REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

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

19 November 2013 .....

Date Signature

CASE NO: 21866/2012

In the matter between:

NGOZO: SEBUSISO PATRICK Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

WEINER J:

INTRODUCTION

[1] This matter arises out of a motor vehicle accident which occurred on 16 December 2009 at approximately 23h30 in Moabi Street, Evaton North. It resulted in injuries to Mr

Ngozo, the plaintiff in the action ("Ngozo'), who was 20 years old at the time.

[2] Ngozo instituted a claim against the defendant, ("the RAF") in the sum of R 5 500 000.00. The RAF denied liability and defended the action. I intend to briefly set out the common cause facts and circumstances of the day leading up to the accident.

COMMON CAUSE FACTS AND CIRCUMSTANCES

[3] On 16 December 2009, a public holiday, Ngozo and an unknown number of his friends and acquaintances secured the services of a minibus taxi to convey them to a music festival in Abrahamsrust and then to return them to Evaton that evening. The minibus taxi in question is believed to be a newer model, namely, a Toyota Mini Quantum ("the taxi"). No evidence, in terms of the exact model or specifications was put before this court.

[4] The taxi was driven by a Mr MJ Mokoena ("the insured driver") at the time of the accident. The insured driver was also the owner of the vehicle.

[5] At the hearing, a seating plan for the taxi was put to various witnesses and placed before the court ("the seating plan"). In the front, there were two seats next to the driver ("the driver's row"). Immediately behind the driver, there were three seats and an empty space next to the door ("the 2nd row"), presumably to allow space for passengers to embark and alight from the vehicle. Directly behind the 2nd row is another row of seats ("the 3rd

row"). The configuration in the 3rd row is two seats behind the 2nd row of seats. The two seats are to the right of the taxi. There is then a space between the two seats and the single seat (on the left hand side), to allow space for passengers to get the back row of the taxi ("the back row"). Ngozo was seated in the single seat in the 3rd row on the left hand side behind and adjacent to the taxi door.

[6] Ngozo sustained injuries when he fell from the moving taxi driven by the insured driver.

[7] Ngozo was taken first to Kopanong Hospital and was discharged four days' later. He was then admitted to Sebokeng Hospital after the wound to his calf became septic.

[8] The liability in this matter relates to the circumstances which caused Ngozo to fall out of the taxi. The second issue to be determined by this court is the quantum of Ngozo's damages as a result of his injuries sustained. On 6 June 2013, this court ordered that the parties should first present evidence with respect to merits/liability and that the quantum evidence will follow thereafter.

EVIDENCE LED BY THE PLAINTIFF

NGOZO'S TESTIMONY

[9] Ngozo's evidence, is that he was seated in the single seat in the 3rd row. This seat is

immediately next to, but slightly back from the taxi's sliding door. The insured driver was driving his taxi at high speed, down the residential Moabie Street, Evaton, where he hit a hump in the road. This caused the door of the taxi to open and Ngozo fell out of the taxi.

[10] Ngozo testified that he lived in Moabi street, roughly three minutes from the accident scene. He did not consume alcohol and did not smoke. On the day in question, he had been to Abrahamsrust and was conveyed by taxi. Ngozo and his friends had packed a cooler box with some meat for a braai and some cold drinks. They spent the day at the festival and then left around 22:30. His friend, Jabulani Mashinini ("Mashinini") and a few others were in the taxi. He knew some of them.

[11] The taxi arrived in Evaton and was dropping off some of the occupants at certain locations in and around Evaton and Evaton North. The streets were quiet and he didn't hear any music when they arrived in Evaton. They then proceeded to drop off, one Ntswaki, in Evaton. Ngozo testified that he did not close the door when Ntswaki alighted but that she did.

[12] The taxi arrived at Evaton North and was, at this time, speeding. The taxi went over a hump in the road which caused the door to open.

[13] Under cross-examination, it was put to Ngozo that he had told certain experts who had assessed his injuries, that he was an occasional drinker at family functions. He conceded

that he sometimes has a *Red Square* (an alcoholic drink). He said his mother does not know that he drinks and neither does his friend Mashinini. Ngozo denied drinking that day and testified that no one in his group was drinking alcohol. He testified that alcohol was allowed at the festival and that he saw people drinking, however, his group was only drinking *Coca-Cola*.

[14] It was put to Ngozo that the insured driver will testify that Ngozo and his group appeared drunk, that they demanded the music to be played loud and that they were *"jiving"* in their seats. Ngozo disputes this.

[15] Ngozo denied that when they dropped Ntswaki off, he told the driver to proceed onward with the door still open which the driver refused to do.

[16] It was put to Ngozo that the insured driver was told by one of his passengers that someone had fallen from the taxi before the speed hump and that the driver was only told to stop after a while down the road. This, too, was denied by Ngozo.

[17] Ngozo further rejected the contention that the insured driver was driving at 40Km/h and said they had been moving at a speed in excess of 40Km/h.

[18] It was also put to Ngozo that a passenger in the front seat, Ms Kedibone Eva Diale ("Diale") would testify that he, Ngozo, opened the door in Moabi Street whilst the taxi was

moving. Ngozo denied this.

[19] According to Ngozo, the door handle was at the front of the door and he would have to have to had to stand up from his seat and either take a step forward to reach the handle or stretch forward in a lunging position to reach the door handle. He did neither.

[20] It was put to Ngozo that the insured driver would testify that his vehicle was the newer model *Mini-Quantum* and that they are equipped with seat belts. Ngozo testified that whilst this model of taxi usually has seatbelts, he didn't see any seatbelts in this particular vehicle.

MASHININI'S TESTIMONY

[21] Mashinini testified that he had known Ngozo since standard 6. They were first classmates and then they became friends.

[22] Upon arrival at the music festival, there were informed that there was no alcohol allowed into the confines of the music festival. He and Ngozo did not drink alcohol.

[23] Mashinini stated that he had been with Ngozo all day and was in the taxi when the accident happened. He was seated in the back row.

[24] Mashinini testified that the driver did not know where everyone lived and to facilitate him being given directions, the music was switched off. The taxi dropped at least one passenger off in Evaton proper. This was the person referred to earlier as Ntswaki. Ngozo was seated next to the door. Mashinini testified that he could not see who had opened and closed the door as the taxi was fitted with the high seats which obstructed his view. After dropping off Ntswaki, Mashinini testified that they then proceeded to Evaton North.

[25] When they arrived in Evaton North, Mashinini stated that the street upon which they were travelling was not a tar road but rather was surfaced with paving bricks. This resulted in the road being bumpier than the average road. The street also had speed humps which Mashinini said perhaps the insured driver did not see. The insured driver went over one of these speed humps and a few moments thereafter, Mashinini saw the door was open and someone had fallen out.

[26] Mashinini, under cross-examination, stated that he did not see the speed hump but he felt it as the driver went over it. When the taxi hit the bump, the door opened. He couldn't give the court an estimate of the speed. Mashinini stated that the door was not open prior to this.

[27] The taxi then stopped and the occupants alighted from the vehicle. The occupants and the insured driver went to Ngozo, to ascertain what injuries he had sustained.

[28] A few minutes later, the insured driver and some of the passengers returned to the vehicle and departed from the scene. It was put to Mashinini that the driver and the occupants left because they felt that Ngozo was the master of his own misfortune. Mashinini said this was not the case.

[29] Mashinini reiterated that the door opened when the vehicle hit the hump. He, however, could not say whether the door opened on its own, when the vehicle went over the the hump, or whether Ngozo had opened it.

[30] Mashinini denied that they drank alcohol that day. He testified that he didn't drink until he was 21. He stated that he did not know if Ngozo drank alcohol but he could say that he had never seen him drink.

[31] Mashinini was asked whether Ngozo had wanted the door to remain open after the insured driver had dropped off Ntswaki. He did not hear Ngozo make this request but he was not with him, he was seated at the back talking to other people.

[32] The cross-examination then turned to the taxi itself. Mashinini was told that it was a modern taxi and it was equipped with seatbelts. Mashinini stated that he did not see any seat belts.

[33] It was put to Mashinini that Diale would testify that she saw Ngozo opening the door

whilst the vehicle was in motion. Mashinini's answer was that he cannot dispute this. Counsel put to him again that Ngozo fell out before the speed hump. Mashinini disputed this and said that the taxi hit the hump and the door then opened and Ngozo fell out.

TESTIMONY OF MOKOENA

[34] Mrs Mokoena is Ngozo's mother. She testified that Ngozo was residing with her at the time of the incident. She confirmed that he is still residing with her in Evaton North. She was telephoned when the accident occurred and went to the scene.

[35] Mokoena testified that she reported the accident to the police approximately a week after the incident. She explained the main concern was that the driver of the taxi had disappeared and they had no knowledge of his whereabouts nor his particulars. They later managed to trace and identify him.

[36] Mokoena stated that she took this information to the police station which resulted in the insured driver being asked to come to the police station the next day. The insured driver attended at the police station the next day and had a conversation with Mokoena. Mokoena asked the insured driver why he did not aid Ngozo in attaining medical assistance. Mokoena then testified that the insured driver's response was that he was sorry.

[37] She stated that her son did not drink alcohol and that he spends most of his time

studying and on Saturdays he would attend church.

[38] She testified that her son had told her that the insured driver was on the way back to Evaton North and was in hurry. Mokoena said her son also said that the insured driver did not see the speed hump and that it was this that caused the door to open and for him to fall out. She stated that this was what her son had told her when he was in the Kopanong hospital in the early hours of 17 December 2009.

[39] That concluded the plaintiff's case on the merits.

EVIDENCE LED BY THE DEFENDANT

INSURED DRIVER'S TESTIMONY

[40] The insured driver was both the owner and driver of the taxi in question. He had two taxis, both "*Mini-Quantums*" which had seats in the configuration as set out above.

[41] The insured driver testified that the taxi was booked from Evaton to Abrahamsrust and then a return journey to Evaton North, via Evaton. It turned out that there was one passenger who needed to be dropped off in Evaton. It was at the this drop-off point where the person seated on the left hand side in the third row, Ngozo, asked for the taxi to proceed with the door open. The insured driver testified that he refused to depart until the door had

been closed. The person then closed the door and the taxi continued on its way.

[42] The insured driver was under the impression that he was taking them to a person's home for a house party. He was receiving directions from one of the passengers to an address in Evaton North. The music in the taxi was loud and the occupants of the taxi were *"jiving"* (described as dancing and moving to the rhythm of music whilst being seated). He confirmed that no one got out of their seats to dance.

[43] The insured driver stated that he did not see Ngozo open the door and added that Ngozo would have had to have stood up to reach the handle to open the door and he did not see him do this.

[44] He remembers seeing two unknown men walking in the street on the opposite side of the road but before the speed hump. The presence of these men, at such a late hour made him nervous and he focussed his attention on them.

[45] He testified that there were 14 occupants with the person giving him directions in the front seat wearing an orange shirt and drinking *"Hunters Gold"*. He further testified that the person sitting nearest to the door in the single seat, Ngozo was wearing a white shirt and was carrying a *"Red Square"* beverage bottle. The insured driver was sure about this as he remembered Ngozo getting in with a bottle that was blue in colour. He could not remember who was carrying the cooler bag but stated that all the occupants were drinking inside the

vehicle.

[46] The insured driver denied that he was hurrying that night. He denied that he still had two more trips to make. He said that he was in no hurry as he was going home after dropping off his passengers. He denied that he drove over the speed hump with such speed that it caused the vehicle to *"jolt"*. He stated that he had seen the hump and had slowed down before he went over it. It was after going over the hump that he had heard that someone had fallen from the vehicle.

[47] It was put to the driver that he did not ensure that the sliding door of the taxi was properly latched or closed after the passenger had been dropped off in Evaton. The insured driver responded that his vehicle was equipped with a modern instrument display and that the open door warning light would illuminate should a door not be properly closed. The light did not come on after the door was closed. He also confirmed that he saw Ngozo close the door and could hear that it was properly closed. The insured driver testified that the door was definitely closed after Ntswaki alighted as it would have opened on the other humps that they had gone over that night. He testified that he would have stopped immediately if the light had been illuminated as he would have seen it. When asked whether he saw such a light and stopped the taxi immediately when Ngozo fell out, the insured driver responded that he did not see the light and stopped the vehicle because his passengers had told him to stop. He testified that he did not see the light as he was focussing on the road. He also stated that he did not hear the door opening as the radio was loud.

[48] The insured driver denied that he was obliged to tell Ngozo to move from the seat in the third row or to put on his seat belt. He testified that the doors could be locked with a central locking button. He did not activate the central locking to ensure that Ngozo did not attempt to open the sliding door as he had requested. The insured driver stated that his vehicle was equipped with seat belts. He also stated that he did not think that he had to tell the passengers to wear their seatbelts.

[49] The insured driver estimated that he was travelling below 40Km/h as he was approaching the hump, as he had checked his speedometer. He checked the speedometer at the moment of the hump but did not notice whether the light was on.

[50] The insured driver stated that when the passengers told him to stop, he looked back and saw the door was open and immediately stopped the vehicle. He testified that Ngozo was "*in front of the hump*".

[51] He thought Ngozo's injuries were serious. He, however, left the scene without leaving a note nor contacting the paramedics. He confirmed that he did not report the accident to the South African Police Services.

DIALE'S TESTIMONY

[52] Diale testified that she was in Grade 11 at the time of the accident. She confirmed that she was with the party that had hired out the taxi to take them to and from Abrahamsrust. She was not familiar with Ngozo or Mashinini before the day of the accident.

[53] She had brought a bag and some *Hunters Gold* in a cooler box. The passengers were conveyed to the Vaal Mall to buy some food and some alcoholic drinks.

[54] They arrived at Abrahamsrust sometime around noon. There was an entrance fee to be admitted into the grounds of the festival and as they did not have money, they remained outside. She and her friends had put money in together to buy the *Hunters Gold* and, to avoid splitting up her party, they remained outside. She confirmed that the Plaintiff and Mashinini went into the festival grounds.

[55] At the end of the day, they gathered all outside the grounds of the music festival and phoned the driver to pick them up. She was seated in the driver's row for the return trip to Evaton. She was seated in the middle seat, between the insured driver and another passenger, whom she could not recall. In the second row, behind the driver, there were two seats with people behind her, with whom she was conversing.

[56] The music was on loud. There were seatbelts in her row. The seat she was sitting on

was broken as it did not have a backrest. She confirmed that they were planning on going to an after party but said these plans failed to materialise as a result of the accident.

[57] They had dropped a female passenger off in Evaton. Ngozo wanted to leave the door open after the female passenger had alighted. Ngozo was reprimanded by the insured driver as well as the other passengers. Ngozo then closed the door.

[58] Diale could not recall if the passenger next to her was dropped off. She moved off the broken seat and moved into the seat on the left hand side. She then retracted this and said she did not move into the seat on the left hand side.

[59] She remained in the middle seat and was looking backwards and was talking to the occupants in the second row. She would have been facing forward when she was giving instructions to the driver.

[60] She had consumed 7 *Hunters Gold* throughout the day and was "*tipsy*". She could not remember who else was drinking in the taxi as the only people she could see from her seat were the two passengers in the second row and Ngozo in the single seat in the third row. She testified that Ngozo had a beer bottle in his hand and appeared drunk.

[61] Upon entering Evaton North and whilst the taxi was in the vicinity of Moabi Street, Diale testified that Ngozo said something to the effect that he was now in his township and

he opened the door. Ngozo had a bottle of beer in one hand and used the other hand to open the door. He was seated and moved one foot and his body forward and stretched forward with his left hand. She did not warn the insured driver that Ngozo was attempting to open the door. She said that Ngozo then fell out of the taxi. She and the others screamed. The insured driver turned down the music and stopped the vehicle and the occupants then alighted.

[62] It was put to Diale that the vehicle went over a hump and that caused the door to open and Ngozo to fall out. She replied by stating that she did not see him fall out. She confirmed that she saw the door open and that she continued to converse with the two people seated behind the driver looking over her right shoulder. She was asked to provide the court with the names of the people with whom she was conversing. Her response was that she does not remember them. She was asked whether or not she was concerned that the door was open to which she testified that she was *tipsy*. She stated that she was also *jiving* and shouting in the taxi.

[63] She reiterated that she saw Ngozo open the door but she then looked away to continue her conversation. She then testified that she saw Ngozo in the street when she looked out of the passenger window in the front row and saw Ngozo in the side view mirror. She then screamed and the taxi came to a halt. She confirmed that the taxi was driving at a normal speed.

[64] They all alighted from the vehicle and went to check on Ngozo. He was calling out for someone to call his mother and he was bleeding. The driver then left but she could not recall whether he left with passengers or not. They told the driver to go.

ANALYSIS OF THE EVIDENCE

[65] There is a common thread of undisputed facts in the evidence of Ngozo, Mashinini, Diale and the insured driver. They all concur that the taxi left Abrahamsrust at around 22:30 and first dropped off Ntswaki in Evaton before heading to Evaton North. All four witnesses place Ngozo in the single seat in the third row. They agree that Ngozo fell from the taxi and was injured.

[66] The evidence of Diale and the insured driver was that after dropping off Ntswaki in Evaton, Ngozo had wanted the door to remain open. Both, however, stated that after being reprimanded to close the door, Ngozo did indeed close the door.

[67] Diale was the only person who testified that she saw Ngozo open the door whilst the taxi was in motion in Moabi Street. Her evidence, in this regard, must be treated as evidence of a single witness. In this regard, the case of *Daniels v General Accident Ins Co Ltd* [1] is of relevance. In that case King J held at 759I-760B the following:-

[1] 1992 (1) SA 757 (C)

It is of course competent for a court to find in favour of a party on the strength of the evidence of a single witness - s 16 of the Civil Proceedings Evidence Act 25 of 1965, which provides that judgment may be given in any civil proceedings on the evidence of any single competent and credible witness...
...although there is apparently no 'cautionary rule' in civil cases as in criminal matters where proof beyond reasonable doubt is required, the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the Court that on the probabilities it is the truth".

[68] The court needs to be satisfied that the evidence of Diale is reliable and trustworthy. Her evidence was that she had consumed 7 *Hunters Gold* during the day and was "*tipsy*". Her testimony was also that she was sitting in the middle seat, next to the driver in the front row, then she moved to the left hand side seat in the front row. She then retracted this. She stated that she was talking to people in the first row behind the driver over her right shoulder. It seems likely that if she had moved seats, as she had originally testified, from the broken seat to the seat on the left hand side of the vehicle she would not have been able to see what Ngozo was doing. It is also likely that she would have moved seats when the other person got out, as the seat she was sitting on was broken.

[69] Although an independent witness, Diale's evidence is unsatisfactory and contradictory. As her testimony is the only evidence that Ngozo in fact opened the door, the court cannot accept such a version and disregard the evidence of Ngozo that he did not. In addition, the version of the plaintiff and Mashinini that the door opened when the taxi hit the hump appears more probable.

[70] The insured driver testified that his taxi was equipped with seatbelts. He further testified that upon arriving at Abraamsrust, Ngozo and the other occupants appeared drunk. They also got into the taxi, continued to drink, wante the music loud and were *jiving* in their seats. It must then be asked what is required of an operator of public transport in these circumstances. In *Kruger v Coetzee*[2] it was held:-

"*Once it is established that a reasonable man would have foreseen a possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of a reasonable man in a situation posing a foreseeable risk of harm to others:*

(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences if the risk of harm materialises;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm."[3]

[71] Counsel for Ngozo, referred to *Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others*[4]("Rail Commuters"). It was submitted that the duty to ensure the safety of passengers being conveyed by taxi should be seen as similar to the duty to ensure the safety of commuters on trains as was the case in *Rail Commuters*.

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[2] 1996 (2) SA 428 (A) at 430E-G.
[3] *Ibid.*
[4] 2005 (2) SA 359 CC

[72] A taxi driver, such as the insured driver, is indeed performing a public function- that being public transportation. O'Regan J in the *Rail Commuters* case held that those that perform such a public function should be held accountable. Placing this upon the shoulders of the taxi driver would not "*impose undue burdens on them that would impair their ability to provide the service effectively or efficiently*"[5]

[73] In *Tungata v The Road Accident Fund*[6], the plaintiff was thrown from a taxi that was travelling with its sliding door open. The driver of that taxi failed to take into account the state of intoxication of the plaintiff and failed to ensure that the door was closed and/or that the plaintiff was wearing a seatbelt.[7] The sliding door of the taxi had to remain open as it was jammed stuck in that position. The plaintiff was fully aware of both these facts. Bozalek J held that an insured driver should foresee "*that intoxicated passengers in their condition might well behave in a foolhardy manner in an existing dangerous situation*"[8]

[74] In *Fredericks v Shield Insurance Company Ltd*[9] it was held by Rabie AJ that a bus driver is under a duty to close the door before the bus moves off. However, if the passenger is under the influence of alcohol, the bus driver should show even more attention to having the door closed before the bus continues on its way.[10]

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[5] *Ibid* at 83.
[6] Unreported (Case Number 16718/2006) Date of Judgment 8 March 2006 in the Western Cape High Court.
[7] Ibid at [2].
[8] Ibid at [23].
[9] 1982 (2) SA 423 (AD).
[10] *Ibid* at 423.

[75] I see no reason why this cannot be applied to a taxi save for the fact that the driver is usually unable to close the door himself and relies on the passengers to do so. This may result in the door not being properly closed, especially if the person closing the door is drunk. According to the insured driver testified, his vehicle was equipped with the "open door indicator light" and this would illuminate if the door was not closed. The driver can accordingly be fully aware amd in complete control of the door and whether it is closed or not.

[76] In *Ndhlovu and Others v Durban City Council*[11], Fannin J summarised the responsibility that is placed on bus driver as follows:-

(i) *a bus driver (as indeed every driver of a vehicle) must take all reasonable precautions against dangers to his passengers known or reasonably to be apprehended;*

(ii) *a bus driver is entitled to regulate the manner in which he drives his bus upon the assumption that his passengers will take such steps to protect themselves against the ordinary risks and difficulties attendant upon travelling in a bus as may reasonably be expected of such passengers; and*

(iii) *what may reasonably be expected of a passenger of a bus will depend upon a number of circumstances, including the age, physical condition and the apparent ability of the passenger to cope with such ordinary risks and difficulties."*

[77] It is clear that the authorities place a duty on both the driver of the public vehicle and the passenger to take steps to protect themselves from suffering harm. In this regard, the

[11] 1970 (1) SA 39 (D).

insured driver, on his version, testified that passengers appeared drunk. Ngozo, in a foolhardy manner, also requested that the taxi drive with the door open. In that situation, the insured driver should have told Ngozo to wear a seatbelt. And should have insisted that Ngozo sit in a seat away from the door. He should, also have centrally locked all doors as he was able to do.

[78] In the circumstances, I find that on his own version, the insured driver should have taken more steps to ensure the safety of his passengers.

[79] The plaintiff, who was a major at the time, should also be held responsible for ensuring his own safety. He should have worn a seat belt. The evidence from the insured driver was that his taxi was equipped with seatbelts. Ngozo testified that he did not see any seatbelts. The insured driver testified that this is a newer model Quantum and that the vehicle was fitted with seatbelts. Ngozo did not look for a seatbelt. If he genuinely did not see a seat belt after looking, he should have moved seats to one that was not in the unfortunate position of being next to the door. In *Vorster and Another v AA Mutual Insurance Association Ltd*[12], Goldstone J held that "*in determining whether conduct of a plaintiff constitutes a negligent act or omission the enquiry is directed to the question as to whether such act or omission deviated from the norm of the bonus paterfamilias*"[13] . It would be expected for the plaintiff to be more cautious and to look for the seatbelt and then put it on. Had he worn the seatbelt he would not have fallen out of the taxi when the door

[12] 1982 (1) SA 145 (T).
[13] *Ibid* at 151H.

opened.

[80] In the circumstances, The Road accident fund should be liable for the Plaintiff's proven damages but liability is limited to 80% after taking into account the plaintiff's contributory negligence (20%) in failing to wear a seatbelt (see *Vorster supra).*

QUANTIFICATION OF PLAINTIFF'S CLAIM

[81] The plaintiff alleges that he has suffered certain brain and orthopaedic injuries as a result of the accident. The plaintiff claims R5 500 000 which is broken down as follows:-

81.1. estimated future medical and hospital expenses in the sum of R200 000;

81.2. estimated past loss of earnings in the sum of R300 000;

81.3. estimated future loss of earnings/earnings potential in the sum of R4 000 000;

81.4. general damages in the sum of R1 000 000.

[82] The defendant was invited to admit to certain agreements concluded in the joint expert minutes by the clinical and neuropsychologists (Dr C Angus and Dr P Dlukulu), the

occupational therapists (Ms J van der Berg and Mr D Brummer), the industrial psychologists (Mr L Linde and Dr W Pretorius) and the uncontested report of Ms A Mattheus, the educational psychologist for the plaintiff. This invitation was turned down.

[83] The parties, however, did agree that in the event that the RAF is found liable for the injuries sustained by Ngozo, which I have indeed found, then the RAF will furnish the plaintiff with an undertaking as envisaged in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1995 ("the Act") in respect of the costs of future medical expenses.

[84] The defendant has objected to the RAF4 form and has indicated that it wishes for the matter of determining the seriousness of Ngozo's injuries to be reffered to the tribunal, as envisaged in Section 17(1), read with Regulations 3(1), of the Act ("the tribunal"). Plaintiff's counsel has argued that this will only result in undue delay to the finalisation of this matter in light of medico-legal reports and joint minutes of the experts filed in this matter. Counsel for the defendant responded by referring the court to the Matter of *The Road Accident Fund v Duma and Three Related Cases*[14]("*Duma*"). In *Duma*, Brand JA at [19] held as follows:-

"the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has correctly been assessed

[14] Road Accident Fund v Duma and Three Related Cases 2012 JDR 2249 SCA (Case Numbers:202/2012, 64/2012, 164/2012, 131/2012).

in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages."

[85] Plaintiff's counsel referred to *Faria v The Road Accident Fund* [15] ("*Faria*"). In that case, the Fund had accepted the joint minutes of the experts that stated that the injuries were indeed serious but then objected, on the day of trial, to the RAF4 forms. I ruled that it "*it would be artificial to hold that simply because the defendant has objected to the RAF 4 assessment, that, irrespective of the basis therefore, the plaintiff must follow the procedure set out in Regulation 3.*"[16] It must be noted that in the *Faria* case the Fund's expert, in terms of the narrative test, had found the injury to be a serious long term impairment. It must also be noted that the judgment in *Faria* has been appealed against and is presently pending before the Supreme Court of Appeal.

[86] In the present matter, the joint minute of Drs Earle and Lewer-Allen, the neurosurgeons, stated the following:-

"*We therefore consider that he sustained a mild head injury and that there are no neurological sequelae pertaining to his brain functioning*".

[87] Drs Van Niekerk and Swartz are the orthopaedic surgeons of the plaintiff and defendant. They jointly prepared a minute in which it is stated that they disagree as to the whole person impairment ("WPI") in terms of the American Medical Association's

[15] Faria v Road Accident Fund (2210/2012) [2013] ZAGPJHC 63 (12 March 2013).
[16] *Ibid* at 51.

("AMA") guidelines. Doctor Swartz calculated a 5% WPI and Doctor Van Niekerk a 10% WPI. Doctor Swartz found that Ngozo does not qualify to be assessed in terms of the narrative test whereas Doctor Van Niekerk believes that he does. It is, therefore, clear that the Doctors are not in agreement as to the seriousness of Ngozo's injuries.

[88] Section 17(1)A of the Act provides that only a medical practitioner registered in terms of the Health Professions Act, 56 of 1974 can conduct the assessment to determine whether or not a particular injury meets the threshold requirements. Ngozo was assessed by numerous experts in regard to this matter. However, only the neurosurgeons and the orthopaedic surgeons are considered medical practitioners in terms of section 17(1)A of the Act. In the circumstances, the neurosurgeons have found there to be no neurological sequelae and the orthopaedic surgeons are in disagreement as to whether the narrative test is applicable. Both orthopaedic surgeons agree that Ngozo does not satisfy the threshold in terms of the WPI.

[89] It would then be quite acceptable, in light of *Duma,* for the RAF to object to the assessment of Ngozo's injuries as serious and for the matter of general damages to be referred to the appeal tribunal appointed by the Registrar for the Health Professions Council in terms of Regulations 3(4) through 3(13) of the Act.

[90] Plaintiff's Counsel has sought an order that should the Court determine that the matter of general damages be referred to the appeal tribunal, as is indeed the case, then an

order should be made that payment of an amount awarded to the plaintiff in respect of his claim for general damages would be subject to the determination of whether the plaintiff's injuries are serious injuries as contemplated by Section 17(1) of the Act. This court, at this stage and as mentioned in *Duma*[17] and in regulations 3(3) of the Act, is not competent to decide the seriousness of the injuries. It is difficult then to decide what the sum of damages should be when I cannot decide the seriousness of the injuries. Seriousness is not a question that is simply answered in affirmation but has a degree of severity attached which would impact on the amount of general damages that should be awarded. This matter, as a result, must be referred to the tribunal as to the seriousness of Ngozo's injuries and only then can the amount of general damages that the plaintiff has sustained as a result of the accident be determined.

[91] The final issue for determination is that of past and future loss of earnings. Plaintiff's counsel submits that joint minutes concluded between the neuropsychologists, the occupational therapists and the industrial psychologists rendered this part of the damages not contentious save for the appropriate contingencies that should be applied. The Fund was afforded numerous opportunities to admit these reports but ultimately decided to contest them at the hearing. Counsel for the Fund argued that the future loss of earnings is bound to the decision of the tribunal regarding general damages and that a decision with regard to the quantum could only be decided after the tribunal has decided on the seriousness of Ngozo's injuries. This is because the ruling will deal with the physical impairment of Ngozo's right

[17] Duma *supra* at [19].

calf, left shoulder and head injury. This approach though, does not take into account that whilst the tribunal may be considering the seriousness of the injuries, Ngozo has been examined by numerous specialists and experts and that those experts have agreed that his ability to earn in the past and the future has been diminished. There would be no reason to wait for the Tribunal to determine the seriousness of the injury when the relevant experts have already said to what extent his earnings potential has been affected by the accident. In the circumstances, I intend to deal with the damages sustained by the plaintiff through his diminished ability post the accident. The other experts (save for the neurosurgeons and orthopaedic surgeons) are *ad idem* that his working ability has been diminished.

[92] Ngozo suffered a head injury, a brachial plexus injury of his left upper limb and a degloving injury of his right calf. As a result, Ngozo has reduced tolerances due to his orthopaedic injuries that he sustained in the accident. Ngozo is presently studying towards a 3 year certificate course in boilermaking. The Joint reports of the occupational therapists, Ms Van der berg and Mr Brummer, have agreed that this occupation falls within the heavy work category, a category for which Ngozo's injuries make him unsuitable as he has decreased lifting abilities. They agree that he does not meet all the physical demands that may be placed upon Ngozo as a boilermaker. Ngozo could do some work of lower range medium physical work but that he would require frequent breaks. As a consequence of these physical disabilities, the plaintiff will not be able to work as a boilermaker irrespective of him completing medical and therapeutic intervention.

[93] It is also important to note that these physical impediments are significant in that the plaintiff is not training to work in a semi sendentary occupation. He is rather training to be in an occupation where heavy manual labour is an integral part of his day-to-day activities.

[94] The neuropsychologists, Dr Angus and Dr Dlukulu, both found residual cognitive deficits as a result of the accident. They both suggest that Ngozo is vulnerable to mood and anxiety problems as a result of him not feeling as if he is performing as well in relation to the effort he puts into tasks. They recommend that he should be afforded 10 sessions of counseling in the future if and when the need should arise. They both agree that this will not have a curative effect as Ngozo will always have neurostigmata. Dr Angus noted the finding of Dr Dlukulu where she found that Ngozo had difficulties with perceptual, visual discrimination and closure difficulties. Dr Dlukulu submits that this would suggest that the plaintiff would not be suitable for retraining as a draughtsman who would be designing and drawing steel plates.

PAST LOSS OF EARNINGS

[95] Mr Linde and Dr Pretorius, the Industrial Psychologists, agree that Ngozo would have probably become a boilermaker but for the accident and earned, according to Mr Linde, B1 Level for two to three years and, according to Dr Pretorius between A3 and B2 on the Paterson-derived grading scale ("Paterson"). It was put to Mr Linde whether he accepted that Ngozo could earn between A3 and B2. Mr Linde conceded that it was indeed possible

but that he stood by his original opinion of between A3 and B2. Counsel for the plaintiff argued that these differences can be dealt with by the application of a 5% contingency deduction on the plaintiff's actuarial calculation for past loss of earnings. This percentage was supplied by the Plaintiff's actuary Mr Jacobson for illustrative purposes. Munro Consulting, who prepared an actuary report on behalf of the defendant, did not provide a contingency percentage that should be applied to the pre accident scenario. Counsel for the Fund did not, however, challenge the 5% suggested.

[96] I accept that a 5% contingency would be just and equitable in the circumstances as it is probable, in light of the Ngozo's present academic performance, that he would have qualified as a boilermaker and earned at the level of B1.

FUTURE LOSS OF EARNINGS

[97] Dr Pretorius and Mr Linde submit that he would have earned, but for the accident, within the scale of C2 in terms of Paterson and would have received salary inflationary agreements after completing his apprenticeship. Dr Pretorius, however, suggests that there is a possibility that Ngozo would have been unable to complete his trade and would then have been an unqualified artisan earning within the B3/B4 levels. Mr Linde, however, stated in the joint minute that if one was to consider Ngozo's post academic performance then it would be improbable that he would have been unable to complete his qualification if the accident had not happened. The accident has affected him in a neuropsychological sense yet

he is passing his courses. Without this impediment, I find it improbable that he would not have completed his studies and progressed as boilermaker earning within the C2 level.

[98] The experts, however, differ on the retirement age of Ngozo. Mr Linde believes that Ngozo would have retired at 65 and Dr Pretorius believes that Ngozo would retire between 63 and 65 years of age. Dr Pretorius, testified that the normal retirement age is 65. Ngozo has shown a good work ethic at the FET and it would be probable that he would work to the age of 65 years.

[99] After considering the differences between the experts with regard to his pre-accident employment scenario, I find that applying a 10% deduction to the plaintiff's prospective loss, as calculated by Mr Jacobson, is acceptable in the circumstances.

[100] The Post-accident position, from the joint minute of the Dr Pretorius and Mr Linde is clear, "*we agree that he will no longer be able to work in the field as a tradesman.*" Ngozo will not be able to work as boilermaker according to these experts. Mr Pretorius believes he will be able to perform basic draughtsman work whereas Mr Linde says that he will not be able to work as a CAD operator/ draughtsman.

[101] The experts are in agreement that Ngozo would probably enter the labour market at the lower quartile of the earnings for semi-skilled labourers in the non-corporate sector in 2015, and with time and natural progression would reach the upper quartile by the age of 40-

45 years. His earnings would be in line with earnings of a semi-skilled labourer in the non-corporate sector according to the Quantum Yearbook 2013 by Robert Koch those amount being:- R16 400,00 – R47 300,00 – R120 000,00 per annum. The experts concur that even at this lower level his earnings are compromised and a higher than usual contingency deduction should be applied.

[102] Mr Jacobson has proposed, in his original report that a 50% contingency deduction be applied. However, after receiving the joint minute of the industrial psychologists which recommended a higher than usual contingency, Mr Jacobson filed an updated report dated 19 June 2013 wherein he used a contingency deduction of 60%. Counsel for the plaintiff submits that applying this contingency is fitting in the circumstances as Ngozo is, in light of the South African labour market, functionally unemployable and suggested. Dr Pretorius, under cross-examination readily conceded that the plaintiff will find it extremely difficult to obtain and sustain employment. I, however, believe it is probable that Ngozo does have a good work ethic and he is also performing satisfactorily at the FET College. He is on track to complete his qualifications this year and despite him not being suited to being a tradesman and not meeting all the requirements to be a boilermaker, his attitude seems to be one where he will endeavour to find work and would strive to ensure that he remains employable. However, this needs to be considered in the context of the dire state of youth unemployment in this country. Dr Pretorius, under cross-examination, stated that Ngozo will have trouble competing with other fully able-bodied job seekers. Ngozo has physical and cognitive defects that will require a sympathetic employer who would be willing to

accommodate him. Dr Pretorius accepted that the unemployment rate is around 25% but that the lower skill level and youth unemployment rate are considerably higher. In light of Ngozo's attitude, weighed against his probability of finding work, a 50% contingency deduction on the prospective loss figure calculate by the plaintiff's expert would be acceptable and fair to both parties.

[103] The loss of earnings is calculated by taking the difference in value of Ngozo's income but for the accident and the value of his income having regard to the accident after the deduction of the relevant contingencies that should be made for sickness, unemployment, errors in the estimation of future earnings and life expectancy, earlier retirement and general hazards of life.

[104] The accrued loss has been calculated by Mr Jacobson to be R37 113.00 and after applying a 5% contingency, the nett accrued loss totals R35 257.00

[105] The prospective loss of earnings is determined by taking the value of the income but for the accident (which is R5 182 081.00) and applying the contingency of 10% mentioned above. The net prospective loss of earnings but for the accident is, therefore, R4 663 873. The value of future income having regard to the accident is R1 678 455.00 less a 50% contingency deduction would then amount to R839 228.00. Total nett loss of earnings is the differential between the two which amounts to R3 859 902.00

[106] As I have ruled above, the defendant has been found liable for only 80% of the defendant's damages and, accordingly, the defendant is liable to the plaintiff in the sum of R3 087 922.00 made up as follows:-

Past Loss of Earnings

Value of Income but for the accident:	R 37 113.00
Less 5% contingency deduction :	(R 1 856.00)
Net Accrued Loss:	R 35 257.00

Prospective Loss of Earnings

Value of Income but for accident:	R 5 182 081.00
10% contingency deduction:	(R 518 208.00)
Net value of income but for accident:	R 4 663 873.00

Value of Income Having Regard to Accident:	R1 678 455.00
50% contingency deduction:	(R 839 228.00)
Net value of Income having regard to the accident:	R 839 228.00
Net Prospective Loss:	R 3 824 645.00

Total Net Loss:	**R3 859 902.00**

Total Net Loss after 20% Liability Deduction	**R3 087 922.00**

[107] Counsel for the Plaintiff has sought a punitive cost order in this matter in that there were joint minutes compiled by the clinical and neuropsychologists (Dr C Angus and Dr P Dlukulu), the occupational therapists (Ms J van der Berg and Mr D Brummer), the industrial psychologists (Mr L Linde and Dr W Pretorius) that would have resulted in approximately 2 days' less of court time had they been admitted. The invitation to admit these reports was declined and Counsel for the Fund indicated that she would like the opportunity to cross-examine the plaintiff's experts. Despite a lengthy cross-examination, all the experts stood by their method of assessment and the joint reports and the cross-examination effectively resulted in naught. The Fund's own experts were also called and whose testimony reaffirmed their joint minute as well as the evidence of the opposition's expert. This matter could have been decided without these experts being called and for only the evidence of the industrial psychologists with respect to the correct contingency to be applied being sought by the Court. It would be acceptable to impose a punitive cost order on the defendant for the two days that were indeed wasted.

[108] Accordingly an order is made in terms of the Draft marked X.

Weiner J

Date of hearing:	05,06,10,11 June 2013, 29 August 2013
Date of judgment:	19 November 2013
Counsel for Plaintiff:	Adv G Strydom SC
Attorneys for Plaintiff:	AF Van Wyk Inc.
Counsel for Defendant:	Adv H Ngomane
Attorneys for Defendant:	*Pule Inc.*

"X" 19/11/2013

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

On the 19th day MAY of 2013 before The Honourable Judge Weiner

CASE NO: 21866/2012

in the matter between:

NGOZO: SEBUSISO PATRICK Plaintiff

and

ROAD ACCIDENT FUND Defendant

DRAFT ORDER

Having heard counsel and having read the papers filed of record, the following order is granted: -

1. The Defendant is ordered to pay the plaintiff's attorney of record the sum of **R3 087 922.00** to be held in an interest bearing account pending the formation of a trust for the benefit of the plaintiff to be paid over to the trustees of such trust upon the formation thereof.

2. The matter of general damages is referred to the tribunal, as envisaged in Section 17(1), read with Regulations 3(1), of the Road Accident Fund Act 56 of 1996.

3. The Defendant furnishes the plaintiff with an undertaking as envisaged in terms of S17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of 80% of the

costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in a motor vehicle accident which occurred on 16 December 2009, inclusive but not limited to the treatment as set out in the expert witness reports of the expert witnesses referred to in paragraphs 41.-4.9 hereinafter.

The costs aforesaid shall further include the costs in respect of the creation and administration of a trust to be formed in order to manage and administer the compensation payable to the plaintiff referred to in paragraph 1 hereinbefore upon such costs having been incurred, which costs shall be limited to the costs and fees chargeable by *curator bonis*.

4. That the plaintiff's attorneys AF Van Wyk Attorneys:

4.1. cause a trust to be established in accordance with the provisions of the Trust Property Control Act, No. 47 of 1988;

4.2. invest the nett capital amount referred to in paragraph 1hereinbefore upon payment thereof to the plaintiff's attorneys in terms of Section 78(2) of the Attorneys

4.3. Act, 53 of 1997, for the sole benefit of the plaintiff;

That the trust instrument, contemplated in paragraph 3.1., hereinbefore, shall make provision for the following:

4.3.1 the plaintiff to be the sole beneficiary;

4.3.2. the nomination of the first trustee, Ronald Hermann Meyeridricks (ID No.441127 5028 004);

4.3.3. the trustee of the trust to be formed to take all the requisite steps to secure an appropriate Bond of Security to the satisfaction of the Master of the High Court for due fulfilment of his obligations and to ensure that such Bond of Security be submitted to the Master of the High Court at the appropriate times as well as to all other interested parties;

4.3.4 the remuneration of the trustee at a rate equivalent (and not exceeding) to that of a *curator bonis* as contemplated by the Administration of Estates Act 166 of 1965;

4.3.5. the duty of the trustee to disclose any personal interest in any transaction involving the trust property;

4.3.6. the exclusion of contingent rights of the beneficiary in the event of cession, attachment or insolvency of the beneficiary, prior to the distribution or payment thereof by the trustee to the beneficiary;

4.3.7. procedures to resolve any deadlock between the trustees subject to the review thereof by this Honourable Court;

4.3.8. the termination of the trust only upon the death of the plaintiff, in which event the trust property shall pass to the estate of the plaintiff;

4.3.9 the amendment of the trust instrument to be subject to the leave of this Honourable Court.

4.4. The provisions referred to in paragraph 3.3. hereinbefore, shall in accordance with the provisions of the Trust Property Control Act aforesaid, where necessary, be subject to the approval of the Master.

5. The Defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, save for the costs of 10th of June 2013 and 11th of June 2013, which costs the defendant is ordered to pay on the scale as between attorney and own client, and which costs are to include the costs of the employment of senior counsel as well as the preparation, qualifying and attendance fees, if any, of the following expert witnesses;

5.1. Dr J J van Niekerk (orthopaedic surgeon);

5.2. Ms J van der Berg (occupational therapist);

5.3. Ms I M Hattingh (speech therapist);

5.4. Dr C M Lewer-Allen (neurosurgeon);

5.5. Dr D A Shevel (psychiatrist)

5.6. Dr C Angus (clinical and neuropsychologist)

5.7. Dr P B White (plastic and reconstructive surgeon);

5.8. Mr L Linde (industrial psychologist);

5.9. Ms A Mattheus (educational psychologist);

5.10. Mr G W Jacobson (actuary)

BY ORDER OF THE COURT
REGISTRAR