

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 10274/19

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
30 November 2021

In the matter between:

JIYANE, MXOLISI ZIPHOZONKE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Delivered: 30 November 2021 - This judgment was handed down electronically.

JUDGMENT

Karachi AJ:

Introduction

1. The plaintiff, a major male constable was injured in a motor vehicle accident on 29 June 2018. He has instituted a claim for damages against the defendant, the Road Accident Fund (“the RAF”).

2. The merits of the claim were conceded 100% in favour of the plaintiff on 11 February 2019.

3. Due to all manner of delays occasioned by the RAF, the RAF’s defence was struck out on 27 July 2019 and the issue of quantum proceeded by default. The matter was enrolled for hearing on the default judgment trial court roll on 27 October 2021 and was allocated to me for hearing on 3 November 2021.

The plaintiff’s evidence

4. The plaintiff, is a major male constable, born on 4 August 1991.

5. The plaintiff was involved in a motor vehicle collision as a passenger, on 29 June 2018 wherein he sustained various injuries.

6. As a consequence of the injuries sustained, the plaintiff had to undergo medical treatment; will in future have to undergo medical treatment; suffered loss of earnings; and suffered a partial alternatively complete destruction of his income earning capacity.

7. As regards the plaintiff’s claim for

7.1. general damages, the RAF failed to exercise an election on whether or not to accept the plaintiff’s RAF4 forms and as a result, the plaintiff requests that the court postpone the issue of general damages *sine die*;

7.2. past medical expenses, at the hearing of this matter, counsel on behalf of the plaintiff submitted that the plaintiff has no claim in this regard;

7.3. future medical expenses, the plaintiff seeks an order directing the RAF to furnish the plaintiff with an undertaking for future treatment in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996; and

7.4. loss of earnings, the plaintiff claims R6 555 875,00.

8. The plaintiff sustained the following injuries in the accident:

8.1. Head injury with reported loss of consciousness at the scene but fully conscious upon arrival at the hospital;

8.2. Facial laceration – 3 cm on the forehead;

8.3. Cervical spine soft tissue injury;

8.4. Thoracic spine wedge compression T6 fracture;

8.5. Left knee soft-tissue injury.

9. The affidavits of the plaintiff's experts, Prof. Kelly, a neurosurgeon; Mr Rosen, an industrial psychologist; Ms Doran, an occupational therapist; Dr Volkersz, an orthopaedic surgeon; Dr Berkowitz, a plastic and reconstructive surgeon; Dr Samouri, a clinical psychologist; Dr Naidoo, a specialist psychologist and the plaintiff's actuary Mr Kramer were accepted as evidence in the trial.

The experts

(i) Dr Kelly – Neurosurgeon

10. Dr Kelly evaluated the plaintiff and is of the opinion that the plaintiff has a depressive disorder including a mild traumatic brain injury due to the injuries sustained in the accident.

11. Dr Kelly found that

11.1. Attention and memory problems were evident and deferred to the report of Dr Samouri, who confirmed impairments in both these areas of cognitive functioning;

11.2. A mood disorder was evident. Neuropsychological complications were found and deferred to the report of Dr Naidoo the psychiatrist who confirmed the finding;

11.3. Facial scar was clearly visible and disfiguring. Further assessment by a plastic surgeon was required;

11.4. Cervical spine examination demonstrated paraspinal muscle spasm and a decreased range of motion;

11.5. Thoracic spine examination demonstrated paraspinal muscle spasm and a reduced range of motion.

12. The plaintiff suffers from post-concussion headaches.

13. The plaintiff would not be able to compete effectively in the open labour market due to the following reasons: headaches, memory problems, mood disorder, facial scarring, cervical spine pain and thoracic spine pain.

(ii) Mr Rosen - Industrial psychologist

14. At the time of the accident, the plaintiff was employed as a constable in the South African Police Service at the Rosebank Police Station, where he was part of the crime prevention team.

15. The plaintiff was off work for about 2 weeks post-accident, after which he returned to work on light duty. The plaintiff continued to experience pain in his neck, headaches, backache and travel-related anxiety.

16. The plaintiff then applied to be moved to Jeppestown Police Station, where he began working as a personnel officer, in which position he continues to date.

17. The plaintiff however remains symptomatic and finds that he experiences chronic pain and depression.

18. The plaintiff enrolled for a diploma in policing at the Tshwane University of Technology but is not coping with his studies. The plaintiff is constantly fatigued owing to his inability to sleep properly at night due to the experience of pain.

19. The plaintiff continues to work in an accommodated post focused on administrative tasks as opposed to operational duties.

20. In terms of the psychological and physical assessment, the plaintiff recognises his physical constraints and is frustrated at not being able to perform at his previous levels of activity. He lost concentration and appeared markedly tired.

21. The plaintiff realises the extent of his injuries and feels that his life has changed since the accident. He specifically points to ongoing pain in his neck and back, particularly when standing or sitting for periods. Similarly, he becomes irritated and aggressive at times. Whilst he tries to cope, he is unable to perform his duties as he did prior to being injured. This has impacted on his work and has affected his aspirations of progressing as a police officer.

22. Mr Rosen noted and agreed with the observations of the other experts, including

22.1. Dr Kelly, the neurosurgeon, that the plaintiff paid attention intermittently. That the plaintiff has memory problems and dysthymic mood. Is suffering from post-concussion headaches which will need conservative treatment.

22.2. Dr Naidoo, the psychologist who diagnosed the plaintiff with mild traumatic brain injury, neuropsychiatric sequelae due to multiple aetiologies, reactive depressive symptoms and travel related anxiety symptoms.

22.3. Dr Samouri, the clinical psychologist who found that the plaintiff struggles with divided attention, has high levels of anxiety and presents with symptoms for Post-Traumatic Stress Disorder. The plaintiff's sleep patterns are disturbed due to chronic experience of pain which may have an impact on mood and anxiety. There are implications for memory and concentration and the plaintiff would be an unfair competitor in the open labour market.

22.4. Ms Doran, the occupational therapist, found that the plaintiff is optimally suited for tasks of a sedentary to light physical nature, where neither of these is exerted on a constant basis. This is compounded by the psychological difficulties. An intertwining relationship between the pain experienced by the plaintiff, and the depression, which has resulted in a vicious cycle of emotional distress and depression, as well as fatigue. In turn, there is increased vulnerability and compromise on his ability to sustain expected efficacy levels, even in a sedentary to light position, as to what he currently holds as well as securing of further qualifications to allow for promotional opportunities.

23. Mr Rosen is of the opinion that the plaintiff has been markedly affected by the accident and as a result, he has not been able to progress in his career path or tolerate the rigours of his previous work. Further, he is unable to pursue his aspirations to become a senior police officer.

24. Mr Rosen is of the opinion that, but for the accident, in light of the plaintiff's qualifications (National Diploma in HR Management as well as additional law enforcement qualifications) as well as the plaintiff's deep interest in law enforcement, it is anticipated that the plaintiff would have been promoted through the ranks as part of his planned career path.

25. Mr Rosen is further of the opinion that at the time of the accident, the plaintiff was on track towards promotion and would likely have been promoted to sergeant by 2021 with the associated earnings of approximately R343 838,00. The plaintiff would have spent approximately 3 to 5 years at this level before being considered for another promotion to the rank of warrant officer with commensurate earnings at this level. The plaintiff would have spent a further 5 years at this level before being considered for promotion to lieutenant. As the plaintiff would have spent at least approximately 7 years at the lieutenant level, Mr Rosen suggests ending the plaintiff's projections at this level.

26. Mr Rosen obtained collateral information from Colonel Meredith, the plaintiff's supervisor, who confirmed the various physical and psychological difficulties experienced by the plaintiff post-accident. In summary, she confirms that the plaintiff continues in an accommodated, office-bound post since he cannot cope with the physical requirements of his pre-accident position. As such, the plaintiff has suffered a loss of earnings due to not being able to earn overtime and danger pay. Even in an accommodated state, the plaintiff still suffers from physical and psychological constraints, is unlikely to obtain promotion in the future, should his present situation remain the same. Colonel Meredith confirmed that the potential promotion opportunities have now been limited.

27. Mr Rosen concludes that the plaintiff's career path has been halted and that there is a very real possibility of a limited future in the South African Police Service. That the plaintiff's physical and psychological constraints will hamper his ability to find alternative work. Although he will not be unemployable, the plaintiff will need to seek sedentary work. He is of the opinion that the plaintiff will be a vulnerable employee or work seeker in the open labour market and he is of the view that plaintiff will experience large periods of unemployment and remuneration at lower levels.

28. These factors can be taken into account by the application of a higher post-accident contingency deduction, over and above the factual difference between pre- and post-accident.

(iii) Ms Doran – Occupational therapist

29. Ms Doran confirmed that the ongoing pain and discomfort suffered in the plaintiff's spine negatively impacts on the plaintiff's ability to sustain tasks of a constant light nature or greater.

30. The plaintiff would be optimally suited for tasks of a sedentary to light nature, where neither of these is exerted on a constant basis to sustain the expected efficacy levels correlating with the change in his work duties post-accident.

31. The plaintiff demonstrated fluctuating concentration levels.

32. Ms Doran deferred to the Industrial Psychologist to comment on the loss of any earnings incurred due to accident injuries.

(iv) Dr Volkersz – Orthopaedic surgeon

33. Dr Volkersz confirmed that the plaintiff sustained a head injury, a soft tissue injury to his cervical spine with persistent right arm symptoms and a fracture of the sixth dorsal vertebra.

(v) Dr Berkowitz – Plastic and reconstructive surgeon

34. Dr Berkowitz, the plastic and reconstructive surgeon confirms that the plaintiff has reached maximum medical improvement.

(vi) Dr Samouri – Clinical psychologist

35. Dr Samouri found that the plaintiff is experiencing high levels of anxiety since the accident, presents with symptoms for Post-Traumatic Stress Disorder and is experiencing a low depressive mood at times since the accident.

36. The plaintiff's experience of chronic pain has resulted in him having to alter his social, physical and emotional behaviour.

37. Since the accident the plaintiff experiences stress and anxiety when he travels.

38. The above-mentioned disturbances cause clinically significant distress and impairment in social, psycho-social and occupational functioning.

39. From the Clinical Interview and by his own account of functioning, the plaintiff can be diagnosed with a Depressive Disorder and Post Traumatic Stress Disorder.

40. The plaintiff's sleep patterns are disturbed due to chronic experience of pain which results in him not being able to feel fully rested. Chronic interrupted sleep may have an impact on mood and anxiety.

41. From a physical perspective it appears that the accident has had a restrictive impact on his functioning compared to previous levels of functioning and the plaintiff would struggle with executive functioning.

42. Although he reports no pre-morbid cognitive limitations, the current testing administered indicates that the plaintiff has experienced a drop in cognitive functioning. He struggles with his attention and concentration and his current levels of anxiety and depressive symptoms could result in him presenting with inadequate ability to maintain adequate attention and concentration which resulted in the low scores obtained.

43. The plaintiff currently has a job which is sedentary in nature which accommodates him since the injuries sustained in the accident. However, should he not be able to hold on to his employment, the plaintiff would be an unfair competitor in the open labour market with his cognitive level of functioning and his restricted range of movement. His pre-morbid abilities are estimated to have been average range at least. His current functioning indicates that he would generally struggle with the basic factors for memory. This would negatively impact him within the work space as he would at times during his day struggle with optimal attention and concentration which may lead to poor work performance. Behaviourally, he may be

at risk of de-motivation and lack of commitment due to not being able to follow his work commitments with the same efficiency and determination as before the injury.

44. It seems unlikely that he will be able to secure work in the open labour market (as he would have been able to) if the accident had not taken place.

45. From the plaintiff's account of work history, he had to stop working in Visible Policing and find a more sedentary position to accommodate him. He has noted that he is unable to maintain the necessary attention and concentration required as he could before the accident and injuries sustained. The testing administered supports inadequate memory functions. This could result in experiencing problems in the work place as he may not always remember instruction given which could result in him producing incomplete tasks further causing him anxiety with regard to holding on to his employment.

46. It would benefit the plaintiff to consult with a clinical psychologist to help manage his anxiety, low mood and poor self-concept.

47. It is likely that there may be presentation of future cycling of exacerbations and remissions of the psychological condition as stressors arise and provision should be made for this.

48. The plaintiff could also benefit from seeing a psychiatrist who would be able to further help manage his low mood and anxiety so as to help improve his general state of affective functioning.

49. The plaintiff could also benefit from seeing a functional physiotherapist to further assist him with pain management.

50. The plaintiff feels that he was cheated by the accident. He was unable to continue working active duty for Visible Policing. His social life has been affected. He struggles to run and lift heavy objects. He is no longer able to engage in sports activities like he could prior to the injuries sustained.

(vii) Dr Naidoo – Specialist psychologist

51. Dr Naidoo diagnosed the plaintiff as suffering from a depressive disorder due to injuries sustained in the accident in question (including traumatic brain injury) with some travel related anxiety symptoms.

(viii) Mr Kramer – Actuary

52. An actuarial calculation was obtained in line with Mr Rosen's report.

53. After applying a 15% contingency deduction in respect of the plaintiff's prospective earnings but for the accident and a 40% contingency deduction in respect of the plaintiff's prospective earnings having regard to the accident, the total loss according to the actuarial calculation amounts to R6 555 875,00.

Evaluation

54. In order to assess the plaintiff's future loss of earnings a comparison should be made between what he would have earned pre-morbid and what he is likely to earn post-morbid.

55. Experts are frequently called in to assist the courts, but courts are not bound by the opinions of experts. It is the duty of the expert to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusions so as to enable it to form an independent judgment by the application of these criteria to the facts.

56. No doubt, the determination of contingencies is a process of subjective impression or estimation. The application of contingencies is largely arbitrary and depends on the court's impression of the case. The future is uncertain and it is difficult to judge how a person's career prospects may change over a considerable period of time what other factors may influence the career, either positively or negatively. The facts and all relevant circumstances must be considered as best as possible in order to adjudicate the matter.

57. As a result of the accident, the plaintiff is a changed individual. He suffers from depression, anxiety and physical pain. The plaintiff has had to secure alternative sedentary work. He has suffered from a decrease in productivity. He is now more vulnerable and an unequal competitor in the open labour market. He is at a high risk of future unemployment. But for the accident, the plaintiff would have progressed in his career path. These factors and all other risks affecting his income should be taken into account.

58. I am therefore satisfied with the assumptions and the contingency deduction applied by the actuary to provide for the future uncertainties. I find that the amount as claimed is fair and reasonable compensation for the plaintiff in respect of loss of earnings.

Order

59. In the result, I make the following order:

59.1. The defendant shall pay to the plaintiff an amount of R 6 555 875. 00 in respect of loss of earnings together with interest a *tempore morae* calculated in accordance with the Prescribed Rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996;

59.2. Payment will be made directly to the trust account of the plaintiff's attorneys within one hundred and eighty (180) days: Holder De Broglio Attorneys Account Number [...] Bank & Branch Nedbank – Northern Gauteng Code 198 765 Ref J290 3.

59.3. The defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse 100% of the plaintiff's costs of any future accommodation in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by the plaintiff in the motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.

59.4. The defendant is to pay the plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the costs of 03 November 2021, the costs of the preparation and qualifying fees of the experts, consequent upon obtaining the plaintiff's reports to be served between the parties, the plaintiff's reasonable travel and accommodation costs to attend experts, and counsel. The plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the defendant's attorney of record; and the plaintiff shall allow the defendant fourteen (14) days to make payment of the taxed costs.

59.5. The issue of General Damages is postponed *sine die*.

59.6. There is no contingency fee agreement in existence between the plaintiff and his attorneys.

F KARACHI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv P J Van der Berg

For the Defendant: No appearance

Date of the hearing: 3 November 2021

Date of the judgment: 30 November 2021