IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 7857/2018

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
30 November 2022

In the matter between:

MBEWE: PETRUS SHIMANE Plaintiff

and

ROAD ACCIDENT FUND Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **30 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff in this matter was injured in a motor vehicle accident during the night of 9 November 2016. He was driving a motorcycle which collided with a motor vehicle around or near R556 Road in Ledig, North West Province. He was 31 years old at the time of the accident as he was born on 27 August 1985. He sustained the following injuries from the accident: fractured left knee; fractured right femur, and fractured right fibula. He blamed the negligent driving of the driver of the motor vehicle ('insured vehicle') to have caused the accident.

[2] On 6 February 2018, the plaintiff issued summons against the Road Accident Fund, the defendant, in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the Act') claiming compensation initially in the amount of R530 000 for damages he allegedly suffered due to the injuries from the accident. On 6 May 2022, this Court *per* Tlhapi J granted an order whereby the defendant's defence in the principal action was struck out and, thenceforth, the matter proceeded towards the granting of default judgment at the instance of the plaintiff.

[3] On 5 October 2022, the matter came before me for a hearing *via* video link. Mr H Schouten appeared on behalf of the plaintiff. There was no appearance on behalf of the defendant, ostensibly, due to the striking out of its defence referred to above. I reserved this judgment after oral submissions by counsel. Counsel, gratefully, had also filed detailed written submissions (incorporating the material contained in a document labelled 'Exhibit A') on behalf of his client in terms of the practice directives of this Division.

[4] Counsel for the plaintiff advised that issues relating to liability or merits have been settled on 80/20% basis in favour of his client, the plaintiff. This meant that the issues remaining for determination in this matter are those relating to the *quantum* of the plaintiff's claim for future medical, hospital and related expenses;

past and future loss of income or earnings, and general damages.

Evidence and submissions on behalf of the plaintiff

General

[5] The plaintiff's highest academic achievement is grade 11. He quit school whilst in grade 12 in 2001. His reason for quitting, reportedly, is that he had to attend to family responsibilities and could not afford to go back to school. He has on-the-job training as an electrician and also holds a motor vehicle driving licence.

[6] The plaintiff's employment history includes the following. As from 2002 to 2006 he worked as a semi-skilled electrician at Robbies Electrical. He quit this job, reportedly, due to his father's passing, as he had to return home. During 2007 to 2009, the plaintiff worked as a semi-skilled electrician at Edison Power. Again he quit this job to return to his previous job at Robbies Electrical. He worked there from 2010 to 2015 as a semi-skilled electrician, but again quit for a better opportunity. From January 2016 until he was involved in the accident he was working as a semi-skilled electrician and technician at DMG Automatics. He convalesced for 13 months, receiving payment for 3 months and unpaid leave for the remaining 10 months. In 2017, DMG Automatics was liquidated and taken over by OCS Africa. The plaintiff worked for the latter entity from January 2018 to March 2020 when his contract expired and was not renewed.

Plaintiff's injuries and/or sequelae /expert medico-legal reports and opinion

[7] The plaintiff had obtained medicolegal reports by experts who had assessed his injuries and their *sequelae*. The experts had subsequently filed affidavits to confirm their respective opinions and other contents of their reports as envisaged by the practice directives of this Division. Also, this was necessary for purposes of an order in terms of Rule 38(2)[1] of the Uniform Rules of this Court. I allowed for the

[1] Uniform Rule 38(2) reads as follows: "The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such

evidence to be adduced or given on the basis of the filed affidavits.

[8] The aforementioned reports and affidavits include an RAF 4 Form (i.e. serious injury assessment report form) by Dr Read, an orthopaedic surgeon, who qualified the plaintiff's injuries as serious in terms of the narrative test 5.1 (i.e. serious long-term impairment or loss of a body function). There is also another RAF 4 Form completed by Professor Chait, a plastic surgeon, who qualified the plaintiff's injuries as serious by stating that they equate to whole person impairment or WPI of 35% and in terms of the narrative test 5.2 (i.e. permanent serious disfigurement). I find that these assessments and noting to suffice to qualify the plaintiff's entitlement to claim compensation for general damages due to the injuries sustained from the accident and *sequelae*.

[9] It is submitted that in addition to the injuries stated above, the plaintiff also has scarring on the right side of the lateral buttock area; right side of the trochanteric area; right side of the lower lateral thigh area; right upper medial calf region; left lateral lower thigh area; left lateral knee area extending onto the upper shin; left upper lateral shin area; left upper medial shin area; left upper anterior shin region; right lower medial calf region, and just above the left medial malleolar area on the left hand side.

[10] The plaintiff was ferried from the scene of the accident by an ambulance to hospital.

He spent about 2 months in hospital. His treatment included open reduction and internal fixation of the femur fracture with the fixatives still in *situ*. The plaintiff's left tibial plateau fracture was also treated by way of open reduction and internal fixation, after it was initially treated by way of immobilisation with an external fixator for about two weeks. Also with the internal fixatives still remaining in *situ*. The internal fixatives, fracture sites and anterior part of right knee are the source of pain for the plaintiff, which exacerbates during physical activities and cold weather. The plaintiff resorts to resting and occasional use of analgesics to alleviate the pain.

---

witness can be produced, the evidence of such witness shall not be given on affidavit."

[11] The plaintiff's current main complaints relate to his lower limbs and include symptoms suggestive of post-traumatic chondromalacia of his right knee (occasionally); post fracture syndrome of his right femur, and ongoing left knee symptoms. There are no symptoms regarding the plaintiff's right fibula. The plaintiff's lower limb symptoms are also linked to his complaints regarding difficulty in standing for long periods of time, running, walking for a distance, kneeling, crouching, picking up heavy objects and taking a flight of stairs. The plaintiff also suffers from headaches. Also, the plaintiff has developed fear of travelling, ostensibly by vehicles, particularly as a passenger. Prior to the accident, the plaintiff enjoyed running and playing soccer in his leisure time. He now struggles to find a comfortable position to sleep in. And the plaintiff is short-tempered, angry, sad and frustrated regarding his deficits emanating from the accident.

[12] It is submitted in as far as the *sequelae* of plaintiff's injuries are concerned that he experienced a considerable degree of pain and suffering given that fractures of the long bones are exceedingly painful injuries. His lower limbs were the worst affected by his conditions. Also, the plaintiff has prospects of further painful surgery ahead of him. Although further treatment is expected, this will not rid the plaintiff of his ongoing significant disability related to the accident. The prognosis is poor with regard to the plaintiff's left knee. According to the orthopaedic surgeon the plaintiff's left knee would require long-term conservative treatment. The same would apply to the symptoms on the plaintiff's right femur and right knee. Further, the internal fixatives can be removed surgically from his right femur and left tibia. The orthopaedic surgeon recommends specified further treatment of the plaintiff's right femur, left tibia and left knee. He opines that due to the fact that the plaintiff is still young, he should be treated conservatively for as long as possible. He may require within the next 10 to 15 years a left knee replacement, with a revision knee replacement every 10 to 12 years.

[13] It also submitted and borne by the evidence that the plaintiff's limb length as measured from the anterior, superior iliac spine to the sole of the foot is approximately 1 cm shorter on the left than the right. The plaintiff limps due to deformity on his left knee. There is severe deformity of the left knee as compared to the right knee.

[14] On the other hand, the plastic surgeon opined that a number of the plaintiff's scars could be improved surgically. The scars, reportedly, could all be improved by excising the stretched, irregular and thickened parts of the scars and closing of the wounds directly, but the plaintiff will be left with permanent disfigurement in the scarred areas. However, the scars on his left knee and shin are unstable and could be subject to trauma and breakdown, which may require further surgery. Although, employment opportunities and recreational activities, in the future, would need to consider these, according to the plastic surgeon the scars are not capable of any functional disability, apart from pain and discomfort in the region of their location.

[15] The plaintiff was away from work for nearly a year following the accident. But thereafter he was able to return to his pre-accident employment as an electrician and technician with DMG Automatics. He had been with this employer for a period of four years when he met the accident. He was deployed on the Skytrain at Sun City Resort on a high voltage site. After DMG Automatics was liquidated in April 2018 the Skytrain contract was awarded to a new company which employed the plaintiff on a short-term contract until March 2020. The plaintiff, reportedly, had considerable difficulty with his duties to work following the accident. According to him the non-renewal of his contract was linked to his loss of productivity related to the accident.

[16] The plaintiff pre-accident job fell with the category of medium physical demand with aspects of heavy demand level work. With further treatment, the plaintiff, post-accident, would require sedentary work that does not place excessive strain on his left knee. It is submitted that his pre-accident job is not found suitable to the plaintiff's post-accident condition.

[17] The results of the evaluation performed by the occupational therapist revealed that the plaintiff is best suited to perform sedentary physical demand work with limitations in all of his mobility aspects even though he was able to achieve lower range medium demand aspects. He will, therefore, require to be accommodated when it comes to strenuous and repetitive mobility tasks of both knees, particularly on his left knee. The same would apply to load-handling for the sake of knee joint preservation. The use of assistive devices to optimise functioning, among others, will be beneficial. It is concluded that the current indications are that the plaintiff does not

meet all of the physical demand aspects of his pre-morbid vocations as an electrician and/or technician. He would struggle to perform the majority of the physical demand requirements of his pre-morbid vocation, given his mobility limitations and pain. He would most likely require extensive suitable accommodations. It is also opined that the plaintiff is not suited to light to very heavy demand work within the open labour market. Due to his limitations and despite the recommended intervention and treatment, the plaintiff will remain best suited to sedentary type of work, such as supervisory or administrative (office-based) type work in the event that he regains future employment.

[18] Given the plaintiff's current physical fallout, pain and anticipated future left knee deterioration, he would most likely find it markedly difficult to secure employment within the open labour market within his fields of experience and the work fields with the light to heavy demand. He is highly likely to remain unemployed for a long time, including when consideration is given to the economic and employment climate in the country.

[19] Without the accident, the plaintiff would have been able to secure employment and utilise his work experience as an electrician and technician, albeit that he lacks the necessary qualifications, to continue to work in this capacity. With increase in his work experience, it is postulated the plaintiff would most likely have been able to secure a supervisory position or a more skilled role with an increase in earnings. He would have continued working until retirement by the age of 65.

[20] Now that the accident has occurred, the industrial psychologist's opinions incorporating the opinions of other experts are to the following effect. The plaintiff will no longer be able to reach his pre-accident potential in as far as his career and earnings are concerned. He, thus, would suffer loss of vocational capacity and productivity due to the physical injuries sustained in the accident. The plaintiff will probably remain unemployed for the remainder of his working life. This is so, despite the recommended treatment and interventions. He will remain limited to sedentary work, for which he lacks the requisite educational qualifications and experience. However, the plaintiff's future best-case career scenario is that he may probably secure employment or some form of participation in an informal capacity as an

assistant electrician with light electronic maintenance work on a part-time basis, earning a limited income until retirement at the age of 65.

[21] Given the above information, it is recommended that a higher-than-normal post- accident contingency deduction for unemployment be applied. The risk of early retirement due to problems with the left knee ought to be acknowledged through a higher than normal post- accident contingency deduction.

[22] The actuary prepared calculations to assist in determining the plaintiff's past and future loss of earnings and earning capacity. It is submitted that a higher post-morbid contingency deduction is warranted based on the facts of this case. I will return to this below.

General damages

[23] I have already mentioned above that I find the injuries sustained by the plaintiff from the material accident and *sequelae* to be serious and, therefore, qualifying him to claim general damages.

[24] Counsel for the plaintiff, ably, reminded the Court of the principles relating to assessment of non-patrimonial damages, mainly, from the authority of decided cases. Of cardinal importance is the principle that such assessment cannot be done with mathematical precision, but with a judicious exercise of the discretion of the Court to arrive at a fair and reasonable amount given all facts relevant to the matter under determination.[2]

[25] Past awards in comparable cases afford a useful guide in the determination of general damages. The process of comparison is not a meticulous examination of awards and should not interfere with the Court's general discretion.[3] The amounts awarded in previous awards must be adjusted to provide for the erosion of the value

[2] Putt v Economic Insurance Co 1957(3) SA 284(D), 287; Sandler v Wholesale Coal Supplies 1941 AD 194, 199.
[3] Protea Assurance v Lamb 1971(1) SA 530 (A) 535H-536A.

of money.[4]

[26] Plaintiff's counsel cited the following comparable cases to assist the Court in the determination of a fair and reasonable amount to be awarded to the plaintiff under the specific circumstances of this matter:

> [26.1] *Mgudlwa v Road Accident Fund*:[5] this case concerned a 34-year-old claimant who was a teacher by profession. The injuries of this claimant were the fractures of the femur and tibia. The claimant was in traction for three and a half months. There was also deformity of the proximal end of femur with left leg being 5 cm shorter than right leg. This had resulted in diminished range of motion of the leg, hip and knee. There was also scoliosis of the spine. The claimant was forced to make use of a crutch to aid mobility. Further surgical interventions included the following: bone grafting, arthroscopic debridement and total knee joint replacement, and realignment of the fractured femur. The claimant was no longer able to play social soccer. The award made by the Court in February 2010 was in the amount of R300 000 which equates to an amount of R540 900 in current terms.
>
> [26.2] *Ndlovu v Road Accident Fund*:[6] This case concerned a 38-year-old female storekeeper whose injuries comprised compound factures of both lower legs and fracture of ankle. She had sustained compound fractures of the left tibia and fibula with a large lateral degloving soft tissue injury. She also sustained compound fractures of the right tibia and fibula, as well as a fracture of the medial malleolus of the left ankle. The treatment received by the plaintiff included internal fixation of both tibial fractures with intramedullary locking nails and screws, internal fixation of the left medial malleolar fracture with two cancellous screws. The wound on the left shin was grafted with donor's skin harvested from the anterior aspect of the left thigh. She was hospitalised for three weeks, used a wheelchair for six weeks and operated on crutches for many weeks. She has been left with painful and unsightly scars, has nightmares and faced the prospect of further surgery and skin-

[4] Protea Assurance v Matinise 1978(1) SA 963 (A) 974D
[5] Mgudlwa v Road Accident Fund 2011 (6E3) QOD 1 (ECM).

grafts. She endured pain in her legs which leads to further pain, tiredness and loss of concentration. All of these led to anxiety and depression. Proposed surgery was only expected to improve her situation, but she could never be restored to the position in which she was prior to the accident. In March 2015, the Court awarded this plaintiff and amount of R470 000 as compensation for her general damages which equates to the amount of R653 300 in current terms.

[27] It is submitted that the injuries sustained by the plaintiff in the matter under consideration are more severe than those sustained by the claimant in the comparable case of *Mgudlwa v Road Accident Fund*, referred to above, and which the award made currently equates to an amount of R540 900. On the other hand, counsel suggested an amount of R650 000, which means that this matter is considered more similar to that of *Ndlovu v Road Accident Fund* appearing above.

Revised actuarial calculations and further submissions

[28] On 11 November 2022, through my erstwhile registrar, I caused communication to be directed to the plaintiff's legal representatives, essentially along the following lines:

[28.1] that, a revised actuarial calculation be furnished in terms of which contingency deductions of 20% to the uninjured income of R4 510 400 and 25% to the injured income of R1 197 100, are applied.

[28.2] that, these contingencies were considered, in the main, due to the following reasons:

[28.2.1] the relative youthful age of the plaintiff;

[28.2.2] the fact that the plaintiff was able to continue working after the accident with no reported work problems and with the plaintiff only having lost his employment due to contract non-renewal

[6] Ndlovu v Road Accident Fund 2015 (7E4) QOD 18 (GSJ) (11 March 2015).

with no evidence to establish that the non-renewal or expiry of the employment contract was due to his accident- related deficits, and

[28.2.3] the fact that the plaintiff could still use the experience he has as electrician/technician to acquire new formal employment and ought not to be only restricted to the informal sector.

[28.3] that, when filing the revised calculation the legal representatives were welcome to include further submissions as to why the suggested contingencies should not be applied.

[29] The plaintiff's legal representatives responded on 14 November 2022 and stated that the plaintiff would in respect of his claim for future loss of earnings and earning capacity instruct his actuary to apply the suggested contingencies as the plaintiff accepts the proposed contingency deductions and, therefore, no further submissions will be necessary. However, the plaintiffs legal representatives enquired what the position was with regard to past loss of earnings.

[30] I sought to clarify the suggested contingencies regarding the past loss and explained that, mainly, this was for the same reasons as future loss and due to consideration of plaintiff's historical earnings averaging R9 600 per month stretching over a period of 41 months. On 21 November 2022, the plaintiff's counsel sent communication to my erstwhile registrar, reiterating the plaintiff's acceptance of the application of the contingency deductions suggested by the Court on the future loss of earnings calculation, but criticising the contingency deductions suggested by the Court on the past loss of earnings. Without repeating counsel's submissions in this regard, most of which I found valid, suffice to state that on 28 November 2022 I caused another communication to be directed to the plaintiff's legal representatives requesting a revised calculation which include a 10% contingency deduction with regard to plaintiff's past loss. This was in line with counsel's submissions and my reconsideration of the facts against those submissions.

Conclusion

[31] In terms of the revised calculations received on 28 November 2022 from counsel and based on what is stated above, the amount of R423 270 is awarded to the plaintiff for his past loss of earnings and the amount of R2 739 370 will be awarded to the plaintiff for his future loss of earnings. The total amount of the award for past and future loss of earnings is R3 162 640.

[32] With regard to general damages I agree with counsel that the injuries and *sequelae* of the plaintiff in this matter are similar to those of the claimant in the matter of *Ndlovu v Road Accident Fund*, discussed above. But I am of the view that the injuries and effects of those in the latter case are more severe comparatively speaking than those of the plaintiff in this matter. This is not the same as downplaying the debilitating effect of the plaintiff's injuries and their effect on his enjoyment of amenities of life. I will award the amount of R600 000 as general damages.

[33] The total amount awarded to the plaintiff in respect of his current claims is R3 762 640 (i.e. R3 162 640 for loss of earnings plus R600 000 for general damages). When the 80/20 apportionment is effected the result is that the amount of R3 010 112 should be paid to the plaintiff by the defendant as damages or for his loss.

[34] Further, the claim for future medical, hospital and related expenses will be settled by an order directing the defendant to furnish the plaintiff with an undertaking envisaged by section 17(4)(a) of the Act for settlement of 80% of the future expenses to be incurred for treatment of the plaintiff due to the injuries sustained in the accident and their *sequelae*.

[35] Costs will follow the abovementioned outcome. The details of such costs appear in the order made below, essentially, in terms of the order contained in the draft order submitted by counsel in this matter.

Order

[36] In the premises, I make the order, that:

a) the defendant is liable for 80% of the plaintiff's proven or agreed damages;

b) the defendant shall pay to the plaintiff the post-apportioned capital amount of R3 010 112.00 (three million and ten thousand one hundred and twelve rand) as compensation for the plaintiff's total claim for delictual damages, which is calculated as follows:

general damages:	R 480 000.00;
past loss of earnings:	R 338 616.00, and
future loss of earnings and earning capacity:	R 2 191 496.00

c) the amount in b) hereof shall be paid directly into the bank account of the plaintiff's attorneys of record with the following particulars, which amount shall be paid within 180 (one hundred and eighty) days from the date the order was made:

NAME OF ACCOUNT:	**Wim Krynauw Attorneys**
Trust Account; BANK:	**ABSA Bank**
BRANCH CODE:	**632005**
BRANCH:	**Krugersdorp**
ACCOUNT NO:	**[....]**
REFERENCE:	**TM4463/LW**

d) no interest will be payable in respect of the total capital amount referred to in b) hereof except in the event of the defendant failing to effect payment within 180 (one hundred and eighty) days following this order, in which case interest will be payable on the said capital amount at the prescribed rate of interest per annum;

e) no interest will be payable on the costs referred to in f) hereof, except in the event of default payment of such costs, in which case interest will be payable at the prescribed rate of interest per annum;

f) the defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale up to date, which costs shall include, but not be limited to:

i. the reasonable costs in respect of the preparation of the medico legal reports, RAF 4 Serious Injury Assessments reports and actuarial calculations of the following experts:

1) Dr Read (Orthopaedic Surgeon);

2) Prof Chait (Plastic and Reconstructive Surgeon);

3) Ms. Georgiou (Occupational Therapist);

4) Mr. De Vlamingh (Industrial Psychologist), and

5) Munro Actuaries (Actuary).

ii. costs of counsel to date hereof, including the preparation for trial and attendance on 5 October 2022; Drafting of Exhibit A and Heads of Argument, as well as costs relating to the further submissions and other activities at the instance of the Court between 14 and 28 November 2022;

iii. costs of obtaining confirmatory affidavits for the above-mentioned experts for purposes of trial;

iv. any costs attendant upon obtaining of payment of the total capital amount referred to in b) hereof, as well as any costs attendant upon the obtaining of payment of the plaintiff's agreed or taxed costs.

v. subject to the following conditions:

1) the plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and

2) the plaintiff shall allow the defendant 180 (one hundred and eighty) court days

to make payment of the taxed costs.

3) no interest will be payable, except in the event of default of payment of such costs, in which case interest will be payable at the prescribed rate of interest per annum from date of taxation.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing:	**05 October 2022**
Date of Final Further Submissions:	**29 November 2022**
Date of Judgment:	**30 November 2022**

Appearances:

For the Plaintiff:	Mr H Schouten
Instructed by:	Wim Krynauw Attorneys, Johannesburg
For the Defendant:	No appearance