



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

**Case number: 11129/2019**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
.....	2022-02-08
SIGNATURE	DATE

**In the matter between:**

**AVESH ANWANTH**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 08 FEBRUARY 2022.**

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**JUDGMENT**

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**PHAHLAMOHLEKA A.J.**

**INTRODUCTION**

- [1] The Plaintiff is suing the Road Accident Fund for damages suffered as a result of the accident that occurred on 3 January 2018.
- [2] From the accident the Plaintiff sustained the following injuries with *sequelae*:
  - 2.1 The Plaintiff sustained a moderately severe diffuse brain injury with a reduced Glasgow Coma Scale and minimal subarachnoid haemorrhage and pin-point haemorrhagic contusions in the occipital lobe.
  - 2.2 He suffers from neurocognitive difficulties, in the form of:
    - 2.2.1 Memory difficulties;
    - 2.2.2 Concentration difficulties;
    - 2.2.3 A decreased mental processing speed;
    - 2.2.4 Mental inflexibility;
    - 2.2.5 Difficulties in performing calculations;
    - 2.2.6 Multi-tasking difficulties;
    - 2.2.7 Planning difficulties.
  - 2.3 He suffers from neuro-behavioural difficulties in the form of:
    - 2.3.1 Low frustration tolerance;
    - 2.3.2 A decreased ability to take initiative;
    - 2.3.3 Socially withdraw behaviour;
    - 2.3.4 Sensitivity to stimulus overload.
  - 2.4 The Plaintiff is suffering n from neuro-psychiatric difficulties in the form of:
    - 2.4.1 A depressed mood and short temperedness and agitation;
    - 2.4.2 Insomnia;
    - 2.4.3 Decreased energy levels;
    - 2.4.4 A loss of libido.
  - 2.5 He is suffering from a Depressive Disorder due to a Traumatic Brain injury.
  - 2.6 He is suffering from a Neurocognitive Disorder due to a Traumatic Brain injury.
  - 2.7 He is suffering from symptoms of a Post-Traumatic Stress Disorder.
  - 2.8 Fracture of the pelvis, specifically the right superior and inferior pubic rami as well as the anterior lip of the right acetabulum.
  - 2.9 A fracture of the shaft of the right femur.

- 2.10 A fracture of the shaft of the left tibia.
- 2.11 An injury to the right knee.
- 2.12 An injury to the right sciatic nerve resulting in a drop foot on the right, requiring the constant use of crutches and/or a wheelchair.
- 2.13 Scarring:
  - 2.13.1 Over the right temporal area there is a 2 cm scar that is visible, raised, irregular and unsightly;
  - 2.13.2 Over the right hip and thigh there are scars of 9 cm, 10 cm x 5 cm and two of 1 cm. They are hyperpigmented, irregular, visible, raised and very unsightly;
  - 2.13.3 Over his left knee and leg there are scars of 6 cm, 2 cm x 2 cm, 1,6 cm and 2 cm, they are visible and unsightly;
  - 2.13.4 On his foot and posterior heel there is a very visible and unsightly scar that measures 15 cm. It is hyperpigmented, broad and very irregular;
  - 2.13.5 On his right upper arm there is a large area of multiple glass cut scars over an area of 27 cm x 9 cm, they are hyperpigmented, visible and very unsightly;
  - 2.13.6 There is a very visible and unsightly hyperpigmented scar on his left shoulder that measures 9 cm x 6 cm.
- [3] The matter proceeded in the absence of the defendant. Both the aspects of merits and quantum are in dispute.

### **MERITS**

- [4] Only the plaintiff presented evidence in respect of merits and the defendant presented no version as the matter was undefended. According to the plaintiff the accident occurred as follows:
  - 4.1 The Plaintiff was a tow truck operator, and 3 January 2018 was called out to the N2 Highway, towards Durban, to assist with a broken down motor vehicle.
  - 4.2 It was approximately 13h00 on the aforesaid date.
  - 4.3 The Plaintiff was assisting Justin Leo Anwanth, to load the motor vehicle onto the back of the roll back truck.
  - 4.4 The Plaintiff was sitting on the vehicle which was to be loaded onto the roll back truck. Both these vehicles were situated off the road surface, on the left side of the emergency lane, on the tarred shoulder of the road.
  - 4.5 Justin Leo Anwanth was operating the hydraulic controls, and the Plaintiff was steering the broken down vehicle, while it was being pulled onto the roll back truck by the hydraulic winch.



- 4.6 The insured vehicle was travelling in the fast lane, on the highway and suddenly veered to the left, into the emergency lane, colliding with the stationary vehicles therein.
- [5] There is no version to gainsay the Plaintiff's version and therefore the Plaintiff's version remains uncontested.
- [6] In the circumstances I am of the view that Plaintiff should be awarded 100% of his proven damages.

#### **PAST MEDICAL, HOSPITAL AND RELATED EXPENDITURE**

- [7] The Plaintiff has incurred past medical, hospital and related expenses in the amount of **R 56 269.56**. The only evidence presented in this regard is that of the Plaintiff should be compensated for this head of damages.

#### **FUTURE MEDICAL, HOSPITAL AND RELATED EXPENDITURE**

- [8] The Plaintiff sustained the injuries as aforesaid and there is clearly the need for substantial future medical, hospital and related treatment and expenditure. The Plaintiff should therefore be awarded an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996.

#### **LOSS OF INCOME / EARNING CAPACITY**

- [9] The postulation by the Plaintiff's Industrial Psychologist, as read in conjunction with the Plaintiff's other experts, is as follows:

##### **9.1 Pre-morbidly;**

- 9.1.1 Plaintiff was involved in an accident on the 03 January 2016, while he was Self-Employed as the Owner and Business Operator of AV's Auto Services for approximately 13 years.

9.1.2 According to Mr. B Balkin (Forensic Accountant), the Plaintiff was earning an average income of R 13 95.00 per month, amounting approximately R157 140.00 per annum.

9.1.3 The Plaintiff's duties as the Owner and Business Operator included the following:

- 9.1.3.1 Managing five employees including one Business Administrator and four Drivers;
- 9.1.3.2 Administrative duties, paying salaries, liaising with existing and potential clients;
- 9.1.3.3 Towed a minimum of one vehicle and maximum of eight vehicles on peak days (over weekends and Easter);
- 9.1.3.4 Received calls from stranded drivers, drove to the scenes or dispatched another tow truck driver;

- 9.1.3.5 Checked if tow trucks were in good conditions in terms of oil, water, tyres, brakes and lights;
  - 9.1.3.6 Drove to the scene of the accident or to locate a broken –down vehicle;
  - 9.1.3.7 Upon arrival, communicated with the client, introduced himself to the client, inform the client whether the vehicle will be taken in for repairs, or call the accident assessment centre )Justin Leo Anwanth (in case of accidents) or repairs centre (in case vehicle has faults);
  - 9.1.3.8 Kneeled and squatted to manually hook the vehicle from underneath using a manually operated sling;
  - 9.1.3.9 Operated a hydraulic lift to load broken down vehicle and ensures that the vehicle is safely harnessed;
  - 9.1.3.10 Transported damaged vehicles to nearby Accident assessment Centre, Repair Centre, Dealer or Motor Mechanic;
  - 9.1.3.11 Upon offloading, he would unhook chains, releases damaged car from the deck, reloading the deck to its normal position, an driving back to his post and wait for another call from his office; and
  - 9.1.3.12 Logging calls with the client's insurance company.
- 9.1.4 Considering the information at hand, it is not likely that Plaintiff would have progressed within his career, and thus already reached his career ceiling pre-morbid.
- 9.1.5 Following a conservative approach, had it not been for the accident, it is foreseen that the Plaintiff would have most probably remained in his pre-morbid role with similar earnings, benefitting from inflationary increases, up until retirement.
- 9.1.6 Self-Employed individuals are not bound by a retirement policy and for the purpose of this report, he would have most like worked until the age of 70 years old.
- 10.1 Post-morbidly;
- 10.1.1 Plaintiff was involved in an accident on the 03 January 2016, while he was self-Employed as the Owner and Business Operator of AV's Auto Services for approximately 13 tears.
- 10.1.2 According to Mr B Balkin (Forensic accountant), the Plaintiff was earning an average income of R13 095.00 per mo nth, amounting to approximately R157 140.00 per annum.
- 10.1.3 The Plaintiff's duties as the Owner and Business operator included the following:



- 10.1.3.1 Managing five employees including one Business administrator and four driver;
- 10.1.3.2 Administrative duties, paying salaries, liaising with existing and potential client;
- 10.1.3.3 Towed a minimum of one vehicle and a maximum of eight vehicles on peak days (over weekends and Easter);
- 10.1.3.4 Received calls from stranded drivers drove to the scene or dispatched another tow truck driver;
- 10.1.3.5 Checked if tow truck were in good driving condition in terms of oil, water, tyres, brakes and lights;
- 10.1.3.6 Drove to the scene of the accident to locate a broken down broken;
- 10.1.3.7 Upon arrival, communicated with client, introduced himself to the client, inform the client whether the vehicle will be taken in for repairs, or call the accident assessment centre (in case of accidents) or repair centre (in case vehicle has faults);
- 10.1.3.8 Kneeled and squatted to manually hook the vehicle from underneath using a manually operated sling;
- 10.1.3.9 Operated a hydraulic lift to load broken vehicle and ensures that the vehicle is safely harnessed;
- 10.1.3.10 Transported damaged vehicle to nearby accident Assessment centre, dealer or Motor Mechanic;
- 10.1.3.11 Upon offloading, he would unhook chains, release damaged car from the deck, reloading the deck back to its normal position, and driving back to his post and wait for another call from his office: and
- 10.1.3.12 Logging calls with client's insurance company.

[11] Considering the information at hand, it is not likely that Plaintiff would have progressed within his career, and thus already reached his career ceiling pre-morbid. Following a conservative approach, had it not been for the accident, it is foreseen that the Plaintiff would have most probably remained in his pre-morbid role with similar earnings, benefitting from inflationary increases, up until retirement. Self-Employed individuals are not bound by a retirement policy and for the purpose of this report, he would have most likely worked until the age of 70 years old.

[12] In the post-morbid:

- 12.1 According to Mr B Balkin (Forensic accountant), "for the period from the date of the accident until end of February 2021. Plaintiff has suffered a past loss of income..." Currently, the business is experiencing a noticeable

decline in activity, and the Plaintiff is only able to source an income of approximately R88 032.00 per annum.

- [13] It is evident that he will never be able to fulfil the job demands required from his pre-morbid position, and he has accommodated himself in a sympathetic tenure. It is postulated that the Plaintiff will find it extremely difficult to sustain his current employment status, and since this position is the most lucrative positions for him, it is suggested that he maintains this employment tenure for as long as possible. When the plaintiff ceases the operation of the business, this will result in unemployment, where after he will most probably not secure alternative employment.
- [14] The industrial psychologist postulates that best case scenario, the plaintiff continues in his sympathetic position with a yearly decrease in salary, until he becomes unemployed in the next two to five years. Hereafter, he will most probably remain unemployed for the duration of his working life.

#### THE BASIS FOR THE DETERMIN OF CONTINGENCIES

- [15] Counsel referred me to the book of Dr RJ Koch, The quantum of Damages Year Book 2021, where the learned author states at page 118 that the usual contingencies which the Road Accident Fund accepts is 5% on the income and 15% on the future income.
- [16] The aforesaid is obviously only a generalisation but gives one an indication of the general approach applied by the Defendant in matters such as this.
- [17] Counsel also referred me to the matter of **Goodall v President Insurance Co Ltd 1984 (1) SA 98 (AD)**, Nicholas J said the following:  
*"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculation". He has a large discretion to award what he considers right". ...One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". ... "The amount of any discount may vary, depending upon the circumstances of the case. ... "The rate of discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the Judge's impression of the case."*
- [18] I agree that there is no reason to deviate from the "usual" contingency in respect of the past loss of earnings. This results in a past loss of R174 486.00 and I am of the view that this is a fair and reasonable amount for this head of damages.
- [19] In the post morbid scenario, the Plaintiff has been rendered unemployment within the next two to five years. The plaintiff therefore submitted that a post morbid contingency deduction of 15% should be applied.
- [20] I am satisfied with the aforesaid contingencies and therefore in respect of the future loss of earnings/earnings capacity, based upon the application of the aforesaid contingencies the amount of **R 1 833 625.00** is fair and reasonable.



## GENERAL DAMAGES

[21] it is triad that in order to qualify for compensation for non-pecuniary damages or general damages the plaintiff must satisfy the provisions of section 17 A (1) of the Road accident Fund 56 of 1996 read with regulation 3 of the Act.

[22] section 17 of the Act reads as follows:

*"17 Liability of Fund and agents (1) The fund or an agent shall:-*

- a) subject to this Act, in case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;*
  - b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established, be obligated to compensate any person (third party) for any loss or damages which the third party has suffered as a result of any bodily injury to himself or herself or the death due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee duties as employee: Provided that the obligation of the Fund to compensate for a serious injury as contemplated in subsection 91A) and shall be paid by way of a lump sum.*
- (1A) a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party*
- b) The assessment shall be carried out by a medical practitioner registered as such under Health Professions act."*

[23] I am satisfied that the Plaintiff complied with the assessment requirement set out in section 17(1A) as read with Regulation 3. The Plaintiff does qualify for General Damage, in terms of both the WPI (he has a combined WPI of 41%) and narrative test.

[24] In determining the amount to be awarded for general damages a broad discretion is exercised by the courts based on what the court considers fair and reasonable considering the injuries sustained. Previously decided cases are also helpful although one has to concede that it is extremely difficult to find two cases whose facts are totally the same.



- [25] The Plaintiff's injuries are discussed in paragraph 2 *supra*. From the expert reports it appears that the plaintiff sustained very serious injuries.
- [26] Plaintiff's counsel referred me to the following previously decided cases in an endeavour to justify his submission that I should award an amount of between **R 1 300 000.00 and R 1 400 000.00** for general damages;
- 26.1 **Torres v RAF C&H vol VI A4-1 presently at R1 288 000.00** (This was a 20 year male, who sustained a severe diffuse brain injury, soft tissue neck injury, soft tissue face and chin injuries, and suffered from depression and was rendered capable only of sympathetic employment);
- 26.2 **Herbst v RAF C&H vol VI A4-1 presently valued at R1 288 000.00** (This was a 34 year old male, who suffered a severe brain injury, and was rendered unemployable);
- 26.3 **Raupert v RAF C&H vol C+VI A4-52 presently valued at R1 230 000.00** (This was a 24 year old female, who suffered a significant brain injury, recurrent headaches, anxiety and depression, and loss her sense of taste and smell);
- 26.4 **Kgomo v RAF C&H vol VI A4-62 presently valued at R1 312 000.00** (This was a 14 year old boy, with a severe brain injury, a mild distortion of the pelvis, and a mild antalgic gait);
- 26.5 **Dlamini v RAF C&H vol VI A4-83 presently valued at R1 320 000.00** (This was a 37 year old male with a serious brain injury, fractured mandible, loss of teeth, a soft tissue injury to the lumbar and cervical spine. He became unemployable in the open labour market);
- 26.6 **Minnie N.O v RAF C&H vol VI A4-82 presently valued at R1 378 000.00** (This was a 5 year old girl, with a severe brain injury, degloving, with scarring requiring special schooling and rendered unemployable);
- 26.7 **Pietersen obo J ST I v RAF C&H presently valued at R1 230 000.00** (This was a 4 year old boy with a severe brain injury, with seizures, rendered a vulnerable candidate in the open labour market, also had degloving injuries to the feet and right shoulder with scarring);
- 26.8 **Radebe v RAF C&H vol VI A4-220 presently valued at R1 175 000.00** (This was a 13 year old boy with a severe brain injury resulting in organic brain syndrome, and rendered unemployable).

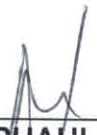
- 26.9 **Kameni v RAF (881/06) [2008] ZAECHC 77 (09 June 2008) presently valued at R206 000.00** (This relates to an adult male who sustained a peroneal nerve injury, resulting in 'a partial drop-foot deformity on the left side);
- 26.10 **Mokoena v Raf (2372/2009) [2010] ZAFSHC 139 (04 November 2010) presently valued at R346 000.00** (This relates to an adult female who sustained a ligament injury to the right knee, a nerve damage in the right leg resulting in a drop-foot, an injury to the right ankle, bruises to the left of her thoracic spine, and injuries to the ribs).
- [27] In the matter of **Wright v Multitateral Vehicle Accident Fund, C&H, volume IV at E3-36**, Broom DJP said the following in respect of the assessment of general damages:
- "I consider that when having regard to previous awards, one must recognise that there is a tendency for awards to now be higher than they were in the past. I believe this to be a natural reflection of the recognition at our awards in the past have been significantly lower than in most other countries."
- [28] In the matter of **Protea Insurance CO Ltd v Lamb 1971(1) SA 530 (A) at 535H 536A**, Potgieter J A said that the comparison of previous awards need not be meticulous, nor should it demand the enquiry so as to fetter the general discretion of the court. Comparable cases should afford some guidance way, by assisting the Court in arriving at an award, which is not substantially out of general accord with previous awards, in broadly similar cases.
- [29] In the light of the aforesaid and taking into account the comparative case law, I am satisfied that a fair and reasonable award for general damages in the circumstances should be **R 1 300 000.00**

In the result I make the following order:

1. The defendant is ordered to pay 100% of the plaintiff's proven or agreed damages.
2. The defendant shall pay the plaintiff a total **R 3 189 894.56** (three million one hundred and eighty nine thousand eight hundred and ninety four rand and fifty six cents) as compensation for general damages, past and future loss of earnings as well as past hospital, medical and related expenses.
3. The defendant shall furnish the Plaintiff with an undertaking for future hospital, medical and related expenses in terms of section 17(4) (a) of Act 56 of 1996.
4. The defendant to pay costs.



The draft order attached hereto and marked "XKP" is made an order of court.

  
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KGANKI PHAHLAMOHLAKA  
ACTING JUDGE OF THE HIGH  
COURT, GAUTENG DIVISION,  
PRETORIA

JUDGMENT RESERVED ON: 03 August 2021  
FOR THE PLAINTIFF : Adv Dredge  
INSTRUCTED BY : Ehlers Attorneys  
FOR THE DEFENDANT : No Appearance  
DATE OF JUDGMENT : 08 FEBRUARY 2022