

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 70224/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
..... DATE SIGNATURE

In the matter between:

TAREKENG GRMISO HAWANDO

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

FLATELA A.J

[1] This matter served before me on 29 October 2021 for determination of quantum in respect of past medical expenses, future medical expenses, past loss of income; future loss of income and/or loss of earning capacity; as well as general damages. Liability has been conceded 100% in favour of the plaintiff.

[2] On 02 August 2018, the plaintiff sustained serious injuries on the Old South Coast Road, Isipingo, whilst a passenger in a motor vehicle with registration details [...] driven by E Segibo. The motor vehicle collided with a truck with registration details [...] driven by T Mambluere.

[3] The Plaintiff contends that the accident was caused by the negligent driving of the insured driver of a motor vehicle with registration details [...].

[4] The Plaintiff was admitted at Prince Mshiyeni Memorial Hospital on 02 August 2018 until 18 August 2018 whereafter he was transferred to Clairwood Hospital on 18th August 2018.

[5] The Plaintiff's initial Glasgow Coma Scale was 9/15.¹ This improved to 13/15 on 6 August 2018. Thereafter the Plaintiff's Glasgow Coma Scale fluctuated. Quite a number of entries reflected 14/15 until mid-August. He was transferred to Clairwood Hospital on 18th August 2018 where he received further rehabilitation. The Plaintiff was hospitalised at Clairwood Hospital for approximately two months and had to use a walker for two months, and thereafter crutches for another two months.

Injuries sustained

[6] In terms of the amended particulars of claim, the Plaintiff suffered the following injuries in the accident:

¹ This is a scoring system used to measure a person level of consciousness following a traumatic brain injury so as to gauge its severity. 13 to 15 represents mild, 9 to 12 is moderate whereas 8 or less is severe.

- Head injury with brain injury
- Fracture of the left clavicle. This fracture has healed with a 2cm shortening;
- Fracture of the midshaft right femur
- Fracture of the left proximal radius;
- A right mishit femur fracture

Loss of earnings

[7] The Plaintiff contends that he suffered loss of earnings in the value of R 1 417 155.00 (One million four hundred and seventeen Thousand One Hundred and Fifty-Five Rand). This contention is supported by the actuarial certificate from AC Strydom of SNG ARGEN -Actuarial Solutions. On 19 October 2021 Strydom calculated that the Plaintiff's past income loss from 2018 up until trial date to be R225 029 (two-hundred and twenty-five thousand. Future loss was calculated to be R1 640 767 (one million, six-hundred and forty-thousand, seven-hundred and sixty-seven rands).

[8] The plaintiff contends that a contingencies deduction of 5% for the past loss and 15% for future loss of income should be applied.

[9] AC Strydom actuarial projection report was based on the Industrial psychologists' report prepared by Prinsloo and Boshoff. The actuary set the Plaintiff pre-morbid at R73 000. The postmorbid projections were calculated from 1st January 2019.

[10] On general damages, the plaintiff contends that he suffered general damaged to an amount of R 1 800 000 .00 but he submits that R 1 500 000.00 is reasonable.

Notice to Amend and Application to Amend particulars of Claim

[11] On 19 October 2021, the plaintiff filed and served on RAF notice of its intention to amend its particulars of claim. This is the second amendment from the original claim.

[12] The first amendment was affected in March 2020. The original amounts claimed were amended to reflect as follows:

• Past Medical Expenses	R50 000.00
• Future medical expenses	R100 000.00
• Past loss of income	R200 000.00
• Future loss of income	R800 000.00
• General Damages	R1 000 000.00
TOTAL	R2 150 000.00

[13] In terms of this proposed amendment the general damages claimed were increased from R 1 000 000 to R 1 800 000. The future loss of earnings is increased from R 800 000 to R 1 203 377.00, Past loss of earnings R 213 778.00 The claim was increased in accordance with this latest amendment by more than ONE MILLION. A total amount claimed is R3 217 155. 00.

[14] The plaintiff contends that the basis for increasing the amounts claimed in respect of past-future loss of earning capacity is based on the plaintiff's actuarial calculation that was prepared on 19 October 2021. The plaintiff further contends that the basis for increasing the amounts in respect for general damages is based on the injuries sustained by the Plaintiff, as well as the sequelae as described by the medico legal experts.

[15] The plaintiff's contentions for increasing the amount claimed does not hold water in that the medico legal experts assessed the plaintiff during 2019/ 2020 and their reports are based on these assessments.

[16] This amendment was done hurriedly and very close to the trial date.

[17] The Modus operandi in this matter regarding amendment of expert's report and pleadings is similar to the modus operandi observed by Fisher J in the case of *MT v RAF, HM v RAF* ² .

Experts Report.

[18] The plaintiff relies on the evidence of various expert witnesses. In this section, I limit myself to the Plaintiff's loss of income, loss of earnings and loss of earning capacity, insofar as they are relevant to the Plaintiff's allegations about his loss of income and past earnings

[19] A court's approach to expert testimony was neatly summarised in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA). Howie J writing for the court stated-

"[36] . . . 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 of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1997] UKHL 46; [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 allegedly negligent medical treatment or diagnosis just because 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 a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion' (at 241G-242B). . . .

[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express prospects of an event's occurrence, as far as they possibly

² 2021 ALL SA 285 (G)

could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingly v The Chief Constable, Strathclyde Police 200 SC (HL) 77 and the warning given at 89D-E that

‘(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.’ (Emphasis added)

Dr Piet’s Engelbrecht (orthopaedic surgeon) – reported dated 14th June 2019.

[20] Dr Engelbrecht’s, an orthopaedic surgeon, assessed the Plaintiff on 14th June 2019. He recorded that the Plaintiff has reached maximum medical improvement (MMI). His injuries were rated to be 30% on the Whole Person Impairment test as well as in the Narrative Test. He lists the injuries sustained by the plaintiff as –

- A moderate brain injury;
- Head injury, traumatic subarachnoid haemorrhage as well as diffuse axonal injury;.
- Compression fracture of the cervical vertebra;
- Fracture of the left proximal radius;
- Fracture of the midshaft right femur. This fracture has resulted in malunion;
- Fracture of the right humerus, closed comminuted supracondylar fracture;
- Fracture of the left clavicle. This fracture has healed with a2cm shortening;

- Fracture of the left proximal radius. This fracture has healed with a dorsal angulation of 15 degrees as well as varus angulation of 15 degrees.

[21] He opined that the Plaintiff would not remain as active as he was pre-accident. This also corroborated the Plaintiff's complaint about his symptoms worsening when doing active tasks.

[22] The Plaintiff reported to Dr Engelbrecht that before the accident, he was employed by a tuckshop owner where he worked every day of the week from 05h30 am to 21h00 pm. He worked on his own with no assistance in the shop. He commuted by taxi to work. But after the accident he had to take a sick leave period of four months. On the date of consultation, he had returned to work and was provided with an assistant due to residual weakness in his arms and right leg. He also reported that he struggled keeping up with his workstation but still continued to work from 05h30 am to 21h00 pm.

Anneke Greef (occupational therapist) – report dated 23 June 2020

[23] Anneke Greef, the occupational therapist consulted by the plaintiff, found that the Plaintiff struggled with sustaining concentration, persistence and pace. He also presented with significant cognitive depletion. The assessment was done on 13th June 2019 and a follow up assessment done on 23 June 2020.

[24] She identified that the Plaintiff had lack of insight, especially in his cognitive impairment; lack of ability to meet life roles in relation to daily living, leisure and recreation, as well as deficiency and impairment in sustaining intra- and interpersonal relationships. She concluded that this was a direct consequence of the head injury and sequelae thereof. He was thus poorly able to cope with expectations of his everyday life roles – a devastating loss of amenity enjoyment. She held this to be permanent in nature.

[25] The Plaintiff reported to Greef that he worked for Katamuka Tuckshop in approximately 2012. His tasks required sedentary-light and medium physical strength exertion. Greef opined that this would have required him to have sufficient cognitive ability to work with the public and with finances.

[26] The Plaintiff also complained that he has not worked since the accident. Greef indicated this would be consequence of the identified major level of impairment which was less on a physical level but more attributable to his significant psychiatric and cognitive level.

[27] Greef further identified several barriers constituting significant vulnerability and compromise diminishing his resilience and employability. Of those barriers she mentioned depleted cognitive capacity with an inability to comprehend, execute and follow instructions. She concluded that post accident, the Plaintiff would only be able to cope in a sympathetic employment environment with a structured routine by an understanding employer.

[28] The summary of work capacity was therefore, of an overall presentation of an individual reminding of a neuro-physical, neurocognitive and psychiatric level with behavioural dysfunction functionally rendered unemployable in all scopes of the labour market. For quantification she deferred to the opinion of an Industrial Psychologist.

Dr JA Smuts (neurologist) – report dated 19th November 2019

[29] Dr Smuts, a neurologist consulted by the Plaintiff, evaluated the head and resulting brain injury. In consideration of the relevant hospital reports and RAF 1 Form, he opined that the Plaintiff sustained a blow to the head which resulted in at least, a moderate concussive head injury and an associated brain injury.

[30] The Plaintiff's reported to Dr Smuts that prior to the accident, **from 2012 onwards he had been a street vendor selling fruits**. But after the accident he was unemployed. Dr Smuts acknowledged this and opined that the Plaintiff is not likely to perform in the capacity he did pre-accident. He recommended that curator ad litem and bonis needs to be appointed to assist the plaintiff.

Dr Annalie Pauw (clinical psychologist) – report undated

[31] Dr Pauw, a clinical psychologist consulted by the plaintiff, produced an undated report. Therefore, it is not clear when she wrote her report.

[32] In summary, she found that the Plaintiff's best test performances, when applying norms of the intellectually disadvantaged, were in the average range. She concluded that his test scores; educational and occupational history considered, all holistically were indicative of **a low average to average level of intellectual functioning**. She held that these deficits and resultant impairment, largely permanent and irreversible.

[33] She also had concerns about the Plaintiff's ability to independently handle his financial and legal affairs. Therefore, she agreed with Dr Smuts that the Plaintiff would benefit from the appointment of a curator bonis and litem.

[34] The Plaintiff also reported to her that he, from 2006 to 2008, was a street vendor selling bananas. From 2008 thereon to 2012 he ran his own shop. This was in Ethiopia. **In 2012 he came to South Africa and sold blankets for a Mr Jambaru from 2012 to 2014. Therefrom, to accident date, he ran his own shop.**

[35] Therefore, the summary of his occupation history is that of a street vendor and shop owner prior to coming to South Africa and upon arrival in 2012, again a shopkeeper, and then progressively a shop owner and co-owner of another shop with a friend in 2014. But after the accident, he was unable to buy stock on reason that he was recuperating from the accident, and sadly, his employees left, the shops deteriorated, and his stock was stolen. He never worked again since the accident.

[36] Dr Pauw concluded that the Plaintiff's occupational prospects presented difficulty in any manner of work, a consequence of impaired memory, attention, psychomotor and mental processing speeds that could hamper his efficiency and accuracy at work. A **narrative test of** his memory difficulties suggested that he could forget everyday conversational content and verbal content. And his ongoing levels of emotional distress could hamper drive and motivation, and ultimately, his productivity.

JJ (Kobus) Prinsloo and Linca Boshoff (Industrial Psychologists) report – dated 04 October 2021

[37] JJ (Kobus) Prinsloo the principal industrial psychologist co- authored a report with Linca Bashoff with the following executive summary:

The Plaintiff's reported that before the accident he had been a tuckshop owner making earnings of R10 000 (ten thousand rand) a month accumulating to R120 000 (one hundred and two thousand) annually. The authors opined that would have probably continued to normal age of retirement but in the absence of collateral information and proof corroborating the same, the authors recommended that the Plaintiff's actual earnings should be placed of a spaza shop owner in the informal market sector point 7 scale of R73 000 (seventy-three thousand rands) per annum. These earnings could be allowed to grow on an annual CPI salary percentage increase until normal age of retirement. Furthermore, the authors suggested that a higher pre-morbid contingency deduction should be applied in address of the lack of collateral information corroborating the Plaintiff's reported earning history. On post-morbid contingencies, the authors recommended an appropriate contingency deduction and protection of monies.

[38] The Industrial Psychologists had before them all the other expert reports, not limited to those just mentioned above.

[39] Of importance, the Plaintiff reported to the industrial psychologists that from 2014 to date of accident, he had been a tuckshop owner of Kamuka's, presumably the name of the tuckshop, in Durban. In this tuckshop, he sold bread, chips, and every day household items. His activities included packing stock and groceries, daily cleaning of the tuckshop; buying stock once a week in town and managing the shop's finances.

[40] It was also reported that the Plaintiff alleged that in addition to owing his tuckshop, he "assisted" in another shop in town (Durban). His monthly income was difficult to calculate, but on average it was R10 000 (ten thousand rands) a month. The Plaintiff confirmed these alleged earnings on an affidavit.

[41] Upon discharge from the hospital, August 2018 December, the Plaintiff reportedly attempted to continue his tuckshops but however had to shut shop in 2019. He has been unemployed since then.

[42] It was recorded that the Plaintiff received no formal training, attended one primary school in Ethiopia, and had built his skills through "on-the job training" and action learning.

[43] The authors noted the discrepancies in Plaintiff's reported occupational history to the other expert. For instance, it was noted that the Plaintiff reported to Dr Pauw, the clinical psychologist, that he was a tuckshop owner at the time of accident. In explanation of these discrepancies, the Plaintiff reported Prinsloo and Boshoff that he was an owner of a shop near his house. However, he was also "involved" in another shop owned by an Emmanuel in town (Durban). In this shop, there was a third employee, Mr Solomon, who assisted in both tuckshops. The Plaintiff reported his net earnings to be R10 000 (ten thousand rands) a month. But to Dr Engelbrecht, the orthopaedic surgeon, and to Anneke Greef, the occupational therapist, the Plaintiff reported to them that he was a tuckshop employee. And he also deposed to an affidavit, signed 13th November 2018, wherein he stated he was selling carpets pre-accident.

[44] On 17th September 2021, the authors approached the Plaintiff's attorneys to seek clarity on these discrepancies. Ms Kisten Hodgson from the Plaintiff's attorneys, Spruyt Inc Attorneys, liaised with the Plaintiff and confirmed that the Plaintiff was indeed a tuckshop owner, and he is currently unemployed.

[45] In the assessment interview, the Plaintiff expressed that the career drive to continue to function as a tuckshop owner whilst growing his business. What this "business" is was unstated in Prinsloo and Boshoff's report.

[46] The Plaintiff provided the authors two cell numbers. One of Mr Solomon, the third employee in Mr Emmanuel's shop in town (Durban) and that of Mr Emmanuel himself. Both numbers went directly to voicemail and continued to do so at the time of writing of the report.

[47] In their own assessment findings, the authors postulated that considering the Plaintiff's family background (not mentioned here), and their educational and occupational attainment, it could be assumed that the Plaintiff hailed from a family with low average to average abilities.

[48] On the premorbid scenario of the Plaintiff being a tuckshop owner, the Industrial Psychologists suggested that the Plaintiff would have probably worked to normal age of retirement, i.e., 65 years. Postmorbid, the Plaintiff was unemployed and with no earnings since January 2019. It should that the Plaintiff reported that upon discharge, he attempted to revive his shops but could not do so as the shops deteriorated, his employees left, and his stock got stolen. He therefore had to close shop whereabouts December 2018. From January 2019 onwards, he was unemployed and received no income.

[49] In their professional judgment, the Plaintiff had career impediment in context of his level of education and skills, the Plaintiff was in the moderate to severe

category of impairment and would be unable to realize his employment potential capacity through sustainable employment and would be unable to secure alternative employment. Therefore, he was unemployable in the open labour market. They recommended that the hardship to the Plaintiff be addressed by compensation of loss of earnings and general damages.

[50] In quantification, the authors placed the Plaintiff in **informal sector: growth orientated micro business labour market**. This sector represents business that are not registered for income tax or Vat. The business are run from home. Other informal arrangements or services are rendered at the customer's premises. The owners are more likely to have a bank account, funeral cover and some form of retirement. This sector has higher requirements of physical and human capital. These upper employees have reasonable prospects of to secure work in the non-corporate and informal sector (examples given were of plumbers, vehicle mechanics, tailors, handymen, builders, appliance installers and technicians etc). This sector represented 27% of the informal sector.

[51] Although the Plaintiff reported his annual income to be R10 000 a month, accumulating to R120 000 annually, the Industrial Psychologists found this unrealistic based on available market information and lack of corroborating proof. They also indicated that there is no credible market remuneration available for the informal sector and the earning scales of Dr Robert Kock are taken from Statistics South Africa. This information process is based on "hearsay and questionability".

[52] They recommended the 2018 reported market remuneration to be used as a point of departure. They recommended that the Plaintiff be awarded at the point scale 7 of spaza shops remuneration. This is the maximum cap of R73 000 (seventy-three thousand rands). Further, they said that on the premorbid scenario, this could be allowed to grow with an annual salary increase at the consumer price index percentage until normal retirement age. But since he has been rendered completely unemployable as a result of the accident, a lifetime loss of earnings should be catered.

[53] They were also in agreement with Greef, the occupational therapist, that the Plaintiff would need a lifetime caregiver; and in further agreement with Dr Pauw and Smuts, the clinical psychologist and neurologist respectively, that a curator bonis ad litem be appointed for the benefit of the Plaintiff.

[54] The Actuarial Report was discussed in paragraph 7 above.

[55] In *MT v RAF* (supra) Fisher J said the following on the role of the Actuary and the Industrial Psychologist

“The Actuary – The parties routinely seek to assist the court in its assessment of the appropriate amount payable by resort to the expertise of an actuary. Actuaries rely on look-up tables which are produced with reference to statistics. Such statistics are derived, *inter alia*, from surveys and studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff’s position using various assumptions and scenarios which should obviously have some foundation in fact and reality.

The general approach of the actuary is to posit the plaintiff, as she is proven to have been in her uninjured state and then to apply assumptions (generally obtained from the industrial psychologists) as to her state with the proven injuries and their sequela. The deficits which arise between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff both pre and post morbidity. The loss is calculated as the difference in earnings derived between the pre- accident or pre morbid state and post- accident or post morbid state. In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and other factors unconnected with the plaintiff’s injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are

dealt with by way of “contingency” allowances. These are applied by the court dealing with the case in order to adjust the loss to reflect as closely as possible to real circumstances of the plaintiff. This is a delicate exercise which is an important judicial function.

The report of the industrial psychologists is pivotal to the actuarial calculation. This is because the actuarial calculation must be performed on an accepted scenario as to income, employment, employment prospects, education, training, experience and other factors which allow for an assessment of the likely career path pre– and post the injuries.

It thus stands to reason that, if the base scenarios adopted by the actuary are fallacious, the actuarial calculation is of no value to a court or to the RAF officials engaged in negotiating a settlement. If the income at date of the accident is overstated even by a few thousand rand, this will lead to a significant inflation of the proposed loss in that the calculation is exponential. Thus, for example the difference between an income of R 5000 per month as opposed to one of R7000 is calculated over a period of 15 years is R610 000 extra on the claim. Thus even a relatively modest claim is easily and significantly inflated by means of this ploy”.

The Legal Principles in respect of claim for diminished capacity

[56] The legal principle in respect of a claim for diminished earning capacity is trite in that the Plaintiff must be placed in the position he would have been in had the injuries not occurred. To succeed in the claim for loss of income or earning capacity, the Plaintiff has to establish on a balance of probability that as a result of the accident, he has lost future earning capacity³.

[57] On the claim for loss of earnings Gough⁴ states:

[58] ‘If one were to regard the loss as one of future earnings one may ask the question “what income will the plaintiff actually lose as a result of the defendant’s wrongful act?’.

³ Rudman v RAF 2003 (SA)234 (SCA)

⁴ Gough “The Lost years” The claim for loss of earnings (1983) De Rebus 486

[59] In *Goldie v City Council of Johannesburg*⁵ the above principle was expressed as follows;

“Mr Hart, who argued the case for the defendant, quoted a number of cases, such as *Union Government (Minister of R & H) v Clay* (1913 AD 385) *Hulley v Cox* (1923 AD 234) and *Craig v Franks* (1936 SR 41) in support of the proposition that it is wrong to calculate the amounts to be awarded under these heads of damage on the basis of annuity, and that whilst such actuarial calculations affords useful guidance, the true basis is what the court considers, under the circumstances of the case, to be fair and reasonable amount to be awarded the plaintiff as compensation. This may be so, but in the case where it is necessary to award compensation for loss of future earnings, I have difficulty in appreciating what better starting point there can be than the present value of the future income which the plaintiff has been prevented from earning. From this point proper allowance must be made for contingencies, but if the fundamental principle of an award of damages under *lex Aquilia* is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not impulse or by guesswork.”

Evaluation

[60] The Plaintiff was born 10 June 1985. He completed grade 7 (equivalent to South African grade 5) in Ethiopia. He left school due to financial difficulties and he started selling fruit on the streets of Ethiopia. He has been married since 2007 and his wife and two kids are in Ethiopia. He came to South Africa in December 2012 and rented a flat in Durban.

[61] I accept that the Plaintiff has proven on a balance of probabilities that he has lost some earnings from date of accident to trial date. However, His accounting of his employment history is laden with discrepancies and is contradictory. On 13th of June 2019, he reported to Ms Greef, the occupational therapist that he worked at Katamuka Tuck shop since 2012 to date of accident. His tasks were light to medium sedentary with a requirement of sufficient cognitive ability to interact with the public as well as work with finances. He then reported that he was unemployed since discharge and remained so till present date.

⁵ 1984(1) SA 98 (A) at 112E-114F

[62] On 14 June 2019 the plaintiff, a day after he consulted with Greef, the Plaintiff a consulted with Dr Engelbrecht. He told Dr Engelbrecht that at the time of an accident, he was employed in a Tuck Shop in Durban working from 5:30 AM - 21H00. After the accident he took four months sick leave and upon discharge he reported to work thereafter on the same employment terms and roster (05h30 to 21h00 am). He struggled keeping his workstation but was provided with an assistant. At that date of consulting Dr Engelbrecht, he remained employed. So, which is it? Was he employed or self-employed? After the accident did, he resume his employment or the accident rendered him unemployable?

[63] To Dr Smuts, in an assessment done 19th June 2019, the Plaintiff again changed his tune. This time, he was a street vendor selling fruit. He ran his own street tuckshop. But to Dr Pauw he sold blankets for a Mr Jambaru between 2012 and 2014. Then 2014 onwards he owned his own shop and co-owned another with a friend. Upon discharge from the hospital, he attempted reviving his shop but it deteriorated and eventually collapsed in end December 2018 or somewhere about end December. Whatever happened of the co-owned shop was not mentioned?

[64] The Plaintiff's report to Dr Engelbrecht is consistent with his next report to Ms Greef. To both, he reported to have been a tuck-shop employee. The name was given was of Mr Kamutuka. The same was also repeated to the industrial psychologist save to qualify that to them, he reported that he left Kamuka's tuck-shop employ in 2014 to start his own tuck-shop.

[65] These discrepancies were of concern to Prinsloo and Boshoff, the industrial psychologists consulted by the Plaintiff. Having noted them, they approached the Plaintiff attorneys whom after liaising with the Plaintiff, confirmed that he had been a shop owner. The two numbers given, one of a Mr Solomon, an employee of a Mr Emmanuel, and that of Mr Emmanuel himself went straight voicemail and continued to do so even by time of the consolation. Mr Jambaru was not even remotely mentioned.

[66] The Plaintiff's contradictory and poor account of his employment history shows that he is being economical with the truth. He failed to provide proof of income in the form of receipts as a spaza shop owner or certificate of employment as an employee. Furthermore, it would be remiss of me to not make comment on the Plaintiff's attorneys' laxity in not exercising due diligence to investigate the Plaintiff allegations when its contradictions when the industrial psychologist took the care of bringing them to their attention

[67] I accept that the Plaintiff future earning capacity has been rendered nil. Therefore, compensation is due. However, he must, at the very least, prove the extent of his loss, as well as the amount of damages that should be awarded. In quantification, the Plaintiff is required to provide a factual basis allowing for an actuarial calculation of his losses. This approach calculates what the potential earnings that the Plaintiff would have made but for the accident. The difference between the premorbid and post morbid value of his estate is the reflective indicator of the compensation award.

Contingencies

[68] It is trite that general contingencies cover a wide range of considerations, which vary from case to case.⁶ It has generally been accepted that contingencies of 5 per cent to 15 per cent for past and future loss of income have been accepted as 'normal contingencies.'⁷ A number of issues are considered when an actuarial assessment is done, including considerations of early death, promotion prospects, and taxes.

[69] Having considered Mr Hawando's age, educational background, skills, employment history, the injuries and all the expert opinions, I am of the view that 15% contingences must be applied to pre-morbid position and 50%to the post morbid position.

⁶RH Koch *The Quantum Yearbook* (2015) at 120.

⁷RH Koch *The Quantum Yearbook* (2015) at 120.

[70] In the circumstances when the above contingencies are applied to the original amount calculated by the actuary, the following loss is calculated

74.1	Past loss of earnings	R225 029.00
	Less 15% Contingencies	R 191 274.65
74.2	Future loss of earnings	R 1 640 767.00
	Less 50% Contingencies	R 820 383 .50
	Total loss of earnings	R 1 011 658. 15

General Damages

[71] Moseneke DCJ in *Van der Merwe v Road Accident Fund and Another*⁸ stated that, *non-patrimonial damages, which also bear the name of general damages, are utilized to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include "pain and suffering", "disfigurement", and "loss of amenities of life."*⁹ **(my emphasis – and footnotes omitted)**

....

it is important to recognize that a claim for non-patrimonial damages ultimately assumes the form of a monetary award. Guided by the facts of each case and what is just and equitable, courts regularly assess and award to claimants' general damages sounding in money. In this sense, an award of general damages to redress a breach of a personality right also accrues to the successful claimant's patrimony. After all, the primary object of general damages too, in the non-patrimonial

⁸ (CCT48/05) [2006] ZACC 4

⁹ Ibid at para 39

sense, is to make good the loss; to amend the injury. (My emphasis – and footnotes omitted)¹⁰

Determination of compensation award

[72] In the case of *Protea Assurance Co Ltd v Lamb*¹¹ Potgieter JA stated that although the determination of an appropriate amount for general damages is largely a matter of discretion of the court, some guidance can be obtained by having regard to previous awards made in comparable cases; however, he qualifies:

'... this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.'

Comparable cases

[73] The Plaintiff claims R1 800 000 (one million and eight-hundred thousand) under this head. Of relevance to this claim is the dictum found **M M v Road Accident Fund (5639/2017) [2019] ZAFSHC 262** where Opperman J reminded us that:

¹⁰ Cf: *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 at 199 where the court held: "The amount to be awarded as compensation can only be determined by The broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case".

¹¹

“7. In determining the quantum of general damages in personal injury cases the trial court essentially exercises a general discretion. De Jongh v Du Pisani N.O. 2005 (5 SA 547 (SCA) at paragraph 60 laid down the basic rule in that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour largesse from the horn of plenty at the defendants’ expense. (footnotes omitted).

7.5 There is unfortunately no expert that can place an exact value to the abovementioned losses. The damages that are to be awarded should be assessed by taking into account the age, sex, status, culture, lifestyle and the nature of the injury suffered as well as having regard to previous awards made for similar injures. Also, other factors which are often taken into account include the degree of pain suffered. The fact that pain is subjective is taken into account, whether further surgery can be expected, whether the plaintiff has debilitating scarring, is unable to fend for him/herself and has a decreased life expectancy are examples of factors that guide the court. This discretion is not restrained by an inexorable tariff drawn from previous similar awards.

It is not enough to compare the general nature of injuries. All factors affecting the assessment of damages must be taken into account. Once it is established that the circumstances are sufficiently comparable, then only are comparable cases to be used as a general yardstick’

[74] I have considered comparable cases that counsel referred me to of which I am grateful. In consideration of the authorities and the injuries of the Plaintiff, I find an award of **R950 000** (Nine Hundred and Fifty Thousand) as commensurate and fairly balanced for the Plaintiff’s sequelae of injuries.

[75] In the result, I make the following order

1. The Defendant is liable to compensate the Plaintiff for 100 % (One Hundred Percent) of the Plaintiff’s proven damages.
2. The Defendant shall pay the capital amount of **R 1 961 658.15** (**One Million Nine Hundred and Sixty One Thousand, Six Hundred and**

Fifty Eight Fifteen Cents) in respect of Plaintiff's claim for delictual damages, calculated as follows:

Past Loss of Earnings	R 191 274.65
Future Loss of Earnings	R 820 383.50
General Damages	<u>R 950 000.00</u>
Total	R 1 961 658.15

3. The capital is payable by means of direct fund transfer by no later than 180 (one hundred and eighty) days from the date hereof into the trust bank account of the Plaintiff's attorneys; Spruyt Incorporated, Trust Cheque Account, Standard Bank, Hatfield, Account no: 012 137 944, Branch code: 0225 45, reference **DS3729**
4. Interest calculated on the capital amount referred to in paragraph 2 supra, will be payable at the rate of 7% after a period of 14 (fourteen) days from the date hereof.
5. The Defendant shall furnish Plaintiff with an unlimited Undertaking in terms of Section 17(4)(a) of the Road Accident Fund, 56 of 1996 for the costs of the future accommodation of the Plaintiff in a hospital and nursing home and treatment of and rendering of a service to the Plaintiff and the supplying of goods to the Plaintiff arising of the injuries sustained by the Plaintiff in the motor vehicle collision on **2 August 2018** after such costs have been incurred and upon proof thereof;
6. The Defendant is liable for payment of reasonable costs of the Trustee being Boshoff Incorporated , represented by Joyce Monya

Bezuidenhout (whose consent is attached herein) to be appointed herein , in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his/her fees in this regard , which shall be recoverable in terms of the Undertaking issued in terms of Section 27(4)(a) and which costs will also include and be subject to the following :-

6.1 The fees and administration costs shall be determined on the basis of the directives pertaining to curator 's remuneration and furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, 66 of 1965, as amended from time to time;

6.2 The monthly premiums are payable in respect of the insurance which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;

6.3 All the above-mentioned costs shall be limited to payment of the reasonable costs which the defendant would have to pay regarding appointment, remuneration and disbursements had the Trustee been appointed as a Curator Bonis

6.4 The costs associated with the annual audit of the Trust by the chartered accountant, as determined in the Trust Deed.

7. That the net proceeds of the payment referred to above as well as the plaintiff's taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiff's attorney and own client (the Capital amount) shall be payable to a Trust, to be established within 12 months from the date of this order. The following shall apply to a trust:

7.1 The Trust's main objective will be to control and administer the capital amount on behalf of the plaintiff;

7.2 Such trust may only be terminated in terms of the relevant trust deed alternatively by an order of the competent court

8. The trustee shall set security to the satisfaction of the Master.

9. Should the aforementioned Trust be established within the 12 months, the Trustee thereof is authorised to pay the Plaintiff's attorneys and own client costs out of the Trust funds in so far as any payments in that regards are still outstanding at that stage.

9.1 should the aforesaid Trust not be established within the period, the plaintiff is directed to approach the court within six months thereafter in order to obtain further directives in respect of the manner in which the amount is to be utilised in favour of the plaintiff;

10. The plaintiff's attorney is prohibited from dealing with the capital amount in any other manner unless specifically authorised by this court, subject to the provisions contained in this order.

11. The plaintiff's attorneys are authorised to invest the capital amount in an interest-bearing account in terms of Section 86 (4) of the Legal Practise Bill 28 of 2014 to the benefit of the Plaintiff with a registered banking institutions in favour of the trust

12. Until such time as the Trustees is able to take control of the Capital sum and to deal with the same in terms of the trust deed, The Plaintiff's attorneys are authorised and ordered to make any reasonable payments to satisfy any of the Plaintiff's needs that may rise and that

are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim.

13. The defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court Scale, subject thereto that

13.1 In the event that costs are not agreed

13.1.1 The plaintiff shall serve the notice of taxation on the Defendant's attorneys of record

The Plaintiff shall allow the Defendant 180 (One Hundred and Eighty) Court days from the date of allocator to make payment of the taxed costs

13.1.2 Should payment not be affected timeously, the Plaintiff will be entitled to recover interest at a rate of 7% per annum on the taxed or agreed fees from the date of allocator to the date of final payment

13.2 Such costs shall include but not limited to:

13.2.1 The costs incurred in obtaining payment of the amount mentioned above;

13.2.2 The costs of and consequent to the employment of Senior Junior Counsel, Adv Stefan Marits, including of counsel to

date hereof, including the preparation for and trial on 29 October 2021 as well as the preparation and drafting of the written Heads of Argument and submission document including making of the draft court order.

13.2.3 The costs of all costs of the Plaintiff to and from all medico-legal appointments and consultations; Qualifying and/ or preparations fees if any, for trial on 29 October 2021, as allowed by the Taxing Master, of the following experts:

13.2.3.1 Dr P Engelbrecht (Orthopaedic Surgeon);

13.2.3.2 Dr JA Smuts -Neurologist

13.2.3.3 Dr D Ligthelm -Urologist

13.2.3.4 Dr A Pauw-Neuro-Psychologist

13.2.3.5 Ms A Greeff-Occupational Therapist

13.2.3.6 JJ Prinsloo &Associates - Industrial Psychologists

13.2.3.7 Argen Solutions -Actuary

13.2.4 The reasonable costs and time spent travelling incurred by and on behalf of the plaintiff in, as well as the costs

consequent to attending the medico-legal examinations of both parties , as well as a translator assisting the experts in communication with the plaintiff .

13.2.5 The costs consequent to the Plaintiff's trial bundles and witness bundles;

13.2.6 The costs of holding all pre-trial conferences as well as the round table meeting and judicial case management conferences at court between legal representatives for both the plaintiff and the Defendant, including counsels' charges in respect thereof;

13.2.7 The costs of and consequent to compiling all minutes in respect of pretrial conferences

13.2.8 The reasonable travelling costs and time spent travelling of the Plaintiff, who is hereby declared necessary witness

13.2.9 The reasonable and taxable costs incurred to conduct the inspection in loco and to obtain the Accident Report , medical records and completed RAF1 . The costs will include travelling time and time spent to obtain the above,

14. There is no contingency fee agreement between the Plaintiff and Spruyt Incorporated

15. A copy of the trustees' consent and trust deed have been annexed hereto marked "A" & "B"

FLATELA LULEKA

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 11 March 2022

Date of Hearing: 29 October 2021

Date of Judgment: 11 March 2022

Applicants' Counsel: Adv Stefan Maritz

Instructed by : SPRUYT Incorporated

Email : legal7@spruyt.co.za

REF : S SPRUYT/MDP/SD3719

Respondent's Counsel: None

Instructed by : 3 Ida Street

Menlyn

Pretoria

LINK Number: 4689288

Claim Number 560/12712186/1075/2

