REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12/26113

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

....
DATE SIGNATURE

In the matter between:

ADV ZINHLE BUTHELEZI
obo MKUBA, VUZUMZI Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The plaintiff, a 49 year old male person and heretofore a carpenter by trade, instituted proceedings against the defendant for damages arising out of

a motor vehicle collision that occurred on or about 01 August 2009 and at or near Emangweni Section, Tembisa, Ekurhuleni District, Gauteng Province wherein or whereat he was knocked down by an unknown motor vehicle or vehicle while walking on the pavement of a street. The driver of the unknown vehicle ("*insured vehicle*") as well as the time the alleged collision took place is unknown.

[2] The plaintiff alleged the unknown insured vehicle's driver ("*insured driver*") was negligent in several respects which have not been disputed by the defendant.

[3] At the beginning of the trial, the defendant conceded the issue of liability or the merits, agreeing to be held liable for 100% of the plaintiff's proven damages.

[4] The plaintiff has claimed for an amount of R4 400 000,00 (four million four hundred thousand rand) made up of the following heads of damages:

4.1	Estimated future medical expenses	=	R 500 000,00
4.2	Estimated future loss of earnings/ loss of earning capacity/loss of employment/employability	=	R1 000 000,00

4.3	General damages for pain and suffering, loss of amenities of life, disability and disfigurement as well as contumelia	=	R3 000 000,00

[5] It is clear that the plaintiff made a simple arithmetical error in his computations as the above heads of damages make out a total amount of R4 500 000,00. I assume that the estimated future medical expenses were supposed to have totalled R400 000,00.

[6] The plaintiff is assisted in these proceedings by a *curator ad litem*, Advocate Zinhle Buthelezi.

[7] The parties further reached agreement in respect of loss of earnings or earning capacity in the amount of R768 477,00 (seven hundred and sixty eight thousand four hundred and seventy seven rands).

[8] The issue of future medical expenses was also settled between the parties on the bases that the defendant would issue the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund, 56 of 1996 (as amended).

[9] The only outstanding issue unresolved between the parties was that of general damages.

[10] Both parties are agreed about the extent of the injuries suffered by the plaintiff as well as the *sequelae* thereof. As a consequence, they further agreed on dispensing with the leading of *viva voce* evidence: They argued this issue of general damages on the papers available, which are common cause.

THE PARTIES' SUBMISSIONS ON QUANTUM OF GENERAL DAMAGES

[11] The plaintiff submitted and argued that the general damages herein should be awarded at the sum between R1 000 000,00 (one million rand) and R1 100 000,00 (one million one hundred thousand rand). The defendant submitted and argued that they be awarded at the sum of R600 000,00 (six hundred thousand rand).

ANALYSIS

[12] I listened to and considered submissions and argument from counsel on both sides on general damages. Their cases were both anchored on the expert reports filed by the plaintiff as supported by joint minutes of their respective orthopaedic surgeons, Drs D Engelbrecht and C Edelstein; their clinical psychologists, Ms Lufuno Modipa and Dr Jackie Watts; the occupational therapists, Mesdames N September and Mellony Smit; the neurosurgeons, Drs T S Mpotoane and Frank Snyckers; and the industrial psychologists, Ms Sandra Moses and Mr Friedl van der Westhuizen.

[13] The only difference the two parties have on this aspect is thus only the quantum to be awarded and how each side justifies such quantum.

[14] The ultimate decision as to how much the plaintiff should be awarded in general damages lies entirely within the ambit and discretion of this Court. Opinions of experts are only there to assist the court in the exercise of that discretion and decision. Consequently, experts should avoid overstepping their mandates and attempting to usurp the function of the court. It is the function of the court to base its inferences and conclusions ultimately on all the facts placed before it.[1]

[15] Kotzé J put it as follows in *S v Gouws*:[2]

> "*The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried.*"

[16] Davis J summarised the role of experts and their reports aptly in *Schreiner NO & Others v AA & Another*[3] as follows:

> "*In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as*

[1] See unreported judgment by Wepener J in *Nicholson Charlene v Road Accident Fund*, Case No 07/11453, GSJ, decided on 30 March 2012.
[2] 1967 (4) SA 527 (EC) at 528D.
[3] 2010 (5) SA 203 (WCC) at 211J-212B.

> *possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.*"

[17] Both counsel in this matter advanced cogent and seemingly convincing argument in favour of the award each claimed would be appropriate in the circumstances herein, and I am indebted to them for their state of preparedness. However, this Court cannot and should not lose sight of its primary responsibility, being among others, to interrogate the expert reports in the light of the plaintiff's circumstances as they were prior to the accident and presently, post-accident and then exercise a value judgment after taking all relevant and material aspects into consideration. This Court must also warn itself against the pitfall of uncritically accepting one expert view and/or counsel's submission above the other.

[18] This danger was highlighted in *Louwrens v Oldwage*[4] wherein Mthiyane JA put it as follows:

> "*[27] Confronted with the battery of experts on either side, presenting competing and contrasting evidence, the learned Judge preferred the evidence of the plaintiff's experts to that of the defendant without advancing any basis for so doing. All that he said was that the opinions of Professor De Villiers and Dr Parker are based on logical reasoning but he failed to give any demonstration of this. The learned Judge did not give equal credit to Drs de Kock and Stein and Professor Immelman whose views he harshly dismissed as being incapable of logical analysis and support. I do not share these views. The conclusion reached was clearly wrong. It is an approach which this*

[4] 2006 (2) SA 161 (SCA) at para [27].

Court has recently decried in Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another, where it was said:

> *'(I)t would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the benchmark by reference to which the defendant's conduct falls to be assessed".'*

The uncritical acceptance of the evidence of Professor De Villiers and the plaintiff's other expert evidence and the rejection of the evidence of the defendant's expert witnesses falls short of the requisite standard and the approach laid down by this Court in Michael v Linksfield Park Clinic. What was required of the trial Judge was to determine to what extent the opinions advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities. I have already indicated why I found the evidence adduced on behalf of the defendant to be more acceptable than that of the plaintiff's witnesses and why the conclusion of the trial Court cannot stand."

[19] The learned justice was referring in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*[5] to paragraphs [36] and [37] thereof where the following was stated:

> "*[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision by the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.*
>
> *[37] The Court is not bound to absolve a defendant from liability for alleged negligent medical treatment or diagnosis just because the evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'.*"

[5] 2001 (3) SA 1188 (SCA); see also *National Justice Compania Naviera SA v Prudential Assurance Ltd* 1993 (2) Lloyds Reports 68 81.

[20] That the plaintiff suffered pain as a result of the accident is not in dispute. However, a reading of the orthopaedic reports do not in my view point to the plaintiff having suffered serious orthopaedic injuries.

[21] Counsel for the plaintiff argued that the fact that Dr Engelbrecht has allowed for a possible surgery in the event of the bridging callus that had developed in the meantime not healing properly and/or the bone union in the shoulder area not being complete, the plaintiff will possibly suffer further pain in the future points or leads to a conclusion that a higher award be justified.

[22] It is my finding that that is not what the orthopaedic surgeons agreed on in their joint minute. What the plaintiff is saying is based on speculation which is not supported by the totality of the evidence insofar as the injuries to the plaintiff's shoulder and right knee are concerned. The joint report stated among others that the right knee did not show significant post-traumatic *sequelae*. Plaintiff's counsel harped mostly on the injury to the knee, which in my view is tantamount to him asking this Court to peer too far into the crystal ball and find that the plaintiff is likely to face more pain in the unforeseeable future. That in my view is a beacon rather too far in the light of the circumstances of this case.

[23] Counsel for the plaintiff also argued and submitted at too great a length in my view, about the effect of the neuro-cognitive deficits the plaintiff suffered or is saddled with, relying on them aggravating the plaintiff's physical wellbeing and thus entitling him to a higher general damages award.

[24] I brought this to the counsel's attention during argument and I repeat what I said: Neuro-cognitive deficiencies or *sequelae* played their part in the determination of the award for future loss of earnings and earning capacity. Although the argument cannot be said to be irrelevant at this stage, it is my finding that these should not play a significant part in the final determination of a determination of the award for general damages.

[25] On the other hand, the fact that the plaintiff has developed epilepsy as a consequence of the accident and has also started wetting his bed twice a week present sufficient grounds for this Court to consider a relatively high general damages award. His amenities of life have been significantly encroached on with a resultant concomitant loss of face and/or eternal shame. A proper balancing act is required.

[26] I concur with the report of the clinical psychologist, Lufuno Modipa, when she stated at paragraph 9.9 of her expert report[6] that the plaintiff's neuro-cognitive profile reveals severe cognitive deficits which are in keeping with severe head injury. His present emotional difficulties in the form of severely depressed mood, irritability and lack of motivation and volition have brought about personality changes that are organic in nature. These have also resulted in loss of amenities of life that should be taken into account when the award for general damages is considered.

[6] At page 118 of the paginated Bundle C of the record.

[27] I have had insight into and considered the circumstances and quantums of general damages awarded in the cases quoted by both the plaintiff's and defendant's counsel. It is so that the two sides are far apart when the amounts they relied upon are anything to go by. I have also perused Wepener J's judgment in *Nicholson, Charlene v Road Accident Fund*,[7] especially where he warned against High Courts like ours granting damages at higher scales than those awarded by the Supreme Court of Appeal in comparable cases.

[28] As far as possible, I am also firmly of the view that I am bound by the *stare decisis* principle: I will, unless there are compelling reasons to distinguish the decision of a court higher than mine, follow the higher court when considering the awarding of general damages herein.

[29] I also agree with my brother Wepener J when he ruled in the above case[8] that the liberality or conservation of a judge should not play a role when the determination of general damages (and other heads of damages) is being considered. Awards in previous comparable cases is but one of the considerations which a court should take into account when considering the amount of damages to be awarded.

[30] It is so that three of the four cases alluded to and relied upon by the plaintiff, namely, *Kgomo v Road Accident Fund* (decided on 2 September 2011 by my brother Van Oosten J – awarding R800 000,00 (R949 000,00 by

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[7] *Supra.*
[8] At page 24 paragraph [42] thereof.

present day values); *Dlamini v Road Accident Fund* (R850 000,00 awarded, being R955 000,00 in present day value); and *Van Zyl NO v Road Accident Fund* (decided on 31 March 2012 in the Western Cape High Court and R850 000,00 (R955 000,00) being awarded have some similarities with the facts and circumstances presented in this case in respect of the plaintiff. However, those facts and circumstances cannot be said to be on-all-fours with those of the plaintiff herein. The same can be said about the comparable cases quoted and used by the defendant's counsel, namely, *De Jongh v Du Pisanie*,[9] *Nicholson v RAF*,[10] *Hurter v RAF*,[11] *Modan NO v RAF*[12] and *Mathys NO v RAF*[13] : Although their facts and circumstances cannot also be said to be on-all-fours with those prevailing in this case, the awards thereat were significantly lower than those quoted by and/or for the plaintiff.

[31] In *De Jongh v Du Pisanie* the court awarded R250 000,00 in comparable circumstances which amounts to R453 000,00 updated to 2013. In *Nicholson v RAF* the plaintiff was awarded R400 000,00 during March 2012. In *Mathys NO v RAF* Kathree-Setiloane J of this Court awarded general damages of R500 000,00 to a plaintiff who had suffered severe brain injury and minor orthopaedic injuries and who was admitted to hospital with a GCS of $^{10}/_{15}$.

[9] 2005 (5) SA 457 (SCA).
[10] As referred to above, being Case No 07/11453 (GSJ).
[11] 2010 (6A4) QOD 12 (ECD) decided in December 2011.
[12] C&B, A4-123 Quantum of Damages Vol VI.
[13] C&B, A4-273 (Vol VI – Quantum of Damages).

[32] While appropriate and fair compensation should be made to injured persons, care must be taken that astronomical and out of synch awards are made. As Holmes J (as he was then) put it in another case:

> "*The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour largesse from the horn of plenty at the defendant's expense.*"

[33] As the expert reports put it, the plaintiff herein suffered traumatic head injuries whose *sequelae* he will suffer for the rest of his life. Although he can to some extent still work as a carpenter, the injuries he sustained will make it difficult for him to do so as before or with any reasonable endurance. R1 000 000,00 however is, in my view and finding, an inappropriately high award in the circumstances. Similarly, an award of R600 000,00 as suggested by the defendant through its counsel is inappropriately low in the circumstances. An amount in between those two figures is in my view and finding a figure that will adequately and fairly compensate the plaintiff as general damages for pain and suffering, loss of amenities of life, disability and disfigurement as well as contumelia.

ORDER

[34] In the circumstances I make the following order:

34.1 The defendant shall make payment to the plaintiff in the amount of R1 568 000,00 (one million five hundred and sixty eight thousand rand) made up of the following heads of damages:

34.1.1 R768 477,00 (seven hundred and sixty eight thousand four hundred and seventy seven rand) in respect of loss of earnings or earning capacity;

34.1.2 R800 000,00 (eight hundred thousand rand) in respect of general damages;

which amount shall be paid as follows:

34.1.3 directly to the plaintiff's attorney's trust account, the details of which are as follows:

Account Holder	:	Zwelakhe Mgudlandlu Attorneys
Bank	:	First National Bank
Branch Code	:	250 205
Account Number	:	6211 233 1971

34.2 The defendant is directed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 1996 (Act 56 of 1996) as amended, to pay 100% of the

costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or the rendering of service to him or the supplying of goods to him arising out of the injuries the plaintiff sustained in the motor vehicle accident or collision which occurred on 01 August 2009, after such costs have been incurred and upon proof thereof;

34.3 The undertaking referred to in paragraph 34.2 above shall include all the costs of the creation and administration of a Trust to be formed, including:

34.3.1 The costs of the trustee in administering the plaintiff's estate and the costs of administering the statutory undertaking furnished in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (as amended), as determined by the Administration of Estates Act, 1965 (Act 66 of 1965) (as amended);

34.3.2 The defendant's liability in respect of the Trust shall be limited to the prescribed tariff applicable to a *curator bonis*, as reflected in Government Notice R1602 of 1 July 1991, specifically paragraphs 3(a) and 3(b) of the Schedule thereto;

34.4 The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, such costs to include:

34.4.1 the costs attendant on or upon the obtaining of payment of the capital amount referred to in paragraph 34.1 above;

34.4.2 the preparation costs of the plaintiff's experts;

34.5 The party and party costs referred to in paragraph 34.4 shall be paid directly to the plaintiff's attorney's trust account;

34.6 The trustee shall pay the plaintiff's attorney's as well as counsel's fees for professional services rendered and their disbursements from the capital amount referred to in paragraph 34.1 above;

34.7 The trustee shall be entitled to call for an appropriate taxation of the plaintiff's attorney's (attorney and client) costs and disbursements, if deemed necessary;

34.8 The plaintiff's attorneys, Zwelakhe Mgudlandlu Attorneys, shall:

34.8.1 Cause a Trust to be established in favour of the plaintiff in accordance with the provisions of the

Trust Property Control Act, 1988 (Act 57 of 1988), as amended, within a reasonable period after the granting of this order;

34.8.2 In the event that a Trust is not created within a reasonable period after the granting of this order, payments contemplated to or for the trustee in paragraph 34.1 above shall be paid to the plaintiff's attorney who shall invest the said amounts in a trust account in terms of section 78(2)(A) of the Attorneys' Act, 1979 (Act 53 of 1979), as amended, for the benefit of the plaintiff, namely, Vusumzi Mkuba;

34.8.3 The Trust instrument as contemplated in paragraph 34.2 above shall make provision for, *inter alia*, the following:

34.8.3.1 The plaintiff (Vusumzi Mkuba) to be the sole beneficiary;

34.8.3.2 The nomination of Martha Magdalena Prinsloo as the first trustee, who is a trustee of ABSA Trust Ltd;

34.8.3.3 The trustee of the Trust to be formed shall take all the requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court, for the due fulfilment of his/her duties and to ensure that the bond of security is submitted to the Master of the High Court at the appropriate time as well as to all other interested parties;

34.8.3.4 The remuneration of the trustee shall be at a rate equivalent to (and not exceeding) that of a *curator bonis* as contemplated in the Administration of Estates Act 66 of 1965, as amended;

34.8.3.5 The duty of the trustee to disclose any personal interest in any transaction involving the Trust property;

34.8.3.6 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;

34.8.3.7 The termination of the Trust only with the leave of the court, alternatively, on the death of the plaintiff (Vuzumzi Mkuba), in which event the Trust property shall pass to the estate of the plaintiff (Vuzumzi Mkuba), whichever event occurs first;

34.8.3.8 The amendment of the Trust instrument subject to the leave of the court;

34.8.4 The provisions referred to in paragraph 34.8 above shall, in accordance with the provisions of the Trust Property Control Act 57 of 1988, be subject to the approval of the Master.

34.9 This order must be served by the plaintiff's attorneys on the Master of the High Court and the nominated trustees within 15 (fifteen) days of the granting of this order.

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

FOR THE PLAINTIFF	
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DATE OF HEARING	23 APRIL 2014
DATE OF JUDGMENT	25 APRIL 2014