



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: **07 JUNE 2022** Signature: 

**CASE NO: 7502/2018**

In the matter between:

**CARLOS NCUBE**

**Plaintiff**

And

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

**Defendant**

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**JUDGMENT**

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## **NYATHI J**

- [1] This is an action for damages against PRASA that arose from an incident which occurred on the 12<sup>th</sup> of August 2017, when the Plaintiff was pushed from a moving train by other commuters.
- [2] The plaintiff alleges that on the day of the accident he had a valid ticket.
- [3] The plaintiff alleges further that the doors of the train were at all times open and as such he fell from the open doors.
- [4] The merits of the claim were settled between the parties at 80/20 in favour of the Plaintiff. The matter is thus before court for the determination of quantum.
- [5] The quantum will be in respect of general damages, past and future loss of earnings as well as past and future medical and or hospital expenses.
- [6] Both parties have appointed corresponding experts and the joint minutes of the experts were also obtained from the relevant experts. Parties have both appointed the following experts:

6.1 Orthopaedic surgeons,

6.2 Occupational therapists,

6.3 Industrial Psychologists,

6.4 Actuaries.

[7] In the accident under discussion the Plaintiff sustained the following injuries of which he received emergency medical treatment:

7.1 C4 vertebra burst fracture with quadriparesis<sup>1</sup>

7.2 Fractured left pinkie proximal phalynx

7.3 Right knee multiple lacerations

7.4 Left shoulder injury

7.5 Lost tooth

[8] **Prognosis by Orthopaedic surgeon**

According to the prognosis by the **orthopaedic surgeon** of the C4 Vertebra burst fracture with quadriparesis the following were indicted:

8.1 He sustained C4 Vertebra burst fracture with quadriparesis which was treated with anterior cervical spine decompression and fusion. He developed adjacent segment disease at C5/C6 level. However, considering his young

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<sup>1</sup> A condition in which a person has muscle weakness in all four limbs. Both arms and legs. This condition can be temporary or permanent. (My definition)

age of 35 years, the orthopaedic surgeon is of the view that there is a 50% chance that the symptomatology might worsen to warrant cervical spine decompression and fusion in the next 5 to 10 years.

- 8.2 Prognosis of the fractured left pinkie proximal phalynx indicates that the fracture was treated surgically and is now united. Clinically there is a 10-degree fixed flexion deformity of the left pinkie proximal interphalangeal joint.
- 8.3 Prognosis of the of the left shoulder injury shows wasting of shoulder muscles and reduced abduction. There are intra-articular bone fragments in point suggestive of previous trauma. He will benefit from arthroscopic removal of the bone fragments to improve the joint function. It is further indicated that neck stiffness and left shoulder dysfunction are permanent and the treatment will not markedly improve function but will reduce pain and suffering. He will not be suitable for manual intensive occupations.
- 8.4 It is further indicated that there is a possibility that he will develop significant pain in the future from rotator cuff arthropathy and provision should be made for reversed shoulder prosthesis as there is no chance of salvaging the rotator cuff.

- 8.5 His ability to compete in the open labour market have been affected. The pains on his neck, left shoulder, left hand and right knee/leg will limit his choices of occupations that requires frequent neck movement, prolonged standing, walking and lifting, particularly working above shoulder height.
- 8.6 It is also important to note that both experts are in agreement with the *sequelae* of the injuries sustained in the accident as indicated above, as such their joint minutes does not need any further explanation.

## **[9] Occupational therapist**

- 9.1 Both parties have appointed occupational therapist and it is also important to note that they also have no point of disagreement in their joint minutes. At the time of the accident the plaintiff was employed as a general worker cutting steel materials. He worked in this capacity from 2014 until he was involved in the accident on the 12th August 2017. He has not returned to his pre-accident employment. He now depends on piece jobs as a gardener.
- 9.2 The occupational therapist indicated that when considering his vocational history, age, educational level and formal vocational training, presenting symptoms, and residual functional abilities, it is concluded that he has been rendered compromised in executing his pre-accident duties as a general worker. His residual physical abilities do not match the physical requirements for his pre-accident physical occupational duties nor does he

meet the physical requirement for medium to heavy work. His pre-accident job falls within the heavy physical demand.

- 9.3 It is opined that he is now a vulnerable, compromised and unequal competitor in the open labour market. He will therefore not be able to work until the retirement age of 60 or 65 years.
- 9.4 In term of the joint minutes, he is suited to execute sedentary to light type of occupations as compared to the heavy type of work he was doing in the pre-accident. He will likely require reasonable accommodation in the workplace
- 9.5 In conclusion the occupational therapists opined that considering his pre-accident versus current life roles and circumstances, the impact of the accident in question is considered to be severe in nature as it resulted in functional limitations, limited piece job options, physical limitations. as well as mood challenges.

#### **[10] Industrial psychologist**

- 10.1 Mr Ncube presents with a Form 4 level of education. Post-schooling, he possesses a Powder-coating certificate which he obtained in 2014. He does not have any post-accident training and/or qualification. He alleges that he was earning an income of R1150.00 per week at the time of the accident. Post-accident he did not resume his duties as he realised that he will not cope with the type of employment he was doing.
- 10.2 Post the accident he is doing piece jobs as a gardener working two to three days per month at a salary of R250 per day. The Industrial psychologist

opines that at the age of 31 years at the time of the accident, level of education as well as post school certificate. It is accepted that there was growth in his career. He would have likely managed to progress his career and earnings to within the upper quartile of the semi-skilled workers at approximately age of 45 years. Thereafter increases would have been based on inflation until the retirement age of 65 years.

9.3 In the post-accident, one also need to take note of the occupational therapist's recommendation that the plaintiff will not be able to work until the retirement age of 60 or 65 years, and taking into account all the experts opinions. it is noted that he has suffered significant injuries which diminishes prospects of resuming his pre-accident gainful employment. He is unlikely to secure employment of significant post-accident. He is thus likely to suffer future loss of earnings being the equivalent to his pre- accident earning potential.

[11] As regards the claim for general damages and past and future medical or hospital expenses the Plaintiff's case is properly presented and satisfactorily corroborated with admissible evidence.

[12] The difficulty before me as regards the claim for loss of earnings. This is only supported by bare assertions on behalf of the Plaintiff that pre-morbid he was employed with a powder-coating certificate in a factory earning R1150 per week. The matter ends there, no proof is submitted, not even secondary evidence was presented. When the court made further enquiries in this regard, the only assistance counsel could proffer is that the court should apply a higher percentage contingency.

[13] The actuary's calculations/recommendations are based on postulates presented to him as facts regarding the Plaintiff's pre-morbid earnings as R1150 per week. Post-morbid he was earning two to three times a week earning R250 per day.

[14] I however, cannot accept them as gospel truth absent of any evidence in support thereof; such as salary advice, wage slips or even a letter of appointment in any of the alleged positions.

[15] It would be unacceptable in the extreme for this court to be expected to operate from a reckless premise that seem to assume that the Defendant is possessed of a bottomless pit of public funds. The actual position is that public fiscal reality is far more constrained beyond imagination.

[16] In *Gordon Lloyd Page & Associates v Rivera*<sup>2</sup> Harms JA held that **"...a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff..."** (emphasis added).

[17] The matter that served before me is one such matter where the court is unable to make a finding on the claim for loss of earnings either way.

[18] In the circumstances, I make the following order: The Defendant is ordered to pay the Plaintiff as follows:

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<sup>2</sup> 2001 (1) SA 88 (SCA)



- 18.1 The amount of (R900 000.00 less 20% apportionment)  
  
R720 000.00 in respect of general damages.
- 18.2 The amount of (R1 043 240.00 less 20% apportionment) R834  
592.00 for future medical expenses.
- 18.3 The defendant to pay the plaintiff's party and party costs on a  
high court scale including counsel's fee.
- 18.4 The defendant to further pay the costs of all the experts the plaintiff  
has appointed including the fees for the addendum as well as the  
joint minutes.
- 18.5 On the claim for past and future loss of earnings, I order absolution  
from the instance.



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J.S. NYATHI  
Judge of the High Court  
Gauteng Division, Pretoria

Date of Judgment: 07 June 2022

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