IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 2019/22964

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

HARDY AJ **11 JULY 2024**

In the matter between:

SENZELA, SIVUYILE Plaintiff
(Identity number 8[…])

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

HARDY AJ:

1. On 22 May 2019, the Plaintiff was shoved by the crowd from the open doors of a moving train, which was owned by and under the control of the Defendant, due to the negligence of the Defendant's employees.

2. On 03 July 2019, the Plaintiff instituted action against the Defendant seeking to recover damages of R2 000 000,00 (R500 000,00 loss of earnings; R500 000,00

future medical expenses; R1 000 000,00 general damages) from the Defendant for damage suffered by him due to the negligence of the Defendant's employees.

3. On 22 May 2020, the Defendant's plea sought the dismissal of the Plaintiff's claims against it pleading that no such incident as alleged by the Plaintiff had occurred; that if such incident had occurred, then the Defendant's employees had not been negligent (alternatively, that the Plaintiff's own negligence had been the cause of his damage or contributed to his damage); and that it was not liable to the Plaintiff in the amount claimed or any other amount.

4. On 11 February 2021, the parties agreed at their first pre-trial conference that the issues of liability and quantum should be separated.

5. On 05 May 2021, the Plaintiff amended his Particulars of Claim regarding the quantum of his claim – increasing it to R2 500 000,00 (R1 000 000,00 loss of earnings; R500 000,00 future medical expenses; R1 000 000,00 general damages). It does not appear to me that the Defendant consequently amended its plea.

6. On 24 May 2021, Fisher J granted an order separating the issues of liability and quantum and certified the issue of liability as trial ready.

7. On 04 October 2021, the trial on the issue of liability commenced before Meersingh AJ. The matter was heard over five days to 08 October 2021 and postponed (whilst the Plaintiff was being re-examined) to 06 December 2021 for the continuation of the trial.

8. On 26 October 2021, the Plaintiff again amended his Particulars of Claim regarding to the extent of the injuries suffered by him. It does not appear to me that the Defendant consequently amended its plea.

9. On 10 December 2021, following the completion of the trial on the issue of liability, Meersingh AJ ordered that the Defendant was 100% liable for the Plaintiff's proven damages (as well as for the costs up to that date).

10. On 06 July 2022, Ismail J granted an order compelling the Defendant to attend a pre-trial conference for the issue of quantum; and compelling the Defendant to deliver the notices necessary to identify the experts on whom it intended to rely (and to whom the Plaintiff had to present himself for inspection).

11. On 06 September 2022, following the Defendant's failure to comply with the order of 06 July 2022, Thupaatlatse AJ granted an order compelling the Defendant to attend a pre-trial conference on 14 September 2022; and prohibiting the Defendant from calling any expert witnesses to testify on its behalf.

12. At that pre-trial conference, the Defendant agreed to admit into evidence the reports of the experts (orthopaedic surgeon, occupational therapist, industrial psychologist, and actuary) the Plaintiff intended to rely on but stipulated that these experts still had to testify so that they could be cross-examined on behalf of the Defendant. The parties further agreed that the only issues to be determined at the quantum trial was whether the Plaintiff had suffered damage to be compensated under the claims for loss of earnings, future medical expenses, and general damages; and if so, the amount of damages incurred under each of these claims.

13. On 03 April 2023, the Plaintiff gave notice that he intended to amend his Particulars of Claim regarding the quantum of his claim yet again – increasing it to R4 217 748,00 (R2 517 748,00 loss of earnings; R700 000,00 future medical expenses; R1 000 000,00 general damages).

14. This amendment was effected on 25 April 2023. It does not appear to me that the Defendant consequently amended its plea.

15. This was the state of the pleadings when the trial on the quantum claim was scheduled to be heard on 30 May 2023.

16. On 10 May 2023, the parties held their final pre-trial conference. The Defendant clearly set out that the Plaintiff was required to prove all aspects of his quantum claims – the Defendant was still disputing every aspect of the quantum claims.

17. In summary, the Defendant had denied liability to the Plaintiff for any and all damages suffered by the Plaintiff as a result of the negligence of the Defendant's employees.

18. The Plaintiff was thus required to satisfy the court at this trial on a balance of probabilities that he had incurred damage under each of his three claims; and if so, the quantum of these claims.

19. In essence, what are the Plaintiff's proven damages?

ADMISSION OF EVIDENCE ABOUT SETTLEMENT OF ROAD ACCIDENT FUND CLAIM

20. On Monday 29 May 2023, the day before the scheduled commencement of the trial, the Defendant served notices on the Plaintiff indicating that the Defendant wished to use further documents at the trial.

21. These documents comprised the court file in the matter between the same Plaintiff (represented by a different attorney than in this action) and the Road Accident Fund ("RAF") under case number 2018/35763 in this court; and screenshots from the RAF showing settlement of that entire action (loss of earnings, future medical expenses, general damages).

22. The RAF court file (as contained on CaseLines and bearing its page numbering) comprised the summons, return of service, plea, discovery, notices calling for the Plaintiff to present himself for medical inspections, expert notices, and reports on behalf of the Plaintiff, as well as a notice of removal from the trial roll of 24 November 2022. The expert reports on behalf of the Plaintiff were those of an orthopaedic surgeon (Dr Schnaid), a neurosurgeon (Dr Segwapa), an occupational therapist (Ms Khwela), a clinical psychologist (Ms Mokoena), an industrial psychologist (Mr Tsiu of Affinity) and an actuary (B. Harris of Gerard Jacobson Consulting Actuaries).

23. This notice was followed by an unsigned discovery affidavit on behalf the Defendant making discovery of the same documents on 30 May 2023; and followed by the deposed discovery affidavit on 31 May 2023.

24. The Plaintiff, also by notice on 29 May 2023, objected to the use of these documents by the Defendant. The reasons set out in his notice for his objection relate to the use of the documents where the Plaintiff alleges they are irrelevant because they relate to a different case and do not accord with the Defendant's plea; and further that notice was given so late as to prejudice the Plaintiff in his preparation for trial.

25. This meant that the trial commenced on 31 May 2023 (when a judge became available) with an application from the bar by the Defendant to permit the use at trial of the documents set out above.

26. The Defendant explained that the documents had only been made available to it by the RAF shortly before it served its notice indicating that it wished to use the documents, despite earlier attempts to obtain same being ignored by RAF staff. The Defendant asserted that these documents were effectively discovered by it as soon as possible in the circumstances – which should be weighed against the personal knowledge that the Plaintiff must have had of the RAF settlement as recently as 19 April 2023; and the Plaintiff (and his legal representatives) being aware that he had been cross-examined extensively about his RAF claim during the liability part of the trial.

27. The Defendant submitted that these documents are highly relevant as they indicated some duplication of the damages currently claimed in this action – especially loss of earnings and some future medical expenses – which would have to be put to the Plaintiff's expert witnesses during their cross-examination by the Defendant. Furthermore, the orthopaedic surgeon, Dr Schnaid, was the same expert in both matters and could easily comment on his own earlier report. The Plaintiff had relied on all the expert reports in the RAF matter to secure his settlement of that claim and could not now distance himself from them if they tended to show a duplication in the current action.

28. The Plaintiff submitted that the use of these documents should not be permitted. The Plaintiff submitted that allowing the use of these documents overrode strict compliance with the rules of court, practice manual and directives that required a matter to be certified trial ready before the commencement of a trial. The Defendant had claimed it was trial ready, but was now coming up with a different defence – not pleaded – very late in the day. The Plaintiff submitted that he would be grossly prejudiced as he would now have to run his case in a manner different to what he had prepared for if the documents were allowed.

29. The Plaintiff submitted that the opinions of expert witnesses in another action, who would not be testifying in this action, would now be placed before the court – where the Defendant was clearly trying to work around the court-ordered prohibition on calling its own expert witnesses.

30. The Plaintiff also questioned the authenticity of the documents as they originated from a third party and had not been under the control of the Defendant.

31. It was apparent to me that if the Defendant wished to introduce the documents only for the purpose of showing how other claims for loss of earnings and future medical expenses settled in favour of the Plaintiff amounted to a duplication of his claims in this action, then the documents would be highly relevant to the current quantum dispute. It is trite to state that relevance is a fundamental consideration in determining whether any evidence is admissible in court.

32. The Defendant's plea was also broad enough to accommodate this defence – as it had put the Plaintiff to proving every aspect of its quantum claim on a balance of probabilities.

33. If the Defendant wished to introduce the document for any other reason, such as trying to bind the court to the opinion of an expert who was not before the court, then I would not be able to find that the documents were relevant and would not be able to permit their use.

34. I was not concerned about questions of authenticity at that stage – documents forming part of a court file (public record) would be ordinarily be admissible if they were true copies of that court file (in this instance every page of the expert reports from the RAF action bore two sets of CaseLines page numbering – their original numbering and the numbering in this action); and if the parties could not agree on the status of the RAF settlement documents, then a witness able to authenticate same would need to testify on the issue.

35. Despite the Defendant have discovered these documents so late in the day, it could never have been a total surprise to the Plaintiff. He must have had personal knowledge of the terms of his settlement with the RAF, even if he did not relay same to his legal representatives in this action. His legal representatives did know about that action - it had been introduced during the cross-examination of the Plaintiff during the liability portion of the trial and I could see that the accident report and hospital discharge form in that matter had been uploaded to CaseLines on 07 October 2021 (day four of that leg of the trial). It would have been relatively simply for them to have followed up on the issue with the Plaintiff. In short, I was aware that the settlement of the RAF claim was information that fell peculiarly within the Plaintiff's knowledge and should have been raised by him – rather than sitting back and waiting for the Defendant to establish this on their own.

36. Nevertheless, I was concerned by the Plaintiff's submission of gross prejudice in that he would have prepared to conduct the quantum trial differently had he been aware that these documents would be used in the trial.

37. I accordingly ruled that the documents could be used by the Defendant in the trial only for the purpose of attempting to show duplication in the claims before this court; and that the matter would be postponed if the Plaintiff so wished to deal with any prejudice that he was suffering as a result of the late discovery by the Defendant and subsequent acceptance thereof by this court on the limited ground of duplication.

38. The Plaintiff then indicated that he did not wish the matter to be postponed and would be calling his first witness immediately.

39. The Plaintiff was clearly dissatisfied with my ruling. His counsel challenged the ruling continuously throughout the balance of the trial – almost every time questions were put to his witnesses on any of the documents admitted under this ruling; and even challenged that the Defendant had called a witness from the RAF to authenticate its documents and explain their meaning and effect.

40. I am accordingly setting out the reasoning for my ruling in a bit more detail in this judgment.

41. Relevance is the cornerstone for admissibility. Relevance is determined by reference to the pleadings. The Defendant has put the Plaintiff to the proof of every aspect of its quantum claimed. In these circumstances, any evidence showing a duplication of claims is relevant and of high probative value. The probative value of the relevant evidence to be admitted must outweigh any procedural prejudicial effect to the Plaintiff (preparation time in this quantum action) – if this is the case, then it does not matter that the relevant evidence may impact on the substance of the Plaintiff's claim. Any evidence showing that the Plaintiff's claims may be inflated is thus relevant and should be admitted at trial – which must be distinguished from the weight, if any, that will be accorded to it at the end of the trial when determining the appropriate order to be made on consideration of all the evidence before the court.

42. The late discovery of the documents does not automatically put an end to their use at trial as submitted by the Plaintiff. Rule 35(4) sets out that if discovery has not been made in terms of the Rule (which includes timeous discovery), then the court may grant leave to use the documents on such terms and conditions as it may deem appropriate. The court should only grant such leave if the documents are relevant, there will be no prejudice to any party and the defaulting party has satisfactorily explained its failure to comply with the Rule.

43. As set out above, the documents appear to be relevant, prejudice was addressed and the Defendant explained that it discovered the documents as soon as it came into possession of them. At no stage has there been any satisfactory

explanation for why the Plaintiff did not disclose the RAF documents that would have been peculiarly within his knowledge, rather than the Defendant's knowledge.

44. Furthermore, even if the Defendant had not attempted to make its late discovery, but the documents came to the attention of the court during the quantum trial, it could of its own volition have ordered the Plaintiff to make discovery of such documents in terms of Rule 35(11) and dealt with those documents as it deemed appropriate.

45. The authenticity of the documents was partially apparent at the time – contents of the RAF court file could be authenticated under either section 34 of the Superior Courts Act 10 of 2013 or under section 18(1) of the Civil Proceedings Evidence Act 25 of 1965 for accepting court/public records – RAF documents could be authenticated by a suitable witness (and were subsequently so authenticated).

46. Ultimately, although this was only known at the end of the trial, the Plaintiff did not dispute the authenticity or contents of any of the documents discovered late by the Defendant – it only disputed the weight to be accorded by the court to their contents insofar as they dealt with any alleged duplication of the Plaintiff's quantum claims.

EVIDENCE LED AT THE QUANTUM TRIAL

DR EDWARD SCHAID (ORTHOPAEDIC SURGEON)

47. Dr Schnaid's export report sets out that he examined the Plaintiff on 25 March 2022. His study of the Plaintiff's hospital records and discussions with the Plaintiff indicated that the Plaintiff had suffered a fracture of his left tibial plateau and left fibular head as well as soft tissue damage to his lumbar spine on 22 May 2019. This was treated by surgery, physiotherapy, and occupational therapy. He records that the Plaintiff suffers from diabetes, hypertension and previously fractured right tibia and fibula from a motor vehicle accident on 20 December 2013. The Plaintiff currently suffers from ongoing pain and is physically restricted – due to decreased movement in his left knee and restricted lumbar movement, the Plaintiff cannot walk

far, cannot run, cannot stand or sit for long, cannot lift or carry heavy objects. These physical restrictions make him unable to do any physical work (the Plaintiff battles with household chores) and this will not improve much even after future surgical intervention to improve his situation. The Plaintiff will require surgery at least three more times to remove the tibia fixatives, replace his left knee (and adjust it at 10-yearly intervals), and fuse his lumbar spine if physiotherapy is not effective (and it has not been to date). Each of these surgeries will need to be followed by further physiotherapy and occupational therapy. He concludes that there will not be a good outcome for the Plaintiff even if all this treatment is received. The Plaintiff will always suffer severe pain and experience restricted physical movement. He estimates that the cost of the future treatment he recommends to be in the region of R485 000,00, inclusive of R180 000,00 for the lumbar fusion.

48. Dr Schnaid testified on 31 May 2023 on behalf of the Plaintiff. In his examination in chief, he confirmed all material aspects of his expert report.

49. In cross-examination of Dr Schnaid, he agreed that he had prepared an expert report for the RAF claim after having examined the Plaintiff on 17 September 2018 (which I note is prior the 22 May 2019 incident giving rise to the present action). He tried to avoid answering any questions about the report on the basis that it was more than two years old, but had to concede that his RAF opinion was correct at the time that it was written. The RAF report recorded that the Plaintiff had suffered a head injury, fractured right tibial plateau and soft tissue injury of the cervical spine. Although no injury to the lumbar spine was suffered directly, the Plaintiff was suffering pain because of strain to the lumbar area resulting from the abnormal loading of the lower right leg (which was injured directly) and would require a lumbar fusion in middle age. Dr Schnaid concluded that the Plaintiff would be unable to be employed in any capacity in the future that required physical work. The focus of his cross-examination was the lumbar fusion suggested by him, the inability to be employed for physical work, and the pain and loss of amenities of life experienced by the Plaintiff. Dr Schaid conceded that the lumbar fusion was needed for each set injuries to the Plaintiff and that its costs should be split equally between the RAF and Defendant having regard to the fact that it had not yet been performed; that the Plaintiff’s inability to be employed for physical work existed before the current claims;

that the Plaintiff would now have suffered about the same amount of pain as from the previous injuries, but that the loss of amenities of life was far worse as the second set of injuries compounded the consequences of the first set of injuries.

50. The re-examination of Dr Schnaid confirmed that the Plaintiff will experience a more severe loss of amenities of life in the current claim than in the RAF claim as he now no longer had any “good” leg to compensate for a “bad” leg.

MS NOMBULELO MKOSI (OCCUPATIONAL THERAPIST)

51. Ms Mkosi’s expert report sets out that she examined the Plaintiff on 05 April 2022. She reports injuries, treatment, prior history, and current status about the Plaintiff that are materially the same as reported by Dr Schnaid. Specifically, Ms Mkosi notes that the Plaintiff limps quite badly – a difficult situation when it takes 10 minutes to walk to the nearest shop and 20 minutes to walk to the nearest taxi stop. Her report sets out the range of physical tests she conducted with the Plaintiff, the results thereof and concludes that he will only be capable of performing sedentary work in the future. Her biggest concern in this regard is that the Plaintiff has no skills for sedentary work having only completed Grade 11 and only having work experience in the light to medium physical work segment of security guarding. Her report lists a variety of physical assistive devices for the Plaintiff (from enabling better physical comfort with his injuries when resting to enabling him to perform daily tasks with more ease) that would cost R23 480,00 once-off and needing replacement every 5 to 15 years depending on the particular device. She finally concludes that the Plaintiff faces a poor outcome even after he has received all the necessary future treatment and assistance.

52. Ms Mkosi testified on 31 May 2023 and 01 June 2023 on behalf of the Plaintiff. In her examination in chief, she confirmed her expert report in all material respects and emphasised the physical restrictions on the Plaintiff’s ability to move his body and lift weights more than four kilograms that she observed from exercises conducted with him. This poses a particular difficulty for the Plaintiff as his home requires him to walk to a communal toilet and to carry water from a communal JoJo tank to his own home.

53. The cross-examination of Ms Mkosi was done by reference to the expert report of Ms Relebogile Khwela (an occupational therapist who examined the Plaintiff on 12 August 2020) in the RAF claim. Many questions were put to Ms Mkosi about how the other report focused on the right leg and her report focused on the left leg without making much mention of the pre-existing injuries to the right leg. Ms Mkosi countered these questions by pointing out consistently and repeatedly that the other report was focused on the injuries giving rise to the claim it was being used to support, whilst her report did the same for this claim – furthermore, she was most concerned with what the Plaintiff was telling her about his newest injuries that were the most recent and painful at the time of her examination of him. Ms Mkosi refused to comment on the merits of a report based on an examination at which she was not present and did not observe that had occurred sometime prior to her own examination. The major difference between the reports in her view was that the previous occupational therapist concluded that the Plaintiff was capable of unskilled light physical work (which he would not obtain as he would be competing against able-bodied/uninjured workers capable of much greater physical performance than his injured self) whereas she thought he was only capable of sedentary work (which he would not obtain due to his lack of skills) – either way the Plaintiff was unlikely to be employed again.

54. I note that Ms Mkosi examined the Plaintiff about two years after the other occupational therapist and it is inevitable that some further healing of the injuries to the Plaintiff's right leg would have occurred in that interval.

55. In re-examination, Ms Mkosi set out that she did not believe the Plaintiff was faking his injuries or malingering in any way.

56. In response to questions from the court, Ms Mkosi indicated that the Plaintiff would only require one version of any assistive device for both legs – he did not need a separate device for each leg as the recommended devices were not direction-specific. Ms Mkosi indicated further that the Plaintiff would be in a worse position over time because he had broken each leg at separate times – there was no

unbroken leg to take up the slack for a previously broken leg. In effect, the sum total of his two sets of injuries was greater than the individual injuries.

57. I note that the only assistive devices and/or services that appear to be duplicated between the occupational therapists' reports are thermoregulatory heat packs; an Easireach; long-handled shoehorn/sock aid; domestic trolley for heavy objects; post-surgery personal assistance following the lumbar fusion; and the travelling costs related to the lumbar fusion surgery

58. The trial then adjourned (Plaintiff's counsel was not available the next day as the three days the matter was anticipated to run had already expired and he was on brief in another matter) to 12 July 2023 in the court recess.

59. On 10 July 2023, the Defendant uploaded further documents from the RAF to CaseLines that had been produced by the RAF following the service of a subpoena on them by the Defendant – the RAF having confirmed in correspondence on 06 July 2023 that the relevant member of their staff would be testifying when the trial resumed.

60. These documents for all practical purposes replaced the brief screenshots that had been made available on 29 May 2023. They consisted of two sets of RAF settlement offers, settlement acceptances and RAF expenditure authorisation forms indicating that that the Plaintiff in his claim against the RAF had accepted general damages in the amount of R600 000,00 and been paid same as an interim payment on 09 February 2023; and had further accepted the amount of R894 097.70 for loss of earnings (together with a s17(4)(a) undertaking for future medical expenses) on 19 April 2023 which amount was due to be paid on 16 October 2023.

MR TALENT MATURURE (INDUSTRIAL PSYCHOLOGIST)

61. Mr Maturure's expert report sets out that he consulted with the Plaintiff on 11 April 2022 and has had sight of the other relevant expert reports. It records that the Plaintiff completed Grade 11 in 2009 and a security officer Grade C course over one month during 2011. It records the Plaintiff was employed as a security guard for a

few years from then until he was injured in motor vehicle accident on 20 December 2015; and that he did not return to work thereafter until approximately a month before this incident on 22 May 2019. The employment he held at the time of this incident paid below the median for the security industry (according to payslips made available to Mr Maturure). The Plaintiff has not returned to work at all since this incident. Mr Maturure is of the opinion that the Plaintiff's scope of employment has been so compromised that he is practically unemployable in an open labour market. He reaches this conclusion based on the high unemployment rate, where employers have lots of choice for able-bodied workers, and the fact that the Plaintiff has minimal training. He thinks that the Plaintiff's retirement age may have been compromised, but leaves that call to the other experts.

62. Mr Maturure testified on 12 July 2023 on behalf of the Plaintiff. In his examination in chief, he confirmed all material aspects of his expert report. He set out the unskilled or semi-skilled work that the Plaintiff could perform if the job made no physical demands of him, but emphasised that the Plaintiff had very little chance of obtaining employment when the unemployment rate was so high and he was facing stiff competition from able-bodied job-seekers.

63. In cross-examination, it was expressly put to Mr Maturure that the RAF had/would be compensating the Plaintiff for loss of earnings for the rest of his life based on the motor vehicle accident of 20 December 2015 and the expert reports based on that incident concluding he would not work again. Mr Maturure was asked to comment on how such compensation would affect the Plaintiff's loss of earnings claim against this Defendant. He did not answer the question directly, but indicated that he had no knowledge of exactly what compensation had been/would be received by the Plaintiff for the previous incident and thus it was for the lawyers to figure it out. The expert report of Mr Tshepo Tsiu, an industrial psychologist who interviewed the Plaintiff on 16 May 2019, for the purposes of his RAF claim was put to Mr Maturure. Mr Tsiu had previously concluded that the Plaintiff was unemployable as he was not skilled enough to take on the sedentary roles required by his reduced physical abilities. This conclusion was put to Mr Maturure for comment as a possible duplication of the current claim, but he declined to do so on the basis that he did not know what information had been available to Mr Tsiu at the

time of compiling his expert report and had not had sight of other reports to which it referred.

64. There was no re-examination of Mr Maturure.

65. Quite simply, Mr Maturure was not willing to engage with any report other than his own to consider any issues of possible duplication or to even consider the possibility of duplication separate from other reports. The court asked some pointed questions that only elicited the answer that others must decide.

MR ROBERT OKETCH (ACTUARY)

66. Mr Oketch prepared his expert report to calculate (a full and detailed breakdown of every calculation was set out) the amount he viewed would be necessary to compensate the Plaintiff for his loss of earnings (R2 517 748,00) and future medical expenses (R677 062,00). Mr Oketch indicated that he relied upon the reports of Dr Schnaid, Ms Mkosi and Mr Mutururе to make his calculations as at 01 June 2022. He indicated that this figure should be revised every 12 months.

67. Mr Oketch testified on 12 July 2023 on behalf of the Plaintiff. In his examination in chief, he explained some aspects of his calculation of the future medical expenses and the loss of earnings claims. He set out that certain of the future medical expenses were duplicated across the reports of Dr Schnaid and Ms Mkosi and that all such duplications were removed prior to calculating the amount required by the Plaintiff. He was clear that no amounts alleged as duplication (in particular the costs of a lumbar fusion) to other witnesses in this matter had been removed from the calculation. He testified that this claim had some commonalities with the claim in the RAF matter (all being paid from the same fiscus) and that the amount to be received for loss of earnings in that matter should simply be deducted from the loss of earnings claim in this matter, when that calculation was updated. He testified that he calculated the loss of earnings claim with reference to the security industry's remuneration guidelines (easily ascertainable from security industry bodies) and not the Plaintiff's actual payslips.

68. In cross-examination of Mr Oketch, it was put to him that as only one lumbar fusion was required (as it had not yet been performed on the Plaintiff), that such lumbar fusion was foreshadowed in the expert reports made available to the RAF and thus covered by its undertaking to pay future medical expenses, it was not necessary to duplicate such claim against the Defendant. Mr Oketch answered that as the Plaintiff had been injured twice and the procedure recommended by the orthopaedic surgeon twice, it was necessary to claim it twice and there was thus no duplication of claims. Questions were put to Mr Oketch about his report not reflecting his evidence in chief that the RAF loss of earnings settlement should simply be deducted from the current claim when he had indicated that he had been made aware of the fact of that settlement a week earlier. He answered that ideally his report should have been supplemented by an addendum setting this out, but that he had been instructed not to prepare such an addendum.

69. In re-examination, Mr Oketch testified that he had only received the detailed and specific information about the RAF settlement the day before, which left insufficient time to prepare an addendum.

70. I asked questions from the bench to understand why the figures claimed for loss of earnings from the RAF and the Defendant varied so widely when based upon the same Plaintiff who would apparently have the same earning capacity. Mr Oketch enlightened me that the expert reports in the RAF action regarded the Plaintiff as unskilled, whilst his report in the current matter regarded the Plaintiff as semi-skilled.

71. The Plaintiff closed its case after Mr Oketch’s testimony.

MR BRETT PHILLIPS (ROAD ACCIDENT FUND)

72. Mr Phillips testified on 12 July 2023 on behalf of the Defendant. This was itself rather bizarre as his evidence dealt with the settlement of the Plaintiff’s action against the RAF – which fell within the knowledge of the Plaintiff in this action rather than that of the Defendant.

73. In his examination in chief, Mr Phillips testified that he is a senior claims manager at the RAF to whom four teams report directly – those dealing with claims, adjudication, finalisation, and other legal issues – about 250 people in total. These include the staff members whose names appear on the documentation uploaded to CaseLines on 10 July 2023 referred to above. Mr Phillips confirmed that all these documents had been prepared by staff under his control at the RAF and printouts were provided by the RAF to the Defendant (and thus authentic).

74. Mr Phillips identified the link number referred to in the documents (4284201) as being common to the documents and allocated exclusively to this Plaintiff's claim – there is only ever one number allocated to a particular claimant for a particular event (regardless of how many claimants there are per event or how many events a claimant may claim for) to ensure that there can be no duplication of claims at the RAF.

75. Mr Phillips testified further as to the process followed to settle the Plaintiff's claim with reference to the documents and confirmed their contents as correct. Mr Phillips explained that the RAF takes cognisance of the expert reports available (in this instance only those filed on behalf of the Plaintiff – as the RAF had not secured its own expert reports) to quantify the claim. It was thus accepted that the Plaintiff was unemployable in the future in any capacity. The Plaintiff was also treated as an unskilled worker as set out in the expert reports. His claim for lifelong loss of earnings was reduced from the approximately R1,5 million suggested by the actuary to the approximately R894 000,00 accepted by the Plaintiff because a higher contingency was applied to the claim as the Plaintiff had not been able to produce any documentary proof of his past earnings.

76. The Plaintiff objected to Mr Phillips' evidence explaining the calculation of the RAF total loss of earnings settlement amount as being expert evidence that had not been properly placed before this court by way of notice and expert report. I overruled this objection as Mr Phillips was testifying as a factual witness as to what steps had been taken at the RAF to determine the Plaintiff's claim against it.

77. In cross-examination of Mr Phillips, the Plaintiff raised only two issues – the internal RAF memorandums that precede the making of an offer to a claimant, and his personal knowledge of the present claim against this Defendant.

78. Mr Phillips was challenged for not producing the internal RAF memorandums setting out their internal calculations prior to making an offer to the Plaintiff. It transpired that the Plaintiff has never requested these of the RAF at all in this matter. I further ruled that this was not a relevant avenue of enquiry – once the RAF made an offer which was accepted, the underlying calculations would surely fall away – but more importantly, this court could not be bound by the RAF's actions in a different matter – all that was relevant was what amounts RAF did or would pay to this Plaintiff and why they would pay such amounts. It boiled down to the issue of duplication only – the real and only relevance of the RAF settlement amounts to the current quantum claims.

79. Mr Phillips readily (and correctly) conceded that he had no personal knowledge of the facts of this action. This caused the Plaintiff to object to his testimony as not being that of a competent witness, and thus he should never have been called to testify by the Defendant. I overruled this objection as Mr Phillips was never expected to testify about anything other than the settlement of the Plaintiff's RAF claim. His testimony was required because every time any details of the settlement were put to any witness called by the Plaintiff in cross-examination, the Plaintiff objected that this could not be done as the settlement details were not evidence before this court. The Plaintiff refused to accept the correctness of the information sourced and presented by the Defendant in this regard (as he was quite entitled to do), but now complains when the Defendant calls a witness to establish what the Plaintiff refused to accept or agree. The Plaintiff simply cannot have it both ways – the testimony of Mr Phillips was necessary.

80. There was no re-examination of Mr Phillips.

81. I then asked Mr Phillips some questions to establish exactly what procedures the undertaking to pay future medical expenses would cover – concerns about the duplication of the lumbar fusion and some assistive devices having arisen. Mr

Phillips explained that a post-settlement department at the RAF would monitor such claims and that if any injury had been mentioned in the reports on file at the RAF, then the medical expenses for treating such injuries and their sequelae should be covered by the RAF undertaking.

82. The Defendant closed its case after the testimony of Mr Phillips.

83. I was thereafter presented with written and oral argument by each of the parties to determine the quantum issues before this court.

CLAIM FOR FUTURE LOSS OF EARNINGS

84. The evidence that the Plaintiff is unlikely to obtain remunerated employment again in his lifetime is unchallenged.

85. The Plaintiff contends that he should be awarded the amount of R2 517 748,00 for future loss of earnings; alternatively, the amount of R2 517 748,00 less R894 097.70 settled with the RAF for loss of earnings.

86. The Defendant contends that no award should be made to the Plaintiff for future loss of earnings.

87. The applicable legal principle is set out in Zysset and others v Santam Ltd 1996 (1) SA 273 (C) at 277 H:

> "The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed."

88. Is there any difference between the value of the Plaintiff's estate regarding his lifelong earnings between when he boarded the train on 22 May 2019 and now?

89. The short answer is NO.

90. As a result of the injuries suffered by the Plaintiff in a motor vehicle accident on 20 December 2015, he was able to claim compensation from the RAF for the total loss of his remaining lifelong earnings.

91. Although the amount of the claim and the payment of the same would only be determined much later (on 19 April 2023 and 16 October 2023 respectively), this claim arose on 20 December 2015 – about 3 ½ years before the current claim.

92. The Plaintiff was already compensated for any entire lifetime of earnings from another source at the time of this incident. He could thus not have sustained any further loss of earnings as a result of this incident as he can only receive one lifetime of earnings – and not two. He has accordingly suffered no loss and is thus not entitled to any damages under this claim.

93. The Plaintiff has suggested that he was undercompensated by the RAF for his loss of earnings and that I should rectify that undercompensation in this matter by ordering the Defendant to pay the balance of his loss of earnings claim.

94. I cannot do as suggested by the Plaintiff for two reasons – if he has not suffered any loss under this claim, then I cannot award him any damages for this claim; and I have no authority to “rectify” the damages in another matter and/or hold the Defendant in this matter liable for such “rectification”.

95. The Plaintiff’s claim against the RAF was for total loss of earnings. He settled that claim – that is, he had to agree with the amount of compensation that was offered to him by the RAF and was thus an active role player in determining the amount of his damages for loss of earnings. If he is dissatisfied with the amount of his damages from the RAF, then his remedy does not lie in this action where no loss has been proved against this Defendant.

96. As an aside, it also appears that the amount suggested by Mr Oketch in this court is open to some doubt. It has been calculated on the basis that the Plaintiff is a

semi-skilled worker. This is uncertain to me. The occupational therapist treats him as an unskilled worked; the industrial psychologist treats him as both an unskilled and a semi-skilled worker. His settlement with the RAF is premised on him being an unskilled worker. Even if I was prepared to entertain the alternative suggested by the Plaintiff, it would not be possible to quantify it in manner suggested by the Plaintiff due to this discrepancy – even among his own witnesses.

CLAIM FOR FUTURE MEDICAL EXPENSES

97. The evidence that the Plaintiff has suffered injuries during the incident on 22 May 2019 and the extent of those injuries is unchallenged.

98. Is there any difference between the value of the Plaintiff's estate regarding his expenses to treat these injuries and their sequelae between when he boarded the train on 22 May 2019 and now?

99. The short answer is clearly YES.

100. The quantification of the Plaintiff's damages requires a more careful consideration in circumstances where there is no challenge by the Defendant to the extent of the future treatment recommended by Dr Schnaid and Ms Mkosi for the Plaintiff, but there is a challenge to who should bear the costs of some of the future treatment recommended.

101. The evidence before this court indicates some duplication in the future medical treatment required for which the RAF is liable in terms of its undertaking to the Plaintiff and for which the Defendant is liable in this action. More particularly, the Plaintiff will need to undergo a lumbar fusion as a result of both incidents and some of the assistive devices recommended as a result of both incidents is the same.

102. Mr Phillips testified that the RAF ***should*** (my emphasis) pay for all future medical expenses foreshadowed in the expert reports submitted to them. This would include the costs of the lumbar fusion and certain of the assistive devices.

103. If these amounts were paid by the RAF, then the Plaintiff would have no claim for them in this action. It appears to me to be the correct approach to adopt.

104. However, even Mr Phillips was constrained to point out to the court that recovering such expenses from the RAF would not always be smooth sailing and that a full recovery might not be attained in fact.

105. Dr Schnaid suggested that the lumbar fusion costs could be apportioned 50/50 between the RAF and the Defendant. Ms Mkosi made a similar suggestion regarding the assistive devices, even though she did not use those exact words.

106. Mr Oketch was insistent on “two accidents – two sets of injuries – two sets of compensation” and would not even countenance any other suggestion made to him. He had calculated that the discounted value of all the surgery, therapy and devices recommended by Dr Schnaid and Ms Mkosi would cost the Plaintiff R677 062,00 (as set out in Annexure A to his report) – the amended amount claimed by the Plaintiff.

107. The Defendant appears to have adopted in its argument, as a matter of practicality, the approach taken by Dr Schnaid and Ms Mkosi, and seeks that the Plaintiff be awarded damages of R512 167,00 for medical expenses. I cannot fault the Defendant for adopting this approach – it is more generous than the strict approach I would have adopted but for the Defendant opting for the middle ground.

108. The Defendant indicated that it had used Annexure A to Mr Oketch’s report, and deducted one-half of every item duplicated between the RAF and current claims to arrive at this amount. It did not provide the court with the detailed line items of this calculation.

109. I made a calculation based on Annexure A to Mr Oketch’s report. I deducted one-half of all the items that appeared to me to be duplicated – the cost of the lumbar fusion surgery and the items listed in paragraph 57 above. These deductions totalled R91 850,50.

110. Applying this deduction to the Plaintiff's claimed amount, renders a balance of R585 211,50 for medical expenses to be incurred by the Plaintiff as a result of the injuries sustained by him in the incident on 22 May 2019.

111. The Plaintiff has accordingly suffered a loss and is entitled to any damages under this claim in the amount of R585 211,50.

CLAIM FOR GENERAL DAMAGES

112. The evidence of Dr Schaid and Ms Mkosi about the Plaintiff's circumstances and the consequences of these injuries to him over the rest of his lifetime is unchallenged.

113. In summary, the Plaintiff's claim for pain and suffering/loss of amenities of life must be determined considering that the Plaintiff:

a. was only 30 years of age at the time of this incident;
b. is unlikely to have his lifespan shortened by these (or his previous) injuries and thus still has a "long" life in which to experience the consequences of these injuries;
c. experienced severe pain at the time of being injured and treated for his injuries (he was hospitalised for two months);
d. continues to experience pain from these injuries (which is worse during cold weather);
e. will endure more pain when at least three further surgeries are performed on him;
f. will never be completely pain-free again in his lifetime;
g. is severely restricted in the conduct of his daily life because he cannot walk far distances, cannot run, cannot sit or stand for long periods, and cannot lift heavy weights. The need to walk far distances and lift buckets of water are part of his current daily existence and thus he feels the impact of these injuries all day, every day;
h. will practically never be able to return to a workplace and the meaning that may give to his life.

114. The Plaintiff has claimed R1 000 000,00 for general damages. In argument he has placed reported cases during the period 2014 to 2021 awarding general damages ranging from R500 000,00 to R700 000,00 at the time before me. These matters only deal with an injury to one leg – requiring immediate and future surgery to repair. The Plaintiff's settlement of his RAF claim for R600 000,00 would fall squarely within this bracket.

115. In argument the Defendant has placed reported cases updated to 2023 values awarding general damages ranging from R208 000,00 to R258 000,00 before me. These matters also only deal with an injury to one leg. The Defendant has suggested that an award on this claim be in the range of R300 000,00 to R350 000,00.

116. In this regard, I am particularly mindful of the evidence of Dr Schnaid and Ms Mkosi that the consequences for this Plaintiff of his injuries from this incident are greater than the sum of its parts – his loss of amenities of life is compounded by no longer having any "good" leg to take up the slack for a "bad" leg.

117. It is thus inappropriate to determine this claim by having regard only to the comparable cases of one injured leg. The Plaintiff was previously injured, which would exacerbate the effects of any future leg injuries after 20 December 2015. This is the state in which the Defendant permitted him to board their train on 22 May 2019 and they are thus saddled with the impact of his prior injuries on those later injuries for which they are liable to compensate him.

118. In these circumstances, I would award the Plaintiff the amount of R1 000 000,00 claimed by him for general damages.

COSTS

119. The Plaintiff brought three quantum claims (totalling R4 217 748,00) against the Defendant.

120. The Plaintiff has been successful in two of its quantum claims (totalling R1 585 211,50) against the Defendant.

121. This represents a “success” rate of two-thirds by claim (and about 38% by monetary value).

122. The usual practice is that the costs of an action follow its result and that the substantially successful party can recover its all its costs (on the scale awarded) from the unsuccessful party. This is always subject to the discretion of the court to make a different costs order.

123. During this quantum trial, it transpired that the Plaintiff had settled a separate action against the RAF on 19 April 2023 – between giving notice of his intention to amend his claimed quantum on 03 April 2023 and effecting the amendment of his claimed quantum on 25 April 2023.

124. This amendment had the effect of increasing the Plaintiff’s claim for loss of earnings against the Defendant from R1 000 000,00 to R2 517 748,00 at the same time as he was settling a lifelong loss of earnings claim with the RAF – and thus effectively nullifying any claim for loss of earnings against the Defendant.

125. Furthermore, as set out above, the Plaintiff has caused to Defendant to prove information peculiarly within the Plaintiff’s knowledge, whilst constantly objecting to the leading of such evidence, but never ultimately challenging the veracity of that evidence.

126. In these circumstances, it would be inappropriate to award the Plaintiff all his costs as the successful party. It would be more appropriate for the Plaintiff to recover two-thirds of his costs from the Defendant.

CONCLUSION

127. The Plaintiff cannot succeed in his claim for loss of earnings as he has not suffered any loss of earnings resulting from the incident on 22 May 2019.

128. The Plaintiff does succeed in claiming damages for future medical expenses it being unchallenged that he will have to incur such expenses as a result of the injuries he sustained in the incident on 22 May 2019. This claim is quantified in the amount of R585 211,50 having regard to the duplicated medical expenses for which both the RAF and the Defendant are each liable to compensate the Defendant.

129. The Plaintiff does succeed in his claim for general damages it being unchallenged that he has suffered and will continue to suffer pain and loss of amenities of life. This claim is quantified in the amount of R1 000 000,00.

130. The Defendant is to pay two-thirds of the Plaintiff's costs for the quantum trial in this action.

ORDER

131. I grant an order the following terms:

1) The Defendant is to make payment to the Plaintiff of the sum of R1 585 211,50 on or before 25 July 2024.

2) If the Defendant does not make payment as set out in 1) above, then the Defendant is to pay to the Plaintiff interest at the rate of 10.25% *per annum* on the sum of R1 585 211,50 from 26 July 2024 to date of payment in full.

3) The Defendant shall pay two-thirds of the Plaintiff's costs of suit incurred in his claims for quantum as taxed or agreed, to include the qualifying costs and the transport, travelling and subsistence costs of:

a. Dr E Snaid for his attendance at trial on 31 May 2023;

b. Ms N Mkosi for her attendance at trial on 31 May 2023 and 01 June 2023;

c. Mr T Maturure for his attendance at trial on 12 July 2023; and

d. Mr R Oketch for his attendance at trial on 12 July 2023.

G B HARDY

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing	31 May 2023, 01 June 2023, 12 July 2024, 14 July 2024
Date of judgment	11 July 2024

Appearances:

Appearance for Plaintiff	Advocate M Mthombeni
Attorney for Plaintiff	T Manake – Mngqibisa Attorneys tsoarello@mngqibisaattorneys.co.za
Appearance for Defendant	Advocate T Tshitereke
Attorney for Defendant	S Lottering – Padi Inc. shenay@padiattorneys.co.za

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 July 2024.