




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 34385/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
	20/05/2024
SIGNATURE	DATE

In the matter between:

ADV ANTON LOUW N.O. obo MSIBI, VUSI
VICTOR

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Coram: Horn AJ

Heard: 17 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 20 May 2024.

JUDGMENT

HORN AJ

- [1] Mr Vusi Victor Msibi ("Mr Msibi"), born on 25 June 1974, sustained injuries in a motor vehicle collision on 22 October 2018. On 10 May 2024, the current plaintiff, Adv Anton Louw, was appointed as curator *ad litem* to Mr Msibi. On 17 May 2024, at the commencement of the hearing, Mr Louw informed me that he had ratified all steps taken to date by Mr Msibi's legal representatives in the institution and prosecution of Mr Msibi's claim against the defendant.¹
- [2] The question of the defendant's liability has been resolved by agreement between the parties 12 April 2022. In terms of that agreement, the defendant is liable for all Mr Msibi's agreed or proven damages.
- [3] At commencement of the trial, the matter stood down for discussions between the parties' legal representatives. Ultimately, I was informed that the defendant does not take issue with the expert reports delivered on the plaintiff's behalf. The defendant did not appoint expert witnesses of its own. The reports delivered by the plaintiff had been confirmed under oath. I therefore ruled, pursuant to the plaintiff's application in terms of Rule 38(2), that the plaintiff be permitted to adduce his expert evidence by way of affidavit.
- [4] The parties also agreed to separate and postpone the issues of general damages and past hospital and medical expenses,

¹ Ratification by a curator *ad litem* can take place any time before judgment – see *Santam Insurance Ltd v Boo* 1995 (3) SA 301 (A) at 311A and 313C.

[5] Having considered the opinions expressed in the reports of the plaintiff's expert witnesses and the nature of Mr Msibi's injuries (discussed below), there is no reason why I should not accept those opinions. The matter was therefore argued on the agreed facts and opinions set out in the plaintiff's experts.

[6] Mr Mtshemla, for the defendant, confirmed that the only issue for determination is the appropriate contingency deduction to be made from Mr Msibi's postulated pre-accident earnings. To determine the appropriate contingencies to apply, it is necessary to have regard to Mr Msibi's injuries and the sequelae thereof. Mr Msibi's case is indeed a tragic one. But, as I shall endeavour to illustrate below, the case is not a complicated one.

Neurosurgeon

[7] Dr Segwapa, a neurosurgeon retained by the plaintiff, reports that Mr Msibi sustained direct trauma to the head during the accident, followed by a period of unconsciousness of approximately three weeks. He suffered a fractured mandible and currently has left sided hemiparesis, which is expected to be permanent. A brain scan performed during January 2019 reveals that Mr Msibi had an infarct of the middle cerebral artery distribution on the right side. These are features of a severe traumatic brain injury with focal brain damage.

Maxillo-facial and oral surgeon

[8] According to Dr Polakow, a maxilla-facial and oral surgeon, Mr Msibi's injuries include a degloving injury to the scalp, intracranial haemorrhage, a fractured mandible and damage to his lower front teeth. He underwent a craniotomy on the

right, which is the surgical removal of part of the bone from the skull to expose the brain. The fractured mandible was repaired surgically by way of an open reduction and internal fixation.

- [9] Mr Msibi currently cannot chew properly and suffers from chronic headaches and facial muscle spasm. His ability to open his mouth is limited, resulting in him struggling to articulate.

Orthopaedic surgeon

- [10] Dr Schnaid, an orthopaedic surgeon, reports that Mr Msibi, *inter alia*, sustained a fractured skull, fractured mandible, fractured left tibial plateau and a soft tissue injury to the cervical spine. Mr Msibi can only walk short distances and stand for short periods of time. Dr Schnaid also noted that Mr Msibi suffers from right facial palsy.
- [11] The fracture of the left tibial plateau was repaired surgically and the fixatives remain intact. In Dr Schnaid's view, Mr Msibi is predisposed to osteoarthritis, which will be an indication for a total knee replacement. An arthroplasty procedure will relieve the pain, but will reduce the function of the knee significantly.
- [12] X-ray imaging of Mr Msibi's cervical spine shows mild disc space narrowing and mild osteophytes. The dysfunction and symptoms of pain and spasms will probably be ongoing. According to Dr Schnaid, provision should be made for a spinal fusion. In Dr Schnaid's view, Mr Msibi is unemployable.

Clinical psychologist

- [13] Mr Msibi was assessed by a clinical psychologist, Ms Modipa. During the assessment performed by Ms Modipa, neurocognitive deficits were evident. These include short-term memory impairment, speed of information processing and visual impairments. It is reported that Mr Msibi has lost the capacity to perform most advanced activities independently. Ms Modipa is of the view that Mr Msibi will probably remain uncompetitive and unemployable.

Neurologist

- [14] Dr Manyane, a neurologist retained by the plaintiff, was privy to and noted the findings of the expert witnesses set out above. He concludes that Mr Msibi sustained a severe traumatic brain injury with evidence of focal brain damage. Mr Msibi has been left with post-traumatic headaches and neurocognitive and neurobehavioural impairments

Psychiatrist

- [15] Dr Motala, a specialist psychiatrist, reports that Mr Msibi's psychiatric symptoms include a depressed and unstable mood, short temperedness, insomnia, loss of appetite, fatigue and low self-esteem. Mr Msibi also displays classic features of post-traumatic stress, such as uncontrollable worry, headaches and panic symptoms. Additionally, Mr Msibi displays slow processing speed, impaired memory and concentration and intellectual decline.
- [16] According to Dr Motala, Mr Msibi will not cope with any occupation.

Occupational therapist

[17] Ms Mathebula, the occupational therapist retained by the plaintiff, was privy to, *inter alia*, the reports of Dr Segwapa, Dr Schnaid, Dr Polakow and Ms Modipa. According to Ms Mathebula, Mr Msibi's ability to execute activities of daily living, including self-care activities, has been significantly compromised. He experiences difficulties with shopping and using public transport. To this end, Ms Mathebula opines that Mr Msibi is a candidate for a full-time care.

[18] As matters stand, according to Ms Mathebula, Mr Msibi is not a candidate for vocational training as he is not trainable in skill acquisition. He is not suited for the positions of underground electrician and mechanic in the informal sector, which were his occupations pre-accident. Mr Msibi's capacity for employment, even in a sheltered or protected environment, has been compromised. In such employment, if it were attainable, Mr Msibi would be limited to the use of one hand.

Industrial psychologist

[19] Ms Pretorius, an industrial psychologist, provided an updated report dated 30 October 2023. All the other expert reports were made available to her. She reports that Mr Msibi's highest level of education is a N5 qualification in electrical engineering, attained in 2006. He was a qualified electrician. At the time of the accident, he was employed in this capacity by Sibanye-Stillwater Gold Mine. He commenced his employment in 2006. This was confirmed by Mr Tsitsi, a foreman at Sibanye-Stillwater. Mr Msibi's average monthly earnings at the time of the accident amounted to R54 528.

- [20] In addition, Mr Msibi was self-employed in the informal sector. In this position he repaired electrical parts and motor vehicles. His reported earnings in this position were approximately R2 000 per month, net of expenses.
- [21] According to Ms Pretorius, Mr Msibi had reached his career ceiling by the time the accident occurred. He would have remained employed in his pre-accident or similar capacity. The uninjured income scenario, therefore, does not allow for any further career progression. It only allows for inflationary increases until retirement at the age of 65.
- [22] Considering Mr Msibi's limitations and the opinions expressed by the other expert witnesses, Ms Pretorius concludes that Mr Msibi is unemployable in the open labour market. I have no difficulty with this conclusion. Indeed, the defendant's counsel also accepted that this is the position in which Mr Msibi currently finds himself.

Actuarial calculation

- [23] An actuarial calculation of the Mr Msibi's loss of earnings was prepared by Mr Waisberg, a consulting actuary. He did so on the basis suggested in Ms Pretorius' most recent report.
- [24] In light of the fact that Mr Msibi has been rendered unemployable, there is obviously no income to consider post-accident. All that is required is a calculation of Mr Msibi's income, had the accident not occurred.

- [25] Mr Waisberg applied a contingency deduction of 5% to past earnings (between the accident date and the calculation date). Applying this percentage to past loss of earnings is usually uncontroversial.² A contingency percentage of 10% was applied to Mr Msibi's future income, but for the accident. This is slightly higher than the view expressed by Robert J Koch in the Quantum Yearbook, namely that 0.5% per year for the remainder of a person's working life is appropriate. Mr Msibi is currently 50 years old. On Koch's approach, the contingency should be 7.5%.
- [26] In *Goodall v President Insurance Co Ltd*³ the plaintiff was 46 years old at the time of the trial. The plaintiff in that case was in good health prior to the accident. His working life was undistinguished, but he was a steady employee and a reasonable and responsible individual. The court regarded 10% as an appropriate deduction to future uninjured earnings.
- [27] Mr Mtshemla conceded that, in the ordinary course, the aforesaid contingency deductions of 5% and 10%, for of past and future loss respectively, would have been appropriate. But in this case, he says, the position is different. It was contended that a deduction of 10% ought to be made to past earnings and 25% to future earnings.
- [28] Two reasons for the submission were advanced. First, it is contended that the fact that Mr Msibi has already reached his career ceiling at the time of the accident warrants a higher contingency pre and post-accident. I have difficulty in accepting this submission. At best, the fact relied upon by counsel in support of

² *Kruger v Road Accident Fund* 2022 JDR 0753 (GP) at para 186 and the authorities cited there.

³ 1978 (1) SA 389 (W)

the submission is neutral. At worst, the fact that Mr Msibi had already reached his career ceiling speaks against the submission that a higher contingency is warranted. This is so because there is no possibility of career progression, which is by its very nature speculative. Mr Msibi had been employed for 12 years by the same employer pre-accident. There is no indication that the position would have changed, but for the accident.

- [29] The second reason advanced as motivation for the application of higher than normal contingencies is the fact that the plaintiff's additional monthly earnings of R2 000 per month in the informal sector is uncertain. It may well be that Mr Msibi's earnings in the informal sector are less certain than his earnings derived from his formal employment. But the informal earnings represent only 3.6% of Mr Msibi's formal earnings. In future, the informal earnings may have fallen away altogether. Or it may have grown into something more substantial beyond retirement. There are no facts pointing in either direction. In any event, in *Southern Insurance Association Ltd v Bailey NO*,⁴ the then Appellate Division cited the following passage from the Australian decision in *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213 with approval:

"It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune?"

Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad."

[30] Here, Mr Msibi informed Ms Pretorius that he was in the process of doing a foreman's course when the accident intervened. In the event, the possibility of promotion to the position of foreman has been excluded from the calculation of future earnings. That does not mean that it is absolutely certain that it never would have happened. But the uncertainty which may have warranted a higher contingency deduction has been removed from the equation.

[31] I am therefore not persuaded that the facts of this case warrant the application of higher contingencies than those employed in Mr Waisberg's calculation as set out above. In any event, the 10% deduction to future uninjured earnings is already somewhat higher than the usual 7.5% (considering the 15 remaining years Mr Msibi would have worked until the age of 65). If the trivial amount of Ms Msibi's earnings in the informal sector at all warranted the application of a higher contingency to pre-accident earnings, the additional 2.5%, in my view, more than adequately allows for this.

[32] The amount to be awarded for loss of earnings, on the basis provided by Ms Pretorius as recorded above and calculated by Mr Waisberg amounts to R5 733 018. The amount has been reduced from R9 576 969 by virtue of the fact that the "cap" applies, as introduced by section 17(4)(c) of the Road Accident Fund Act 1996.

Costs

- [33] Plaintiff's counsel, Mr Mofokeng, argued for costs to be awarded on scale C as provided for in Rule 69 of the Uniform Rules of Court, as amended. Defendant's counsel contended for scale B. In the context of litigation of the type here under consideration, the claim is relatively large. As noted earlier in this judgment, the claim is not particularly complex. It is certain that the plaintiff is unemployable in future. His earnings at the time of the accident are, for the most part, a matter of record. Future increases are uncontroversial. When the accident occurred, Mr Msibi had been employed as an electrician by the same employer for 12 years. There may be other cases where the quantification of the claim is more complex. On the present facts, I agree with Mr Mtshemla that costs on scale B is appropriate.

Conclusion

- [34] Mr Mofokeng handed up a draft order and contended that I should make an order in those terms. Mr Mtshemla took issue with the scale of costs and the amount to be awarded in respect of loss of earnings, based on his argument in relation to appropriate contingency deductions. The remainder of the draft order was not contested.
- [35] Mr Louw addressed me on the relevant provisions in the draft order which are aimed at protecting the funds to be awarded to Mr Msibi. I am satisfied that those provisions are necessary and adequate.

- [36] The order that I make embodies the uncontested provisions of the draft order and my findings on the issues in dispute between the parties. In the result, I make the draft order annexed hereto and marked "X" an order of Court.



N J HORN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 17 May 2024

Date of judgment: 20 May 2024

Counsel for the Plaintiff: T A Mofokeng

Instructed by Masewawatla Attorneys

Counsel for the Defendant: L Mtshemla

Instructed by the State Attorney