairment and therefore relies on assessment at the point of MMI being a date from which further recovery or deterioration is not anticipated.

- The narrative test is able to perform its function as a safety net by providing an alternative means of assessment where the AMA Guides would not result in a finding of seriousness precisely by freeing the assessor from the rigorous conceptual limitations imposed on the AMA assessment by such concepts as MMI.

- Regardless of the above, should it be demonstrated by the Defendant that the Plaintiff will not reach the stage of MMI prior to medical intervention as demonstrated by Dr Scher in his expert report, the completion of the RAF 4 forms is in any event mandated by Regulation 3(3)(d)(ii) as this is a hit-and-run accident. That is irrespective of the fact that the Plaintiff may not have reached the stage of MMI. The Defendant bears the *onus* of proving the reasonableness of requiring the Plaintiff to go for surgery in mitigation of his damages and provide an explanation as to how the Plaintiff would finance such surgery in the presence of a limited undertaking with no entitlement to general damages.

- As to the medical seriousness of the Plaintiff's injury overall, the Plaintiff's uncontested reports as well as the joint minute compiled by the Occupational Therapists provide support for the findings of Dr Morare. More importantly, subsequent to any purported rejections by the Defendant, the latter has now

admitted the truth and correctness of the medico-legal reports of the Plaintiff and, thereby, effectively admitted that the findings by the various experts on the seriousness of the Plaintiff's injuries are both true and correct. By so admitting, the Defendant has, in my considered view and finding, confirmed, as required in Regulation 3(3)(c), that it is satisfied that the injury has been correctly assessed as serious and has, in terms of the same Regulation, become obliged to compensate the Plaintiff for non-pecuniary loss.

[55] It is only when measures set out in Regulations 3(3)(d)(i) and (ii) have been legitimately exhausted that a referral to the Tribunal under Regulation 3(4) can occur. Regulation 3(3)(e) also allow such a procedure.

EFFECT OF DEFENDANT'S ADMISSION

[56] The gist of the Defendant's special plea reads as follows:

"*NON-COMPLIANCE*:

The defendant pleads that the Plaintiff's claim is in terms of the Road Accident Fund Act 56 of 1996 (the Act) as amended by Act 19 of 2005. In the case of any claim for compensation brought under the aforesaid amendment Act, the third party shall comply with Regulation 3 made under Section 26 of the Act. In the premises the Plaintiff has failed and/or neglected to comply with Regulation 3 of the amendment Act."

[57] The special plea must be read with the pleadings as a whole and to that effect paragraph 3 of the particulars of claim reads as follows:

> "*At all relevant and material times hereto the Defendant is liable in terms of the Act and its regulations to compensate the Plaintiff in respect of the damages sustained by him as a result of the accident referred to in paragraph 4 above.*"

[58] The Defendant pleaded hereto as follows:

> "*Save to admit <u>its liability</u> in terms of section 17 of the Road Accident Fund Act 56 of 1996 (the Act), the Defendant has no knowledge of the balance of the allegations contained herein and accordingly does not admit same and puts the Plaintiff to the proof thereof*." (my emphasis)

[59] In terms of section 17(1) of the Act –

> "*The fund or an agent shall –*
>
> *(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the driver thereof or owner has been established;*
>
> *(b) be obliged to compensate any person for any loss or damage which the third party has suffered …*"

[60] It is my considered view and finding that paragraph 3 of the plea constitutes an admission that this Court has jurisdiction and power to entertain the Plaintiff's claim for general damages and that the Plaintiff is entitled to enforce his claim in this Court.

[61] The Defendant contends and argues that the admission is only in respect of section 17 and does not include Regulation 3. The above argument is in my view disingenuous to say the least. Regulation 3 derives its application existence and/or force from section 17. As a result, Regulation 3 will always be read down from section 17. An unqualified admission of liability in terms of section 17 will always encompass an admission of liability in terms of Regulation 3.

[62] The facts in our present case are almost identical to the facts in *Mbonglseni Makhombothi v Road Accident Fund*, a yet unreported decision by my brother Claassen J which was handed down on 29 April 2011 under Case No. 46854/2009. The court therein held that the admission in paragraph 3 of the plea threat (which is identical to paragraph 3 of the plea in our case) constitute an admission to the Plaintiff's entitlement to seek compensation from the Defendant and that such court's jurisdiction is not ousted. It further held that the special plea raising a lack of compliance by the Plaintiff of Regulation 3 was directly contradictory to paragraph 3 of the plea.

[63] The above is adequately demonstrated by the learned judge at paragraphs [9] to [11] as follows:

> "*[9] The portion commencing with the words, 'be obliged to compensate …' forms an integral part of subsection (a) in the same way as that portion will also form part of subsection (b). One cannot read subsection (a) without reference to the balance of the section because that would make no sense at all. Subsection (a) does not import any liability to do anything on the part of the fund or the agent. It is only when read in the light of the remainder of the main section*

that the obligation resting upon a fund or an agent where the identity of the driver has been established, is described.

[10] I am therefore of the view that the admission made in paragraph 3 of the defendant's plea constitutes an admission that the plaintiff is entitled to seek compensation in this court from the fund as a result of the collision.

[11] The special plea raising a lack of compliance by the plaintiff of regulation 3 is, in any event, directly contradictory to the plea in paragraph 3. I am therefore of the view that Mr du Plessis's submission is correct that it constitutes an admission that the plaintiff is entitled to seek compensation in this court and that jurisdiction of this court is not ousted."

[64] The issue of jurisdiction is directly related to the issue of referral to a Tribunal in terms of Regulation 3(4). Issues that have to do with jurisdiction must be specifically raised by way of special plea. They cannot be raised and/or contended for for the first time in argument.

[65] I repeat, Regulation 3(4) can only be invoked following the processes contemplated in or by Regulation 3(3) and in particular, Regulation 3(3)(d)(i) and (ii). The absence of any dispute on the medical assessment of the plaintiff means that referral to the Tribunal through or in Regulation 3(4) cannot be validly invoked.

[66] For the above reasons the Defendant's counterclaim must fail.

GENERAL DAMAGES

[67] As set out above the Defendant is liable to compensate the Plaintiff for non-pecuniary loss or general damages. General damages account for pain and suffering, disability, disfigurement and loss of amenities of life.

[68] The Plaintiff, who was 25 years at the time of the motor vehicle collision, is presently 27 years old. He was rendered unconscious during the accident and cannot actually re-call the exact sequence of events leading up to his hospitalisation. Save to state that he was in hospital when he regained his consciousness. His initial GCS was recorded as 15/15 which later dropped to 9/15. According to the report of counselling psychologists Jeremy Mostert and Associates the drop in the GCS in such circumstances speaks to or of a significant secondary head injury. The Plaintiff was diagnosed as much. The Defendant ascribes the drop to the intervention of external forces or measures that should lead to a significant reduction of the quantum of damages. Unfortunately, this submission is not supported by expert reports or evidence: It was just a statement from the bar.

[69] It is common cause that the Plaintiff was taken to Natalspruit Hospital in Thokoza, a neighbouring township to Katlehong, by ambulance for treatment. He was X-rayed and diagnosed with compound right tibia-fibula fractures as well as a closed chest injury with lung contusion. The fractures were managed by debridement and stabilisation with an external fixator. After a few days of hospitalisation the Plaintiff developed a suspected fat embolism which was treated conservatively whereafter oxygen was administered and the Plaintiff then referred to physiotherapy. He was discharged about three

weeks following the collision and he hobbled with the help or use of crutches. The external fixator was removed about 5 (five) months after the collision and the Plaintiff continued using the crutches for some time afterwards.

[70] The Plaintiff's injuries can be summarised as follows:

- Compound right tibia-fibula fractures;
- A closed chest injury with lung contusion;
- A 30 cm laceration on the right thigh; and
- A moderate head injury.

[71] The Plaintiff reported the following orthopaedic and psychological complaints as at the time of the hearing hereof:

- pain and weakness in the right leg when walking or standing for prolonged periods. He walks with a pronounced right leg limp;
- mild memory difficulty;
- difficulty sustaining concentration;
- distractibility;
- has become impatient and irritable;
- mood swings with depressive phases;
- regret at having survived the collision;
- poor self-image with feelings or uselessness and worthlessness;
- disturbed sleep pattern with mid-cycle insomnia;
- daytime fatigue;

- increase in weight;
- situational anxiety;
- decrease in socialisation;
- diminished enjoyment of life; and
- concerns about the future.

[72] According to the following uncontested expert reports the following were the *sequelae* of the Plaintiff's injuries:

- As per Dr Scher, the orthopaedic surgeon, the fracture was managed surgically by stabilising same with the external fixator. The right leg condition is considered as stabilised and the Plaintiff has mild residual functional disability and the occasional painful twinge consequent to previous open right tibia-fibula fractures;

- As per Dr Braun, the plastic and reconstructive surgeon, the Plaintiff has a 30 cm ugly and conspicuous right leg scar;

- As per Dr Shevel, the psychiatrist, the Plaintiff has developed or diagnosed with post-traumatic organic brain syndrome;

- As per Mr Mostert, the neuropsychologist, the neuropsychological testing identified the following deficits: (a) attention and concentration difficulties; (b) reduced information

processing speed; (c) reduced mental speed; (d) motor functioning difficulties (e) visuomotor constructive difficulties; (f) mild verbal concept formation difficulties; (g) long-term verbal-memory difficulties; (h) rote learning ability difficulties; (i) poor working memory; (j) executive functioning difficulties. He arrived at a conclusion that neuropsychological testing, medical reports and self-report pointed to the Plaintiff having sustained a diffuse moderate to severe traumatic brain injury which have lead to neuro-cognitive difficulties and neuro-behavioural problems.

- As per Ms Stipnovich, the speech and hearing therapist, observable difficulties also occurred. She observed that from the above expositions it cannot be gainsaid that the Plaintiff cognitive-communicative difficulties are in keeping with an injury to the brain. Observed difficulties with working memory and executive functioning are in line with an injury to the fronto-limbic regions of the brain.

[73] It cannot be disputed that the Plaintiff endured a great deal of pain and suffering following on the accident due to the severity of the injuries sustained and the resultant impairment that followed.

[74] The court in *RAF v Marunga* 2003 (5) SA 164 (SCA) introduced a modernised process of thought when determining general damages: It

introduced the updating of values found in general damages to contemporary times and present values.

[75] The Plaintiff relied on the unreported case of *Penane v Road Accident Fund* Case No. 06/7702. The court therein held that it is the *sequelae* of a brain injury rather than the classification of the injury which is of primary importance. The court further reiterated the principle that where injuries and the *sequelae* of such injuries can be viewed separately, the correct approach is to view them as separate injuries and awarded amounts in respect of the head injury and the orthopaedic injuries sustained by Penane as distinct figures. The court awarded R450 000,00 in respect of the brain injury.

[76] The Plaintiff herein relies on the above figure as the comparable quantum he needs for general damages. Adjusted to present day values, the above amount comes to R646 638,00.

[77] Plaintiff also relies on the arbitration matter of *Adlem v Road Accident Fund* 2003 5 C&B J2-41. In that matter the Plaintiff sustained a head injury with both focal and diffuse brain damage resulting in cognitive impairment, memory difficulties, lack of concentration and tension. An award of R400 000,00 was made in November 2003, which at present values amount to R600 000,00.

[78] In respect of the orthopaedic injuries sustained, the Plaintiff relies on the matter of *Malope v Road Accident Fund* 2009 5 QOD E4-7 (CA). In this case, an adult male sustained a midshaft fracture of the right tibia with effusion of the right knee joint, which fracture was managed surgically. An award of R90 000,00 was made in June 2009. It amounts to R140 000,00 on present values.

[79] In *De Wet v Road Accident Fund* 2003 5 QOD E4-13 (AF) the Plaintiff sustained fractures of the left tibia and fibula which were initially treated conservatively. In December 2003 an award of R95 000,00 was made. It amounts to R148 000,00 on present values.

[80] The Defendant has not made any submissions on general damages, both in its heads of argument and in argument in court save to ask that the Plaintiff's claim be dismissed for lack of compliance with the Act and Regulations. I should not comment on the wisdom of such a move because that is the course the Defendant chose for itself. Defendant placed all its eggs in one basket that was perched on a rickety and unstable structure. It placed its faith in the basket not tipping over or falling, thereby breaking the eggs. As seen above, the eggs fell and broke, if I continue with the same metaphor. It must live with the consequences.

[81] It is my considered view and finding that the Plaintiff herein has made out a case for the award of general damages based on 100% liability on the part of the Defendant.

[82] I will return to the quantum later.

LOSS OF EARNINGS

[83] The general approach of assessing damages for loss of earnings have been re-stated in the matters of *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) and *Southern Insurance Association v Bailie NO* 1984 (1) SA 98 (A) at 112E-114F.

[84] For the Plaintiff to succeed in a claim for loss of earnings, he is required to provide a factual basis that allows for an actuarial calculation. This is a process designed to assess actuarial/mathematical calculations on the basis of the evidence as well as over-all assumptions vesting or depending on such evidence. This approach is known as the actuarial approach.

[85] The actuarial approach seeks to determine the loss of earnings as realistically as possible to what may be the Plaintiff's actual losses. This approach comprises of (a) providing a factual basis upon which the loss of earnings is to be calculated and only then (b) by applying appropriate contingency deductions.

[86] The Defendant's contention hereon is that the Plaintiff did not suffer any loss of earnings because his earnings have been increasing since the accident. Counsel for the Defendant went as far as to state that –

"*… If he loses his job, he must face joblessness.*"

He further argued that the Plaintiff's actuarial calculations are based on wrong assumptions, more so that he can still be promoted to supervisory positions.

[87] Unfortunately again, no basis for these submissions or arguments were laid. They were bare, stand-alone submissions unsubstantiated by expert reports or compelling reasons.

[88] In the matter of *Southern Insurance Ass v Bailie* case (*supra*), the court held that where it has before it material on which an actuarial calculation can be made, the actuarial approach is preferable, because the actuarial approach has the advantage of an attempt to ascertain the value of a loss of earnings on a logical and informed basis as opposed to a robust approach or an educated guess.

[89] In the unreported case of *Mashaba v Road Accident Fund* (2006) JOL 16926 (T), Prinsloo J, referring to the *Bailie* case above held among others that where career and income details are available, the actuarial calculation approach is more appropriate and a court must primarily be guided by the actuarial approach, which deals with loss of income or earnings before applying the robust approach, which normally caters for loss of earning capacity. This, so said the learned judge, would help the court to ensure that the compensation assessed and awarded to the Plaintiff is as close as possible to the actual facts relied upon.

[90] The Plaintiff submitted that the court in this matter has sufficient evidence before it upon which an actuarial or mathematical determination of the Plaintiff's actual loss can be made without heaving to resort or defer to the robust, and unscientific or thumb-suck approach.

[91] As a rule of practice a plaintiff need not be burdened with an undue load of providing such a basis strictly. A plaintiff merely needs to demonstrate that his preferred and given scenario is more probable than another. A 50% + 1% likelihood constitute a probability.

[92] The Plaintiff's probable career progression "*but for*" the collision was charted by the medico-legal report of Du Doit, the industrial psychologist as remaining in his current position of warehouse clerk earning R5 475,00 per month for the next two to three years at which point he was likely to qualify for promotion to a supervisory position with an annual salary of about R120 000,00 – a B4-B5 basic salary – with gradual progression to the C2-C3 Paterson level of R170 000,00 per annum at age 42 years 6 months. Upon attaining his career ceiling, inflationary increases only are provided for until the retirement age of 65. This is supported by the medico-legal report compiled by Mr Mostert, the neuropsychologist, who indicated that pre-accident, the Plaintiff obtained a Grade 12 level of education and a diploma in tourism. No developmental or specific learning difficulties were identified. The Plaintiff's pre-morbid baseline IQ level was conservatively estimated to be in the average to high average range.

[93] No evidence was led disputing the fact that the Plaintiff was a healthy person prior to the accident and did not suffer from any pre-existing neurological, orthopaedic or psychological conditions or pathology which could or would hinder him in his climb up the corporate ladder.

[94] On the other hand, the Plaintiff's probable career progression "*having regard*" to the collision has been compromised, when regard is had to the expert reports filed and used by mutual consent and agreement.

[95] According to Dr Shevel, the psychiatrist –

> "*He will function in a structured empathetic environment where very little new learning or initiative is required. It is unlikely that Mr Mngomezulu will be able to complete any official tertiary education. There has been a loss of occupational potential. Mr Mngomezulu's overall level of occupational dysfunction is further aggravated by the orthopaedic injuries he sustained.*"

[96] According to the neuropsychologist, Mr Mostert –

> "*It is further likely that Mr Mngomezulu would have difficulty with his duties as an admin clerk when the job demanded higher function ability to execute tasks. Basic tasks such as planning, decision-making, working memory, etc, had been compromised. He is also much slower and results showed diminished information processing speed and reduced mental speed. This means that Mr Mngomezulu was much slower in the execution of tasks than his peers. He had more problem-solving difficulties as well as concentration difficulties. Furthermore, given his brain injury status, it is likely that Mr Mngomezulu's supervisory capacity has been compromised. He has become a vulnerable candidate on the open labour market.*"

[97] In her uncontested report Ms Stipinovich, the speech and hearing therapist, stated that –

> "*The current writer is of the opinion that the cognitive-communicative difficulties noted, although mild, are likely to impact negatively on Mr Mngomezulu's potential to study further. His difficulties with working memory, his inconsistent use of meta-cognitive strategies as well as his inconsistent self-monitoring abilities are likely to impact negatively on his ability to prioritise, study and recall large volumes of information. Furthermore, his apparent difficulties with auditory processing, auditory recall, executive and pragmatic functioning are likely to impact negatively on his ability to take on more work responsibilities, thereby affecting his promotional prospects.*"

[98] As per the joint minute of the two occupational therapists, Ms M Doran and Ms E Malan, the following came out –

> "*It is agreed that considering the extent of difficulties identified, it is accepted that he probably would function best in an environment that allows for structure and routine, where very little new learning or initiative is required, probably in a compassionate environment. The cognitive requirements of studying and working in the Human Resources environment would exceed this. Considering all, Mr Mngomezulu has to be regarded as vulnerable and compromised in his ability to cope with work tasks that require applying higher executing functioning.*"

[99] According to the uncontested medico-legal report of Du Toit, the industrial psychologist –

> "*Should the sequelae of the head injury become visible in the short term, Mr Mngomezulu's present salary will probably be his career ceiling.*"

[100] In the light of the above when one looks at the "*having regard to*" scenario, the Plaintiff is unlikely to realise his pre-morbid career and earning potential and is likely to factually lose or suffer loss of earnings over his entire career.

ACTUARIAL CALCULATION

[101] The actuarial calculation by Algorithm Consultants and Actuaries dated 19 July 2011 records the actuarial approach as follows:

- "*But for*" the collision the Plaintiff currently earns R5 475,00 per month. On 1 January 2014 he would have been promoted to a supervisor earning at the average basic salary of the Paterson B4/B5 level of R120 000,00 per annum, reaching his career ceiling at the Paterson C2/C3 level of R170 000,00 per annum. That will be at age 42 years 6 months. Upon attaining his career ceiling, his earnings would have increased in line with inflation only until his retirement age at 65. This translates to an income of R2 735 765,00 in future lost earnings, excluding any contingency deductions that may be applied.

- As regards the "*having regard*" to the collision scenario, the Plaintiff's earnings will increase in line with inflation only until his retirement age of 65. This translates to an income of R1 425

982,00 in respect of future loss, excluding contingency deductions.

CONTINGENCIES

[102] Contingency deductions allow for the possibility that the Plaintiff may have less than normal expectations of life and that he may experience periods of unemployment by reason of incapacity due to illness, accident or labour unrest or even general economic conditions.

Compare: *Van der Plaats v Southern African Mutual Fire & General Insurance Co* 1980 (3) SA 105 (A) at 114-115.

[103] The underlying rationale is that contingencies allow for general hazards of life such as periods of general unemployment, possible loss of earnings due to illness, savings in relation to travel to and from work now that the accident has somewhat incapacitated or impaired him as well as the risk of future retrenchment. The general vicissitudes of life are taken into consideration when contingencies are considered.

[104] Both favourable and adverse contingencies must be taken into account. Nicholas JA held among others in the *Bailie* case (*supra*) at 117C-D, that –

> "*The generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse and all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the buffets and ignore the rewards of fortune.*"

[105] The assessment of contingencies is largely arbitrary and will depend on the trial judge's impressions of the case.

[106] According to the well known and respected actuary, Dr Robert Koch, who the Plaintiff submitted is being widely or extensively used by the Defendant in calculations of this nature, a well accepted principle is that every year of a person's remaining working life should represent a 0,5% contingency deduction. When this principle is applied to the Plaintiff's circumstances, the following scenario unfolds:

- Since the Plaintiff would have continued working for another 37 years, i.e. from age 28 to age 65, the contingency applicable amounts to 18,5%.

[107] The Plaintiff submitted that on a conspectus of all the facts before this Court, an appropriate contingency deduction "*but for*" the accident should be set at 20%. In respect of the "*having regard*" to the collision scenario, the Plaintiff proposed or submitted a contingency deduction of 40%.

[108] The Defendant did not make any submissions on this aspect.

[109] In their joint minute, the occupational therapists, Mesdames Doran and Malan allude to this aspect as follows:

> "*It is agreed t hat should he lose his current employment, he will be regarded as a vulnerable and compromised individual, and he may find it difficult to secure and maintain alternate employment, especially in an environment that requires the learning of new skills or where initiative is required. This is especially considering that his current work format is routine and repetitive for which he is cognitively suited for. He therefore may be found to build a negative work record and may frequently find himself unemployed.*"

[110] The industrial psychologist, Du Toit, supported the above as follows:

> "*… an applicable post-accident contingency is recommended.*"

He based this recommendation on (a) the Plaintiff's tendency to fatigue, (b) his physical pain and discomfort, (c) the exclusion of more strenuous job demands, (d) permanent neuro-cognitive and neuropsychological deficits; and (e) the prospects that should the Plaintiff lose his present job, he will have increased difficulty securing work again.

[111] I have done some calculations around the various scenarios that are set out above. Applying a 40% contingency deduction on a "*but for*" the collision amount given of R2 735 765,00, the amount payable to the Plaintiff could amount to R1 641 459,00. Applying a 20% contingency deduction on a

"*having regard*" to the collision given amount of R1 425 982,00, the amount payable to the Plaintiff could come to R1 140 785,00.

[112] An average of the two scenario amounts is R1 391 122,30.

[113] The Plaintiff asked for an award of R1 333 023,00 as future loss of earnings.

[114] I have come to the conclusion that the appropriate amount to be awarded to the Plaintiff in respect of future loss of earnings should be the amount of R1 300 000,00.

[115] Past medical expenses of R400,00 and past loss of earnings of R15 774,00 have already been agreed upon between the parties. The parties have also agreed that the Plaintiff should be issued with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of future medical expenses.

COSTS

[116] Costs always follow a suit unless there are extraordinary circumstances that militate against such successful party being awarded the costs. Generally, the Plaintiff should be awarded the party and party costs of suit. The only problem remaining is the issue of costs associated with or related to the Defendant's special plea which the Plaintiff asked that they be punitive costs. The reason advanced was the Defendant's refusal or

ignorance of the Plaintiff's request or recommendation that it withdraw the special plea because it was based on spurious grounds. This was done in a series of correspondence, especially a lengthy letter from the Plaintiff's attorneys to the Defendant's attorneys dated 1 July 2011. It is common cause that the Defendant ignored the request and then contemptuously dismissed the contents of this correspondence after that.

[117] In this particular matter further, it is common cause that the attorneys and counsels for the Defendant had agreed with their adversaries on Monday 1 August 2011 that the special plea was being abandoned. The present counsel of the Defendant, Adv R Liphosa, stood up in court on the date this hearing began, i.e. on 2 August 2011 and announced that he had instructions from a claims handler at the offices of the Defendant had instructed him to renege from the previous agreement relating to the special plea and go hammer and tongs and oppose it. What makes the matter worse is that this about turn occurred after the matter had been before the court's allocations or roll call judge and was in the queue for allocation.

[118] I specifically enquired from Adv Liphosa why the Defendant was adopting this obstructive or unethical, if not dishonest course of action. The counsel responded by putting it on record that it was true that the issue of general damages (which concerned the special plea) were initially and indeed agreed upon but that the discussions leading to the agreement were made without prejudice. He confirmed that the Defendant was now springing "*bont*", i.e making an about turn.

[119] Such a situation as was precipitated by the Defendant's about turn is not only highly undesirable but also reprehensible. Victims of personal injury situations are constantly faced with ill-founded, spurious and brazen attempts to delay finality of matters or where trials are unnecessary prolonged in this Court. More often than not a so-called claims handler sitting in some cosy, glass- panelled and/or air-conditioned office, most probably swivelling in an executive chair with a cup of some nicety in hand while enjoying the view of the street below from the vantage point of his lofty window has the cheek and/ or audacity to bark out unreasonable or ill or uninformed instructions to the counsel doing the matter at court to do this or that. That, in spite the fact t hat he is not in court and as such cannot be involved in the practicalities that crop up as the case progresses. It has happened on several occasions that a claims handler would refuse to validate a recommendation of an attorney or counsel at court to settle the matter on one or other term(s) purely for reasons of refusing to so accede or validate, mostly causing a matter that should have been settled to go on a full blown trial.

[120] It is about time that such claim handlers should be hauled to court to explain their actions under oath. At the very least, courts must show their abhorrence of such conduct or attitude by awarding a punitive costs order.

[121] In this case, the Defendant had not procured expert reports to contradict the expert reports of the Plaintiff. Furthermore there are joint minutes by experts from both sides which agree on the severity of the Plaintiff's injuries.

[122] It is my considered view and finding that the primary motivation for the Department of Transport and the Government to amend the Road Accident Fund Act, especially through the Amendment Act 19 of 2005, was rather to shorten the time for settlement or finalisation of claims rather than to further delay them. The latter could never have been the intention of the Legislature.

[123] It is therefore my considered view and finding that the Defendant's special plea should be dismissed with costs on a scale as between attorney and client.

ORDER

[124] In the light of what has been set out hereinbefore, including the agreed upon aspects between the litigating parties herein, the following is the order of this Court:

124.1 The Defendant is held liable for 100% of the damages suffered by the Plaintiff as a consequence of the motor vehicle collision that occurred between him and an unidentified insured vehicle that hit him from behind as he walked on a pavement along a

pavement in Katlehong Township, Germiston, on 8 August 2009;

124.2 The Defendant shall pay the Plaintiff the sum of R600 000,00 (six hundred thousand rand) as general damages for pain and suffering as well as for general loss of amenities of life;

124.3 The Defendant shall pay the Plaintiff the sum of R1 300 000,00 (one million and three hundred thousand rand) in respect of the Plaintiff's future loss of earnings;

124.4 The Defendant shall pay the Plaintiff the sum of R400,00 (four hundred rand) in respect of the latter's past medical expenses;

124.5 The Defendant shall pay the Plaintiff the sum of R15 774,00 (fifteen thousand seven hundred and seventy four rand) in respect of the latter's past loss of earnings;

124.6 The Defendant is ordered to furnish the Plaintiff with an undertaking as contemplated by section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of future accommodation of the Plaintiff in a hospital or nursing home or for the treatment of or the rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the

motor vehicle collision of 8 August 2009, after such costs have been incurred and upon proof thereof;

124.7 The Defendant's special plea is dismissed with costs on a scale as between attorney and client;

124.8 In respect of merits trial the Defendant is ordered to pay the agreed or taxed party and party High Court costs of the action up to and including 3 August 2011, which costs shall include –

124.8.1 the costs attendant upon the obtaining of payment of the capital amount;

124.8.2 the preparation expenses of the Plaintiff's experts, namely, Dr M Scher, Dr J Mostert, Dr M Shapiro, Dr S Braun, Dr S Hurwitz, Dr D A Shevel, Dr J Scheltema, Ms A Stipinovich, M Doran, C du Toit and Mr Whittaker, if any and as agreed or allowed by the Taxing Master; and

124.8.3 the costs in respect of the drafting of written heads of argument by counsel for purposes of closing argument as same were useful, reasonable and necessary.

124.9 The total amount payable to the Plaintiff by the Defendant is R1916174-00 of (one million nine hundred and sixteen thousand one hundred and seventy four rand) to the Plaintiff in full and final settlement of the Plaintiff's claim. Payment shall be made into the trust account of the plaintiff's attorneys, details whereof are as follows:

Raphael Kurganoff Trust Account

First National Bank, Rose Bank Branch

Account Number: 50650111260

Branch Code: 253305

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE PLAINTIFF	ADV FERREIRA/ADV DU LESSIS
INSTRUCTED BY	RAPHAEL KURGANOFF INC PARKWOOD, JOHANNESBURG TEL NO: 011 447 8160
FOR THE DEFENDANT	ADV R LIPHOSA/ADV ENGELBRECHT
INSTRUCTED BY	KEKANA HLATSHWAYO RADEBE INC PARKTOWN, JOHANNESBURG TEL NO: 011 484 4114
DATE OF ARGUMENT	3 AUGUST 2011
DATE OF JUDGMENT	8 SEPTEMBER 2011