


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO 31473/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
E.M. KUBUSHI	DATE 27/1/2019

In the matter between:

PESTANA, NEL PAUL

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

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JUDGMENT

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KUBUSHI J

## INTRODUCTION

[1] The plaintiff's claim is based on a motor vehicle accident that occurred on 27 May 2016 when he was a passenger. The plaintiff was 41 years old at the time of the accident. He is presently 45 years old married with five children. At the time of the accident, he was employed as a rigger/foreman at a rigour signage company.

[2] The liability has been resolved between the parties at 100% in favour of the plaintiff.

[3] When the parties appeared before me only the issue of *quantum* stood to be determined. The heads of damages prayed for by the plaintiff were for future medical and hospital expenses, past medical and hospital expenses, loss of earnings and general damages.

[4] The parties had already made head way in that the other heads of damages had been settled. The defendant undertook to furnish the plaintiff with an undertaking in terms of section 17 (4) of the Road Accident Act, 1996 (Act 56 of 1996) as amended, in respect of all future medical and hospital related expenses. As regards damages for past medical and hospital expenses the plaintiff had lodged a claim with the Workmen's Compensation Commissioner and was awarded an amount of R975 000. The parties agreed that this head of damages should be postponed *sine die* for further handling between them. The plaintiff undertook to waive any further claims against the Workmen's Compensation Commissioner.

[5] Consequently, only the claim for loss of earnings and general damages had to be argued before me. However, as regards the loss of earnings, counsel for the defendant asked this head of damages to be postponed *sine die* to allow for consultation with a senior claims' handler of the defendant and instructions in regard to the new calculations that were provided by the plaintiff on the day. By agreement between the parties this head of damages was allowed to stand down until 21 June 2019 for argument and/or possible settlement.

I deal hereunder with general damages

[6] The parties agreed that arguments on the general damages would be based on the admitted medical reports of their respective experts filed of record. As a result, I was provided with Trial Bundles containing the medico-legal reports of the respective experts

#### GENERAL DAMAGES

[7] In the particulars of claim the plaintiff claims general damages in the amount of R1 500 000 which it is claimed is fair and reasonable compensation for the serious injuries suffered by the plaintiff. The defendant on the other hand submits that the amount claimed as compensation for general damages is excessive under the circumstances and that an amount of R400 000 would be fair and reasonable

[8] Of importance is that both parties are agreed that the plaintiff has suffered serious injuries and ought to be compensated. What the parties are not agreed about is the amount of *quantum*. It is, therefore, expected of the two amounts proposed by the parties that I determine which is fair and reasonable under the circumstances pertaining in this matter.

[9] In support of their arguments for the amount they respectively submit is fair and reasonable, each party referred me to a number of previous judgments. The plaintiff's counsel referred me to the awards made for general damages in respect of various injuries in the following five judgments:

- i. *Schmidt v RAF* QD volume J2168 2006, where an amount of R600 000 was awarded in regard to the plaintiff's injuries that were aggravated by infection and the plaintiff had signs of a depressed mood. This amount of R600 000 awarded in 2006 translates to R1 285 000 in the present.
- ii. *Rou v RAF* QD Volume 6 J259 2010, where the plaintiff suffered pure orthopaedic injuries and was awarded an amount of R650 000 which translates to the present value of R1 043 000.
- iii. *Tsotetsi v RAF*, whereat the plaintiff suffered a whiplash injury and head injury with no infection and the *sequelae* of the plaintiff *in casu*. The

plaintiff was awarded R850 000 which in the present value might be in the vicinity of R1 000 000 or perhaps slightly less.

- iv. *Torres v RAF* QD Volume 6 A4-1 2007, in which the plaintiff suffered more serious injuries than the plaintiff *in casu* but did not have the same *sequelae* of the plaintiff in this matter. The plaintiff in that judgment was awarded R600 000 which amount converted to approximately R1 200 000 in 2018.
- v. *Malela v RAF* QD Volume 6 C3-17 2012, the plaintiff herein suffered back injuries equivalent to the injuries of the plaintiff *in casu* and was awarded an amount of R150 000 which converted to R210 000 in 2018. There was nothing specific in this case about internal injuries like in the case of the plaintiff in the current matter.

[10] Conversely, the defendant's counsel referred me to only one case, being *Tsotetsi v RAF*, which was quoted by the plaintiff's counsel. The defendant's counsel, conceding in argument that the plaintiff has suffered pain and continues to suffer pain, relied on this judgment for his submission that the amount of R400 000 is the appropriate amount to be awarded.

[11] Both counsel agreed that the judgments as referred to me should merely be regarded as guidance and not to be specifically followed by the court. Furthermore, counsel agreed that this case should be decided on its own merits. Therefore, I turn to consider the facts of this matter.

[12] It is common cause that the plaintiff suffers from *sequelae* as a result of the injuries sustained from the accident in question. The injuries of the plaintiff as set out in the particulars of claim are as follows: multiple lumbar spine fractures; injury to the thoracic aorta; open fracture of the right tibia and fibula; fracture of the sternum and rib; bilateral lung contusions and traumatic haemathoraces; liver injury; facial fractures; fractured right calcaneus; concussion; psychological and psychiatric

*sequelae* with major depressive disorder; nasal fracture and injury to the cervical spine.

[13] According to the neuro-spinal surgeon the plaintiff sustained multiple fractures of the face (both maxillae and the nose), which were treated conservatively. He sustained multiple fractures of the lumbar vertebrae which caused him to undergo a posterior spinal infusion. He fractured the right lower leg which was repaired surgically but remains un-united. The wound in the right lower leg developed an infection (rejected the bone graft) and the plaintiff had to be admitted for debridement to control the infection. He, also, had lung contusions with bilateral haemothoraces. He fractured the left rib and sternum and ruptured the anterior wall of the thoracic aorta. He had a contusion of the abdominal wall (with traumatic hernia) and sustained laceration of the liver. He sustained a soft tissue injury of the left hand.

[14] The plaintiff was found to have sustained a mild to moderate head injury which resulted in a mild to moderate long-term cognitive *sequelae*. He suffered cognitive and behavioural changes as a result of the brain injury. He struggles to concentrate and his memory is poor. He has become irritable and short tempered since the accident. He continues to suffer cognitive difficulties that were picked up by the neurosurgeon.

[15] In the opinion of the vascular surgeon, the plaintiff suffered blunt abdominal trauma, that is, a ruptured liver that was treated conservatively, and a large R loin hematoma with damaged muscle. He developed a type of hernia which was repaired with mesh.

[16] The plaintiff is said to have remarkably survived his injuries, but the right leg injury is still not resolved: he will need the plate removed, the sepsis cleared (still has sepsis three years after the accident) and later on an intramedullary nail inserted. If the sepsis remains unresolved there is a possibility of amputation below the knee. He has a risk of developing intestinal obstruction from post-operative adhesions.

[17] According to the orthopaedic surgeon's report, the assessment of which was done on 9 May 2019, the plaintiff sustained the following injuries: head injury, fractures of the nose and left and right maxilla and broken teeth, sternum fracture, post-traumatic aortic dissection, bilateral lung contusions and haemopneumothoraces, cervical spine fractures, lumbar spine fracture, right lower abdominal hernia which was repaired twice, a left hand laceration which has left bad scarring, fractures of the right tibia and fibula and medial malleolus – the medial surgical wound remains open with the plate exposed and on-going infection. The tibia is partially united and the fibula still has un-united fracture as well as a united fracture.

[18] As a result of the injury to the right lower limb he has an antalgic gait. He walks with his right foot extremely rotated. There is a wasting of the right thigh muscles, severe swelling distally, a large foul smelling open wound medially with the plate exposed and a general tenderness over the distal leg and ankle. There is also a comminuted fracture of the distal tibia with a plate and screws *in situ*, a partial/incomplete bony union of the comminuted fracture fragments. He requires a maxilla-facial and oral surgery for the severe scarring and disfigurement.

[19] It is not in doubt that the plaintiff suffered polytrauma and severe multiple injuries some of which remains problematic. Individually each injury is in itself serious and cumulatively they are extremely serious. All the criteria of general damages presents in the plaintiff's injuries, pain and suffering, loss of amenities of life and disfigurement. It is not in dispute, the experts are agreed, that the plaintiff has suffered pain and continues to suffer pain due to the injuries which continue to give him problems as afore stated. He will in future have to undergo several surgeries to attend to the recurring problems. He is badly disfigured due to the scarring to his face and other parts of his body including the right lower leg. He has, obviously, lost several amenities of life, which I do not intend to go into.

[20] The amount suggested by the defendant's counsel of R400 000 is extremely low in the circumstances of this case. This was brought by the court to counsel's attention during the hearing of this matter but he still insisted that the amount was

fair. In my opinion, the injuries sustained by the plaintiff are extensive and I do not think any amount to be awarded can compensate him for these injuries. A fair and reasonable amount in the circumstances is the amount of R1 500 000 as claimed.

#### LOSS OF EARNINGS

[21] When the parties appeared before me again on 21 June 2019 they had not settled the issue of loss of earnings and had to argue. The arguments were based on two actuarial reports of the plaintiff. Both actuarial reports were prepared by Ivan Kramer CC and were based on the industrial psychologist's report of the plaintiff. The plaintiff relied on the actuarial report dated 30 May 2019 which provided for an amount of R1 515 231. The defendant, on the other hand, relied on the actuarial report dated 22 May 2019 which provided for a calculation of R811 434.

[22] The difference between the two actuarial reports is that the report dated 22 May 2019 was compiled on the basis of the industrial psychologist's assumption that plaintiff would be able to work until the retirement age of 65 years. The actuarial report dated 30 May 2019 was compiled on the revised industrial psychologist's assumption that the plaintiff will not be able to work until the retirement age of 65 years. The argument by plaintiff is that the calculations of 30 May 2019 disregard the fact that since the accident the plaintiff has been in an accommodated employment and that his employer, Mr Kemp, is contemplating selling the company due to its financial situation.

[23] The issue I have to decide in this regard is the retirement age of the plaintiff. Put differently, whether the plaintiff will be able to work until the retirement age of 65 years.

[24] It is common cause that the findings in the actuarial report are based on the plaintiff's industrial psychologist's report. It is the opinion of the industrial psychologist that the plaintiff has been severely compromised because of the severe

multiple injuries he sustained in the accident and the on-going sequelae. The plaintiff is presently employed in a sympathetic position and if he can lose his employment it will be difficult to get other employment.

[25] Probabilities are also that the plaintiff might lose this employment because his employer is contemplating selling the business. Therefore, probabilities are that he may not work until the retirement age of 55 years considering that he is presently 45 years old. In the re-calculations, the actuary has now taken this into account and in the actuarial report of 30 May 2019, is of the opinion that having regard to the accident, the plaintiff will continue to receive inflationary increases for the next five years and thereafter remain unemployed.

[26] I agree with the proposition that the plaintiff, having suffered from a decrease in productivity, is now a more vulnerable employee who is an unequal competitor in the open labour market. Of importance is that probabilities are that if he were to lose his job he would remain unemployed. It is, also, on this basis that I agree with the actuary that a deduction of general contingencies need to be made to allow for savings in travelling to and from work and the possibility of loss of income due to illness or unemployment.

[27] All the above-mentioned factors and all the other risks affecting the plaintiff's income should be taken into account in the general contingency deduction as proposed by his counsel at the rate of 15% premorbid and 40% post morbid.

#### CALCULATIONS

[28] Except for the contingencies, the parties are in agreement about the basis for the calculations. Therefore, the calculations are as follows.


	But for the accident	Having regard to the accident	Net loss
Gross accrued value of income	456 367	368 236	
Less Contingency	0	0	
Net accrued value of income	456 367	368 236	88 131
Gross prospective value of income	2 119 805	624 557	
Less contingency	317 971	249 823	
Net prospective value	1 801 834	374 734	1 427 100
Total value of income	2 258 201	742 970	1 515 231

[29] The plaintiff is, thus, entitled to be awarded an amount of R1 515 231 as damages for loss of income, which amount is fair and reasonable under the circumstances.

#### ORDER

[29] In the circumstances I make the following order: -

- 1 The Draft Order marked "XX" is made an order of court.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

**APPEARANCES:**

Counsel for Plaintiff

Instructed by

ADV I J Zidel

De Broglie Attorneys Inc

Counsel for Defendant

Instructed by

ADV M R Ngobeni

T M Chauke Inc

Date of Heard

31 May 2019

Date of Judgment

21 June 2019

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

**Case No: 31473/2017**

In the matter between:

**PESTANA, NEL PAUL**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

**DRAFT ORDER**

On 27 June 2019 at Court 6C before the Honourable Judge Kubushi; by agreement between the parties; it is ordered:

1. The Defendant shall pay to the Plaintiff the amount of R1 200 000 (One Million and Two Hundred Thousand Rand) in respect of general damages and the amount of R1 515 231 (One Million Five Hundred and Fifteen Thousand Two Hundred and Thirty Rand) 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. EM
2. Payment will be made directly to the trust account of the Plaintiff's attorneys:

Holder	De Broglia Attorneys Inc
Account Number	109 645 1867
Bank & Branch	Nedbank - Northern Gauteng
Code	198 765
Ref	P588

A-1

3. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party, such costs will include, but are not limited to the costs of Senior Counsel for the trial dates of 31 May 2019 and 21 June 2019; and
  - 3.1 The costs of all expert medico legal reports, addendum reports and joint minutes as well as the reasonable taxable, qualifying and reservation fees, if any, of such experts;
  - 3.2 The costs of the actuarial reports of Mr Ivan Kramer.
4. The Plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the Defendants Attorney of record.
5. The Plaintiff shall allow the Defendant 14 (Fourteen) days to make payment of the taxed costs.
6. There is no fee agreement in terms of The Contingency Fees Act, No. 66 of 1997 between the Plaintiff and the Plaintiff's Attorneys.
7. The Plaintiff is declared a necessary witness.
8. The Plaintiff waives his claim against the WCC/COIDA in respect of loss of earnings arising from the accident of 22 May 2016.
9. Past medical and hospital expenses is separated and postponed *sine die*.

**BY ORDER**

**REGISTRAR OF THE HIGH COURT**

Plaintiff's counsel: Advocate Ian Zidel SC - 083 271 0456

Noted by: Ms T. Melville - 082 897 6355

Defendant's counsel: Advocate Musa - 063 832 3181

