

**REPUBLIC OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

CASE NO: 27951/2014

DATE: 10/11/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

M J M

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MNGQIBISA-THUSI J

1. The plaintiff instituted a claim against the defendant for injuries he sustained in a motor vehicle collision which occurred on 4 March 2012. At the time of the collision, the plaintiff was cycling along the N1 Road in Elandslaagte, Ladysmith when he was knocked down by a motor vehicle, bearing registration number NN [...] and driven by the insured driver, Mr Thembinkosi Charles Mkhonza.

2. As a result of the collision and the negligence of the insured driver, the plaintiff sustained a severe head injury, a fracture of the mandible and lost some teeth. At the time he was admitted to the Ladysmith Hospital his Glasgow Coma Scale was recorded to be 9/15. He remained unconscious for three days while in hospital and was hospitalised for a period of 4-6 weeks. Three days after he was admitted to hospital a tracheostomy was performed in order to open his air passages. For three months after his discharge he stayed at home recuperating and went back to work as a farm worker until he resigned in January 2015 due to the sequelae of his injuries.
3. Liability was settled at 80%/20% in favour of the plaintiff and an order to that effect was made on 9 October 2015. The issue of quantum was postponed *sine die*.
4. The plaintiff has abandoned the claim for past medical expenses. In respect of future medical expenses, the defendant has agreed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act.
5. The parties agreed that the issue of quantum of damages to be argued on the basis of the plaintiff's expert medico-legal reports without the necessity of having to call the experts as witnesses, with the defendant admitting the correctness of the opinions expressed by the experts. The defendant did not file any expert reports.
6. At the trial no evidence was adduced. The reports of the following plaintiff's experts were handed in by the plaintiff and were admitted without the necessity of having to call the expert witnesses, with the defendant admitting the correctness of the opinions expressed by the following experts:

10.1 Dr C Morare (general practitioner);

10.2 Mrs TMR Nape (occupational therapist);

10.3 Dr G Read (orthopaedic surgeon);

10.4 Prof DM Manyane (neurologist);

- 10.5 Mrs T Gama (industrial psychologist);
- 10.6 Mrs L Modipa (clinical psychologist);
- 10.7 Professor PL Lekgwara (specialist neurosurgeon);
- 10.8 Dr B Malakou (ear, nose and throat surgeon);
- 10.9 Dr NJB Kazadi (specialist psychiatrist);
- 10.10 Dr D Hofmann (plastic, reconstructive and cosmetic surgeon); and
- 10.11 Professor R Lurie (maxilla-facial and oral surgeon).

- 7. The defendant has also admitted the report of Dr G Read, the plaintiff's orthopaedic surgeon. Dr Read noted that the plaintiff did not have any orthopaedic injuries.
- 8. The issues to be determined are the appropriate contingency deductions to be applied to the award for loss of earning capacity and general damages. In line with Dr Morare's assessment, the plaintiff has suffered a serious injury and therefore qualifies for general damages.
- 9. It is common cause that at the time of the collision the plaintiff was 44 years old and had gone up to Standard 6 (grade 8) at school. At the time of the accident the plaintiff worked as a general worker at a farm and earning R2300. After the accident the plaintiff returned to work and for reasons which will become apparent below, he resigned from his employment at the beginning of 2015.
- 10. Furthermore, the following facts are also common cause:

- 10.1. on admission to hospital the plaintiff was unconscious and his GCS measured 9/15;

- 10.2. the plaintiff sustained a severe head injury, facial fractures and loss of

teeth;

11. Professor Lekgwara (specialist neurosurgeon)'s prognosis is that the plaintiff suffers chronic post-concussion headaches and will require long term treatment for the headaches. Furthermore, Professor Lekgwara was of the opinion that the plaintiff had a 5- 100/o chance of developing late onset post-traumatic epilepsy.
12. In Dr Manyane (neurologist)'s opinion that the plaintiff suffers from an amnesic syndrome which has resulted in him being forgetful, un-attentive and unable to recall things said to him. Further, that the plaintiff has undergone a personality change and has become irritable. Dr Manyane was of the opinion that the plaintiff was suffering from severe depressive symptoms and that the neuro-cognitive impact of the brain injury was permanent and irreversible. The plaintiff's wife also informed Dr Manyane that after the accident the plaintiff was so forgetful that he usually gets lost in environments he is familiar with.
13. According to Dr Kazadi, the psychiatrist, the plaintiff presented symptoms of a chronic debilitating neuropsychiatric condition which will affect the plaintiff socially and occupationally. He is of the opinion that the plaintiff's prognosis opens him to the risk of suicide.
14. According to Mrs Modipa, the clinical psychologist, as a result of the head injury the plaintiff sustained, the plaintiff suffers from severe vulnerabilities, cognitively and emotionally, which sequelae she considers to be permanent if one takes into account the number of years which have lapsed since the accident and no significant improvement has been noted. The plaintiff reported that before the accident he had a relatively healthy life. According to Mrs Modipa, post-accident the plaintiff has become withdrawn and does not socialise anymore due to his depression and irritability.
15. Dr Malakou, the ear, nose and throat surgeon, indicates that the plaintiff sustained a hearing loss and severe conductive loss in his left ear which has resulted in a chronic ear infection. In his opinion the plaintiff will need a typanomastoidectomy operation in order to clear the ear infection.

16. Dr Hofmann, the plastic, reconstructive and cosmetic surgeon, indicates that the plaintiff has scarring on his face and neck which is sometimes painful and has affected the plaintiff psychologically. According to Dr Hofmann, people with scarred faces were not favourably considered by prospective employers. Dr Lurie, the maxilla-facial and oral surgeon indicates that as a result of the head injury the plaintiff sustained, he also suffered a 'jiggered cut' around the nose, lost teeth and complains of a painful jaw when he chews. He is of the opinion that the plaintiff will need to undergo medical treatment to restore his lower anterior teeth.
17. The occupational therapist, Mrs Nape, opines that as a result of the accident, the plaintiff may have difficulty in working in an environment where he has to lift objects above his head height or to carry of heavy objects. Further, Mrs Nape is of the view, in light of his injuries, that the plaintiff would no longer be able to work as a farm worker and that he qualifies to perform sedentary to light type of work with accommodation from his co-workers.
18. Mrs Gama, the industrial psychologist, indicates that at the time she consulted with the plaintiff, he informed him that he earned R2 100.00 per month. She is of the opinion that but for the accident, the plaintiff would have been able to work in the unskilled sector until his retirement at the age of 65 years. However, due to the consequences of the injuries he sustained in the accident, the headaches, deafness in the left ear, problems with his eyesight and lower back pain, his employability has been compromised. Mrs Gama basis her prognosis on the fact that when she interviewed the plaintiff's former employer, he had informed him that when the plaintiff returned to work after his recuperation, he struggled to cope and was dependent on his co- workers. It is Mrs Gama's opinion that due to his injuries the plaintiff is no longer in a position to do manual work. Even though he qualifies to sedentary to light work, it will be impossible for him to find employment as he lacks experience and education. Mrs Gama's conclusion is that the plaintiff has become unemployable and has suffered a total loss of earnings.
19. It was suggested that the calculations done by Algorithm Consultants & Actuaries CC ("Algorithm") based on the report of the industrial psychologist, Mrs Gama, be used

in the calculation of the loss of earnings. Further it was submitted by counsel for the plaintiff that for past loss of earnings a contingency of 5% and 10% should be applied to the uninjured earnings for past and future loss of earnings. Further that in regard to post accident contingencies a 5% and 0% contingency deduction should be applied for past and future loss of earnings, respectively. It is the plaintiff's submission that a much lower contingency percentage is used in older people. Due to the fact that the plaintiff was 47 years old and has been rendered unemployable, the loss of past and future earnings and the contingencies applied by the actuaries should be adopted.

20. Even though the court has been presented with actuarial calculations on the assessment of loss of future earning capacity, the court retains the discretion to determine the appropriate award. In *Southern Insurance Association v Bailey* NO¹ the court further stated that:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of loss.

It has been open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumption resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative."

21. At the time of the accident the plaintiff was 44 years old and had a healthy lifestyle. The experts are in agreement, taking into account the debilitating headaches that the plaintiff now suffers from, a change in his personality and has become moody and

¹ 1984(1) All SA 98 (A) at 113G.

easily irritated. Further, as a result of the head injury he sustained, the plaintiff suffers from chronic headaches and has neuro-cognitive and neuro-psychological impairments. The injury has rendered him unemployable particularly as it was suggested by the occupational therapist, Mrs Nape, that the plaintiff was well suited for sedentary to light work. However, due to his lack of experience and low education, the plaintiff is unlikely to find employment in those categories.

22. I am of the view that the contingencies suggested by plaintiff's counsel are reasonable. The actuary postulates that the plaintiff uninjured could have worked until he reached the normal retirement age of 65 years. I am of the view that the amount of R286 055.00 is fair compensation for loss of earnings.
23. With regard to general damages plaintiff is claiming the suggested amount of R1 200 000.00. The defendant submitted that an amount of R600 000.00 would be reasonable as general damages. The court was referred to various comparable cases. The closest in comparison in relation to the injury sustained and the sequelae are *Torres v Road Accident Fund*² and *Radebe v Road Accident Fund*.³
24. In *Torres* matter (*supra*) the plaintiff was 24 years old at the time of the accident. The injuries he sustained were the following: severe diffuse brain injury, soft tissue injury to the neck, face and chin. As a result of the injuries he sustained, the plaintiff suffered neuro-cognitive and neuro-behavioural deficits associated with concentration, working memory and impulse control. At the time of the collision, the plaintiff was running a successful jewellery design business which he no longer ran. Plaintiff was awarded R600 000.00 as general damages in March 2007. At today's values this amount would be R1 025 000.00. In the *Radebe* matter (*supra*) the plaintiff sustained a severe brain injury and suffered from a permanent and irreversible organic brain syndrome. His prognosis was that he was likely to develop post traumatic epilepsy. The court awarded an amount R936 000.00 (1016 values) as general damages.

² Vol 6 **Quantum of Damages in Bodily and Fatal Injury Cases**, Corbett and Honey.

³ 2013(6A4) QOD 220 (GNP).

25. I am of the view that, taking into account the fact that prior to the accident the plaintiff enjoyed a healthy lifestyle, and was working, that post-accident he not only suffers from mental and emotional impairment but also has scarring on his face and neck, the amount of R1 100 000 000.00 for general damages is fair and reasonable compensation under the circumstances.

26. There is common cause that there is a need for the funds in this awarded. Included in the amended draft order, provision is made for the creation of a trust for the benefit of the plaintiff.

27. In the result, an order in terms of the amended draft order marked "X" is made:

NP MNGQIBISA-THUSI
Judge of the Gauteng High Court

Appearances:

For Plaintiff: Adv M Hugo

Instructed by: Mbowane Attorneys

For Defendant:

Instructed by: Tsebane Moloba Inc

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

On 7 MAY 2016

BEFORE THE HONOURABLE Ms Justice Mngqibisa-Thusi
COURT 6A

Case No: 27951/2014

In the matter between:

MADONSELA, J M

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

An order in the following terms is hereby made:

1. The defendant is ordered to pay to the plaintiff, in full and final settlement of his damages, the amount of

1.1. GENERAL DAMAGES: R880 000.00 (EIGHT HUNDRED AND EIGHTY THOUSAND RAND) (being 80% of R1 100 000.000).

1.2. LOSS OF EARNINGS (PAST AND PROSPECTIVE): R228 844 (TWO HUNDRED TWENTY EIGHT THOUSAND EIGHT HUNDRED AND FORTY

FOUR RAND) (being 80% of R486 055.00);

TOTAL PAYABLE: R1 188 844, 00 (ONE MILLION ONE HUNDRED EIGHTY EIGHT THOUSAND EIGHT HUNDRED AND FORTY FOUR RAND)

payable on or before 28 JUNE 2016, into the plaintiff's attorney's trust account, the details of which are as follows:

ACCOUNT BANK HOLDER: MBOWANE ATTORNEYS INCORPORATED
BANK: FIRST NATIONAL BANK
ACCOUNT NUMBER: [...]
BRANCH: HATFIELD

2. The defendant is ordered to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996 (as amended), for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment or rendering of a service to the plaintiff, or the supply of goods to the plaintiff, arising out of the injuries sustained by the plaintiff in the motor vehicle collision on 4 March 2012, after such costs have been incurred and upon proof thereof, LIMITED TO 80%.
3. The defendant is ordered to pay the plaintiff's taxed or agreed party to party costs on a High Court scale, until date of this order, including but not limited to:
 - 3.1. the reasonable taxable fees in respect of examinations and reporting special investigations, RAF4/serious injury considerations and/or reporting, preparation, reservation and trial attendance, if any, of the following experts that the plaintiff gave notice of:
 - 3.1.1. Dr C Morare (general practitioner);
 - 3.1.2. Mrs L Modipa (clinical psychologist);
 - 3.1.3. Dr G Read (orthopaedic surgeon);

- 3.1.4. Mrs T Gama (industrial psychologist);
 - 3.1.5. Dr D Hofmann (plastic, reconstructive and cosmetic surgeon);
 - 3.1.6. Dr B Malakou (ear, nose and throat surgeon);
 - 3.1.7. Dr D M Manyane (neurologist);
 - 3.1.8. Professor Russell Lurie (maxilla-facial and oral surgeon);
 - 3.1.9. Dr N J B Kazadi (specialist psychiatrist);
 - 3.1.10. Mrs T M R Nape (occupational therapist);
 - 3.1.11. Professor P L Lekgwara (specialist neurosurgeon).
- 3.2. The costs of obtaining such expert medico-legal reports/addendum reports/RAF4 Assessments from the above experts, inclusive of the plaintiff's reasonable travelling and/or accommodation costs in respect thereof;
 - 3.3. The full costs of counsel;
 - 3.4. The plaintiff's trial costs for 7 May 2016, inclusive of the reasonable travelling and/or accommodation costs for trial preparation and trial attendance, as well as such costs for any witnesses of the plaintiff;
 - 3.5. The plaintiff's wife, Mrs Madonsela, is declared a necessary witness for purposes of trial;
 - 3.6. The plaintiff's costs in trial preparation;
 - 3.7. The costs of one consultation with the plaintiff for consideration of the

settlement tender made by the defendant, and the consideration thereof by the plaintiff's counsel.

4. The plaintiff's attorney is ordered to cause a trust to be established and is authorised to sign all documents necessary for the formation of the trust for the benefit of J M MADONSELA, with identity number 680808 6335 080, such trust to be held by _____ in accordance with the the written undertaking, dated _____, hereto attached as **ANNEXURE A**.
5. The defendant is ordered to pay, for as long as the trust remains in existence:
 - 5.1. the costs of the appointment of the trustee(s), such costs to be limited to the costs of a curator *bonis*;
 - 5.2. the costs, remuneration and disbursements of the trustee(s) in the administration of the trust; and
 - 5.3. the costs of furnishing annual security.
6. The defendant's liability for such costs as stipulated in paragraph 5 above shall not exceed the costs of the appointment and remuneration of a curator *bonis*.
7. The trustee(s) is to pay the plaintiff's attorney's costs in terms of the contingency fee agreement entered into between the plaintiff and the plaintiff's attorneys.
8. The trustee(s) shall be entitled to call for an appropriate taxation of the plaintiff's attorneys (attorney and own client) cost disbursements if deemed necessary.
9. The trust instrument contemplated here above shall make provision for, *inter alia*, the following:
 - 9.1. that J M MADONSELA be the sole beneficiary of the trust;

- 9.2. that the trustee(s) 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 obligations 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 if so required by the Master of the High Court;
- 9.3. the duty of the trustee(s) to disclose any personal interest in any transaction involving the trust property;
- 9.4. the termination of the trust shall occur when J M MADONSELA dies, otherwise subject to the leave of the High Court upon application, the costs of any such application which shall be costs in the main action herein, and for which purposes notice of such application is to be given to the defendant.
- 9.5. the trustee(s) shall be entitled, if he/she deems it necessary, to utilise the income of the trust for the maintenance of J M MADONSELA and/or his spouse and maintenance dependent children;
- 9.6. that the trustee(s) to be appointed to provide security to the satisfaction of the Master of the High Court;
- 9.7. that ownership of the trust property shall vest in the trustee(s) of the trust in their capacities as trustee(s);
- 9.8. procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by the honourable Court;
- 9.9. that any amendment of the trust instrument be subject to approval and leave of the Master of the honourable High Court and/or this honourable Court;

- 9.10. in the event of the death of J M MADONSELA, such trust shall terminate and the trust assets shall pass to the estate of J M **MADONSELA**;
- 9.11. that the trust property and the administration thereof be subject to an annual audit.
10. That the provisions of such trust document referred to here above shall be, in accordance with the provisions of the Trust Property Control Act, Act 57 of 1988, subject to the approval of the Master of the High Court.
11. The plaintiff shall –
- 11.1. if the costs of suit are not agreed upon, serve a notice of taxation on the defendant's attorneys of record; and
- 11.2. allow the defendant 14 (fourteen) court days, after the *allocatur* has been made available to the defendant, to make payment of the agreed or taxed costs.

BY ORDER:

REGISTRAR

Counsel for Plaintiff: M Hugo

Counsel for Defendant: _____