



NORTH WEST HIGH COURT, MAFIKENG

CASE NO. 3307/2009

In the matter between:

SITHEMBELE GANU

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

GUTTA J.

A. INTRODUCTION

- [1] The plaintiff claims damages from the Road Accident Fund arising out of bodily injuries sustained in a motor vehicle collision which occurred on 01 February 2008 between a motor vehicle with registration number FYL 621 NW, driven by Mr Ofentse Ignatius Mphomane ("the insured driver") and the plaintiff, a pedestrian.

[2] At the commencement of the proceedings, the following issues were agreed to between the parties, that:

- 2.1 the defendant pays 100% of the plaintiff's proven damages;
- 2.2 the defendant undertakes, in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1966, to pay all the plaintiff's future hospital and medical costs;
- 2.3 the defendant pay the plaintiff's past medical expenses in the amount of R92 963.80;
- 2.4 the plaintiff sustained the following injuries:
 - a) compound fracture of the left tibia and fibula;
 - b) mandible fracture;
 - c) injury to the left knee;
 - d) multiple facial scars;
 - e) degloving wound on the left foot;
 - f) moderate concussive head injury.
- 2.5 the sequelae to the injuries;

[3] The only issues left for this Court to determine were:

- 3.1 general damages;
- 3.2 future loss of earning capacity.

B. FUTURE LOSS OF INCOME/EARNING CAPACITY

- [4] The future loss of income is the difference between the capital values of the future uninjured, that is what the plaintiff would have earned in the future had he not been injured, and future injured incomes, that is what the plaintiff will earn in the future with his injuries.
- [5] The plaintiff worked as a mine worker at various mines from February 1996 until January 2007, where he was employed as loco driver at Anglo Platinum Mines ("Anglo") in Rustenburg. After the accident, the plaintiff returned to work at Anglo as loco driver and remains in this position to date.
- [6] Adv Leopeng, counsel for the plaintiff, abandoned his submission that the plaintiff will have early retirement, and accepted the defendant's expert opinion that the plaintiff will retire at the normal retirement age of 60 years.
- [7] Adv Leopeng referred the Court to the defendant's industrial psychologist, Mr Kobus Prinsloo's report, who considered the medico-legal reports of other experts, namely, Ms Adelaide Phasha, an occupational therapist, Ms Narropi Sewpershad, a neuropsychologist, Mr Sean Dicks, a clinical psychologist and Dr B.A. Okoli, a neurosurgeon, and outlined the plaintiff's impediments as:
- 7.1 diminished personal productivity;
 - 7.2 diminished occupational relationships.

[8] Under the heading of 'Post-Morbid', Mr Prinsloo said the following:

"9.3.2 Post-Morbid

- Taking the expert opinions into consideration, a higher than normal post-morbid contingency deduction is recommended due to Mr Ganu's physical-, cognitive- and psycho-social vulnerability within his occupational functioning:
 - 15% Whole person impairment with 20% loss in productivity.
 - Cognitive deficits (concentration, memory and attention).
 - Poor workplace relations.

The aforementioned impairments will lead to decline in personal productivity/compromised performance which may lead to diminished earnings potential.

- Assessment of contingencies is the prerogative of the Court together with the negotiation between the parties involved. The data provided in this report should be seen as a realistic estimate based on the available information received."

[9] Adv Leopeng submitted that the 15–20% loss of productivity is in line with the plaintiff's industrial psychologist's report, namely, Ms Sandra Moses, who stated that the plaintiff will suffer a future loss of earnings the equivalent of 20% in productivity. She deferred to the report by Dr D. Lekalakala, the orthopaedic surgeon, who stated that with time, the plaintiff will experience a reduction in productivity of 20%.

[10] The plaintiff's actuary, Alex Munro, calculated the plaintiff's uninjured future income at R1 115 300.00 and injured income assuming that as at date of calculation the plaintiff will suffer a 20% reduced earning capacity at R987 500.00.

- [11] Adv Leopeng did not rely on the plaintiff's actuary report, but referred the Court to the defendant's actuarial calculations of Mr Johan Potgieter. Mr Potgieter in his report stated that the plaintiff's future income would be the same as his income had the accident not occurred but that there should be a higher contingency deduction.
- [12] Adv Milanzi, counsel for the defendant, only relied on the medico-legal reports of Dr D.A. (Tony) Birrell, the orthopaedic surgeon and Mr Prinsloo, the industrial psychologist.
- [13] Adv Milanzi submitted that when Mr Prinsloo stated that the plaintiff post-morbid has a 20% loss in productivity, that he was relying on the other experts' reports and was not in possession of Dr Birrell's report.
- [14] Dr Birrell stated, "I would estimate that from an orthopaedic point of view, as an underground loco driver, this patient has sustained a loss of work capacity of around 4%, i.e. between 3%–5%".
- [15] I accept the actuarial calculations of Mr Potgieter, as well as the reports of Ms Moses and Dr Lekalakala, who have all made an assessment that the plaintiff will suffer a 20% loss of productivity. Dr Birrell's assessment of 4% is clearly from an orthopaedic and physical point of view and does not include the plaintiff's cognitive and psycho-social effects as outlined by Mr Prinsloo.

- [16] Because of the injuries sustained by the plaintiff and its effect on the plaintiff's productivity, as well as the cognitive and psycho-social effect, a post-morbid contingency deduction must be applied.
- [17] Both parties were *ad idem* that the pre-morbid contingency should be 10%.
- [18] A Court has a wide discretion when making an allowance for contingencies. See ***Southern Insurance Association Ltd v Bailey N.O 1984 (1) SA 98 (A) at 116G–117A; Legal Insurance Co. Ltd v Boles 1963 (1) SA 608 (A) at 614F–G.***
- [19] Adv Leopeng submitted that a post-morbid 30% contingency be applied because of the 20% post-morbid loss of productivity.
- [20] In determining the appropriate contingency for loss of future income, I have taken the following into consideration:
- 20.1 risk of demotion;
 - 20.2 risk of future retrenchment and resultant unemployment;
 - 20.3 loss of income due to illness, incapacity or impairment;
 - 20.4 no promotional prospects;
 - 20.5 future employability;
 - 20.6 decline in productivity and efficiency;
 - 20.7 neuro-cognitive deficits;
 - 20.8 psycho-social problems resulting in poor work relations and poor functionability.

[21] I am of the view that a 30% contingency deduction would be appropriate and consider it to be fair in all the circumstances.

[22] Accordingly, the calculation for future loss of income, calculated on Mr Potgieter's actuarial calculations are as follows:

A	Future loss of income uninjured	R961 754.00
	Less 10%	96 175.40

		R865 578.60
B	Future loss of income injured	R961 754.00
	Less 30%	288 526.20

		R673 227.80
A – B	=	R192 350.80
		=====

C. GENERAL DAMAGES

[23] Adv Leopeng submitted that the parties have agreed on the nature, extent and sequelae of injuries. He referred the Court to the judgment of Kgomo J delivered on 08 September 2011, in the South Gauteng High Court, of *Zamokwakhe Comfort Mngomezulu v Road Accident Fund 2009 (2) SA 401 (ECD)*, and submitted that the injuries and sequelae are the same and the Court awarded the plaintiff the amount of R600 000.00.

- [24] Adv Leopeng submitted that *in casu*, there was the additional injury of the mandible fracture and facial scarring and injury to the knee and that an appropriate award will be R680 000.00.
- [25] In ***Zamokwakhe Comfort Mngomezulu v Road Accident Fund*** *supra*, the plaintiff sustained a compound right tibia and fibula fracture, closed chest injury with lung contusion, a 30cm laceration on the right thigh and a moderate to severe traumatic brain injury, leading to neuro-cognitive and neuro-behavioural problems. The plaintiff walked with a pronounced right leg limp. The injuries and sequelae in the above case and this case *in casu*, are distinguishable.
- [26] Both counsel referred the Court to the case of ***Roe v Road Accident Fund 2011 (6JZ) QOD 59 (GSD)***, where the plaintiff sustained the following multiple injuries:
- 26.1 soft tissue injury to the neck;
 - 26.2 facial injuries with fracture of the cheek and some of the teeth came loose;
 - 26.3 a comminuted fracture of the right femoral shaft;
 - 26.4 comminuted fracture of the right tibia and fibula;
 - 26.5 fracture of the right patella;
 - 26.6 fracture of the left humeral shaft;
 - 26.7 a supra-inter fracture of the left discal humerus;
 - 26.8 degloving injury over the lateral aspect of the right foot; and
 - 26.9 fracture of the right incisor teeth.

- [27] The injuries sustained in the ***Roe v Road Accident Fund*** case *supra*, are different and more severe to the injuries *in casu*, and the Court awarded the amount of R650 000.00 for general damages.
- [28] Adv Milanzi confirmed the injuries and sequelae except the knee injury, which he submitted was not mentioned.
- [29] Adv Milanzi also relied on the following cases under the separate injuries:

29.1 ***Matthyssen v Road Accident Fund 1999 QOD 4B4/23***, where the plaintiff sustained a moderate concussive head injury, reduced memory, mildly reduced competence and intellect and personality change and the Court awarded R90 000.00, and the equivalent for 2011 in terms of *the Quantum Year Book* by Robert Koch is R180 000.00.

29.2 ***De Wet A T v Road Accident Fund 2003 QOD 5 E4/13***, the plaintiff sustained a fracture to his left tibia and fibula, was on crutches, nonunion bone grafting was performed, unfit for work for two years. He was awarded R95 000.00, the equivalent for 2011 is R148 000.00.

29.3 ***Laubscher & Another v Commercial Union 1976 QOD 2 460***. The plaintiff sustained a fracture to the mandible in three places, the jaw was temporarily wired and he was fed by straw, the jaw was not mobilized for two months. He was awarded R1 250.00, the equivalent for 2011 is R35 000.00.

- [30] Adv Milanzi submitted that the plaintiff suffered a mild head injury and that the Court should award the amount of R300 000.00 for general damages.
- [31] Adv Leopeng submitted that the plaintiff's neuro-psychologist clarified the head injury as a moderate concussed head injury.
- [32] The plaintiff's orthopaedic surgeon, Dr Lekalakala, did not mention a knee injury. In his report, he stated that the knees are normal with no deformities. Also the reports of Dr Erlank, the plastic and reconstructive surgeon, Ms Phasha, the occupational therapist and Ms Sewpershad, the clinical psychologist are silent in respect of the injury to the knee.
- [33] I have also considered the cases of *Fielies v Road Accident Fund 1999 C + B 5 E4-1 (AFC)*; and *Fortuin v Road Accident Fund 2007 (5) C + B E5-1 (EC)*, which relate to the compound fracture of the tibia and fibula and injury to the head, where the Court awarded the 2011 equivalent as provided in *the Quantum Yearbook*, by Robert Koch in the amount of R44 000.00 and R80 000.00 respectively.
- [34] In the matter of *Rademeyer v Rondalia Assurance Corporation of South Africa Ltd 1968 (2E4) QOD 46 (C)*, the plaintiff sustained a compound fracture of the right tibia and fibula, also a fracture of the scaphoid bone of the left wrist, fractured mandible and a head injury which caused temporary loss of consciousness. The fracture of the wrist had not united and a bone graft was necessary in the future and if that failed, arthrodosis of the wrist. With regard to the leg injury, the bones failed to sit in a

satisfactory position. A few operations were performed. He walked with crutches. He had gross disfigurement of the abdomen and his leg had permanently shortened. The Court awarded the plaintiff general damages in the amount of R10 000.00. The equivalent as per the Robert Koch Quantum Yearbook for 2011 is R531 000.00.

- [35] What is apparent from the case of ***Rademeyer v Rondalia Assurance Corporation of South Africa Ltd*** *supra*, is that even though the injuries are similar, the sequelae was much more severe than the plaintiff's and are not comparable.
- [36] Courts generally have a discretion to consider the injuries and the quantum awarded either separately or as multiple injuries. No two cases are identical and the case authority generally guide the Courts in arriving at an appropriate quantum. The cases cited by both counsel were helpful in determining the quantum of damages, although as stated *supra*, the injuries and the sequelae in those cases were generally more severe than the injuries sustained by the plaintiff.
- [37] When considering general damages, I have considered the various experts' reports, in particular the orthopaedic surgeons reports for both plaintiff and defendant. According to Dr Birrell, the plaintiff had acute pain for approximately a week after the accident and moderate pain for 10 to 12 weeks after the accident. In so far as the fracture of the left tibia and injury to the right foot, he says that the right foot scar could easily break down with relatively minimal trauma. The intramedullary pin should be removed from the tibia and there is a small chance of not

more than 5% that the plaintiff may develop osteoarthritis of the right ankle, but this will take years to develop and will not require surgery. Dr Lekalakala opined that the plaintiff may have acute pain for about 7 days when removing the internal fixation. Both experts stated further that the plaintiff was not engaged in any sporting activities or hobbies prior to the accident and that the injuries have not affected his leisure. Dr Lekalakala also stated that the musculoskeletal injuries and sequelae have not resulted in permanent disabilities.

[38] I am of the view that an appropriate quantum for general damages that is fair, just and reasonable in the circumstances is the amount of R380 000.00.

[39] Finally, on the issue of costs, costs will follow the result and will be awarded to the plaintiff.

D. ORDER

[40] In the result, this Court makes the following order:

- a) The defendant is ordered to pay the plaintiff the amount of R665 314.60, which amount is made up as follows:

Past loss medical expenses	R 92 963.80
Future loss of earnings	192 350.80
General damages	380 000.00

Total	R665 314.60
	=====

- b) The defendant is ordered to pay interest on the above amount at the rate of 15.5% per annum, calculated from 14 days after the date of this judgment to date of payment.

- c) The defendant is ordered to furnish the plaintiff with an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital or nursing home for treatment or the rendering of a service or the supplying of goods to him after such costs have been incurred and on proof of payment hereof.

- d) The defendant is ordered to pay the qualifying fees, if any, of the following expert witnesses:
 - i) Dr D. Lekalakala – Orthopaedic surgeon;
 - ii) Ms Adelaide Phasha – Occupational Therapist;
 - iii) Dr J.D. Erlank – Plastic and Reconstruction Surgeon;
 - iv) Mr Sewpershad – Neuropsychologist;
 - v) Prof P.L. Lekgwara – Specialist Neurosurgeon;
 - vi) Ms Sandra Moses – Industrial Psychologist;
 - vii) Munro Consulting – Actuary;
 - viii) Dr A. Mohamed – Maxillofacial & Oral Surgeon.

- e) The defendant is ordered to pay the plaintiff's costs including the costs consequent upon the employment of counsel.

N. GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 27 SEPTEMBER 2011
DATE OF JUDGMENT : 01 DECEMBER 2011

COUNSEL FOR PLAINTIFF : ADV LEOPENG
COUNSEL FOR DEFENDANT : ADV J.D. MILANZI

ATTORNEYS FOR PLAINTIFF : GURA TLALETSI INC.
(Instructed by MPHELA & ASSOCIATES)
ATTORNEYS FOR DEFENDANT : SMIT STANTON ATTORNEYS
(Instructed by IQBAL MAHOMED ATTORNEYS)