IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2011/32313

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3)	REVISED: YES / ~~NO~~
22 AUGUST 2024	_____
DATE	SIGNATURE

In the matter between:

BOTES, MARIUS CHRISTIAAN N.O. Plaintiff

and

CITY OF EKHURULENI METROPOLITAN MUNICIPALITY Defendant

JUDGMENT

WINDELL J

Introduction

[1] This is an action in which the plaintiff, Mr Botes, a 53-year-old male, claimed damages as a result of injuries sustained during a motorbike accident. It was initially alleged that the accident occurred on 10 July 2010 at the corner of Ilex Way and Amarillo Road, Edleen Kempton Park, when the plaintiff struck a pothole at night. The particulars of claim were however amended in 2017 to reflect that the accident occurred on the corner of Ilex Way and Adonis Road, Edleen (discussed in more detail later in the judgment).

[2] Summons in this matter was issued thirteen years ago on 25 August 2011. The plaintiff claimed an amount of R1 328 990.00 (one million three hundred and twenty-eight thousand nine hundred and ninety rand) which included a claim for general damages, past and future hospital expenses and past and future loss of earnings. Shortly thereafter, on 11 February 2012, the plaintiff passed away and was replaced by the executor of his estate.

[3] In the particulars of claim, the plaintiff averred that the defendant had a legal duty towards all members of the public to attend to the proper upkeep and maintenance of public roads within the Ekurhuleni Metropolitan Municipality. It is further averred that the incident occurred as a direct result of the defendant's unlawful breach of the duty and the defendant's negligence in one or more of the following:

"5.1 It failed to repair the pothole

5.2 it failed to adequately repair the pothole

5.3 it failed to timeously detect and repair the pothole;

5.4 it failed to timeously detect and adequately repair the pothole;

5.5 it failed to have a system in place for the timeous detection and adequate repair of the pothole;

5.6 it failed to take reasonable measures in order to avoid the incident from occurring

5.7 It failed to warn the plaintiff of the presence of the pothole".

[4] In its plea, the defendant disputed the existence of the pothole at the time of the accident. It stated that it had no knowledge of the date of the accident or the particulars of the vehicle the plaintiff was driving and put the plaintiff to the proof of thereof. The defendant did however admit that it was under a duty to attend to the proper upkeep and maintenance of roads situated within its area of jurisdiction and that there was a pothole at the intersection of Amarillo Road and Ilex Way, Edleen, Kempton Park. It however denied that the accident was caused by this pothole as it only manifested in October 2010 and had not yet formed at the time of the accident (10 July 2010).

[5] The defendant further pleaded that in the event that the court finds that a pothole had manifested by 10 July 2020; and, that the accident took place as a result of the pothole; and that the defendant was negligent in not repairing the said pothole, that the accident was solely caused by the negligence of the plaintiff on one or more of the following aspects: he failed to keep a proper lookout; he failed to negotiate his way around the pothole in a safe manner; and he travelled at a speed which was excessive in the circumstances.

[6] In the alternative, the defendant pleaded that in the event of the court finding that the defendant was negligent in failing to repair the relevant pothole, that the

negligence of the plaintiff contributed to his damages and that any award of damages should be apportioned accordingly.

[7] A pre-trial meeting was held on 7 December 2023 and minutes were properly filed. From the pre-trial minutes it was agreed that the merits and all the heads of damages remained in dispute. In paragraph 7.1 of the minute, the plaintiff stated that the defendant would be presented with the documents detailing the plaintiff's loss of income and past hospital expenses and the defendant would be asked to admit these documents to expedite the proceedings. The minute's paragraph 7.2 stated that there were no other issues in dispute, which implies that the other allegations in the summons were admitted.

The evidence

[8] The trial commenced on 24 January 2024. The plaintiff called two witnesses. The first witness was the plaintiff's attorney, Mr. van Rensburg, who had received the plaintiff's initial instructions. During the consultation, his assistant attorney, Debbie Jones, recorded the notes. At the trial, a bundle of documents was used, which included Mr. van Rensburg’s file notes. The file notes were admitted as an exhibit.

[9] The following information was disclosed from the notes taken in the witness's presence. On 10 July 2010, the plaintiff was involved in an accident while returning from the shops, where he had bought something to eat. The accident happened on the corner of Ilex Way and Amarilla Road, approximately 150 metres from his house when the plaintiff hit a pothole with his motorbike. He told Mr. van Rensburg that it was raining, and the pothole was not visible as it was filled with rainwater. More specifically, the pothole looked to him like a dam of water. As a result, he was seriously injured.

According to the notes, he suffered an ankle fracture, a shoulder fracture; puncture of his lung and all the ribs were broken on the one side of his chest. The plaintiff told Mr. van Rensburg that he was unable to sleep or work as a result of the injuries sustained during the accident.

[10] Mr. van Rensburg confirmed that the contents of the summons were consistent with the instructions he received from the plaintiff. During cross-examination he was asked whether he had independently investigated the accident and tested the version of the plaintiff. Mr. van Rensburg stated that he did not, as he saw no reason to doubt the plaintiff's version of the events. Although there was no date on the notes, he recalled that the plaintiff first called him from the hospital during 2010 and came to see him after he was discharged. The plaintiff's recollection of the accident's specifics was, therefore, still relatively recent.

[11] He confirmed that the plaintiff was employed as a fitter at MEL Mining at the time of the accident and that he earned R21 000.00 (twenty-one thousand rand) per month. He said the plaintiff brought him photographs of the scene of the accident which were handed in as an exhibit. These photos were taken by his daughter-in-law, the second witness, Ms Rittonoti.

[12] The defendant objected to the evidence of Mr. van Rensburg as it constituted hearsay evidence. In terms of the Law of Evidence Amendment Act 45 of 1988, the court, in its discretion, and having regard to the factors listed in section 3 of such Act, admitted the evidence of the witness in the interest of justice.

[13] The next witness was Ms Rittonoti. At the time of the accident, she was married to the plaintiff's daughter and residing on the same property as the plaintiff. She testified that she saw the plaintiff on the morning after the accident occurred. He was

in extreme pain and reported to her that he had been in an accident the night before. He later told her that the motorbike hit a pothole, and that he flew over the handlebars of the motorbike and the bike went over him.

[14] She took the plaintiff to the hospital where he was treated for his injuries. When he was discharged two weeks later, she took care of him. He was however still in extreme pain and his condition deteriorated. He was taken back to a different hospital. It was only then discovered that all the plaintiff's *"ribs and shoulder were broken".* It was also discovered that his lung had ruptured as a result of a rib going through his lung. She testified that the plaintiff had to undergo an emergency operation to *'fix the ribs to the spine'*. The plaintiff remained in hospital for more than a month. She took photos of the plaintiff's injuries, but they were not available at the time of the hearing. She however gave a full description of his injuries which included various fractured ribs, fractured ankle, fractured shoulder, and a damaged lung.

[15] After the plaintiff was discharged from hospital on the second occasion, Ms Rittonoti nursed him for several months. She was required to provide the plaintiff with assistance in bathing, dressing, walking and using the toilet. He was prescribed permanent medication to manage his discomfort and was unable to return to work due to his injuries. She also testified about the pain and suffering he endured for an extended period before his passing.

[16] Ms Rittonoti testified that she saw the motorbike after the accident and noticed that it was damaged on the side. She also took photographs of the potholes in Ilex Way and Amarillo Road two weeks after the accident. The photographs were made available for inspection in terms of Rule 36(10)(a). She said that she was aware of the potholes since they moved to that area a couple of months before the accident.

On the corner of Adonis Way and Ilex Road there were three potholes. Two were big and one was smaller, about 40cm in diameter. To her knowledge, the plaintiff struck one of the three potholes, but she was unaware of which one. She testified that the potholes were repaired approximately two weeks after the accident whilst the plaintiff was still in hospital. That concluded the plaintiff's case.

Amendment of the particulars of claim

[17] During 2016 the plaintiff applied for the amendment of the particulars of claim to reflect that the accident occurred on the corner of Ilex Way and Adonis Road, Edleen, Kempton Park. The amendment was sought after consulting with a potential witness, Mr J.J. Lewis and an inspection in loco that was held during October 2016 with the plaintiff's attorney of record and the defendant's representatives. Mr Lewis allegedly confirmed and pointed out that the accident occurred directly opposite the entrance of his residence at the corner of Ilex Way and Adonis Road, Edleen, Kempton Park and not on the corner of Amarillo Road and Ilex Way, Edleen. Senyatsi AJ granted leave to amend the particulars of claim on 25 August 2017.

[18] During the hearing in January 2024, and after the plaintiff closed his case, a further amendment of the particulars of claim was sought to bring it in line with the evidence adduced. The evidence revealed that there were not only potholes on the corner of Ilex Way and Amarillo Road, but there were also potholes on the corner of Ilex Way and Azalea Road. It was not clear from the evidence which one of the many potholes the plaintiff struck with his motorbike. The amendment was thus granted to reflect that the accident occurred in Ilex Way, Edleen, Kempton Park, approximately 200 meters from the plaintiff's residence.

[19] As a result, the defendant sought a postponement to consider its position. The matter was postponed to 25 March 2024. On 25 March 2024, the defendant closed its case without calling any witnesses. The court was also informed that counsel for the plaintiff had passed away. The matter was therefore further postponed to enable the parties to submit heads of argument.

Merits

[20] The onus is on the plaintiff to prove his case on a balance of probabilities. The only evidence before the court is that of Mr. van Rensburg and Ms Rittonoti. The Court in *S v Saulus and Others,*[1] in dealing with the credibility of a single witness, stated that:

"[t]here is no rule of thumb test or formular to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told…"

[21] Both witnessed for the plaintiff were credible and gave evidence in a satisfactory manner. Additionally, they corroborated each other on material aspects. In the absence of any evidence on behalf of the defendant, it is therefore irrefutable that the plaintiff was involved in a motorbike accident on 10 July 2010, which resulted in serious injuries. The evidence of the plaintiff's witnesses is furthermore sufficient to find, on a balance of probabilities, that the accident was caused by a pothole which had been on Ilex Way for some time before the accident occurred. It is unnecessary to pinpoint the exact pothole the plaintiff struck, as there were three in close proximity.

[1] 1981 (3) SA 172 (A) at 180E-G.

[22] The plaintiff's claim is based on an omission in that the defendant (1) had a legal duty to repair potholes and maintain its roads in its area of jurisdiction, and (2) acted negligently in failing to repair the potholes or to warn the plaintiff of the existence of the potholes.

[23] The defendant's case is a bare denial. Firstly, it denies the existence of the pothole at the time of the accident. As stated above, I am satisfied that the plaintiff has proven the existence of a pothole at the time of the accident. Secondly, it admits that it was under a duty to attend to the proper upkeep and maintenance of public roads situated within its area of jurisdiction. A legal duty has thus been established and it is not necessary for the plaintiff to prove this element.[2] Thirdly, it pleaded that in the event of a finding that there was a pothole that caused the accident, it did not act negligently in, inter alia, failing to repair the pothole.

[24] The only remaining issue is that of negligence. Although the defendant admitted to having a legal duty, this does not automatically mean it is liable for failing to fulfil that duty. A plaintiff also needs to establish fault.[3] In *Bakkerud v Cape Town Municipality*, [4] the Full Court (Brand J), summarized the legal position as follows:

"[47] The converse is equally true. Wrongfulness in itself - without fault - does not establish liability either. Consequently, the finding that the legal convictions of the community require municipalities to keep streets and pavements in a safe condition does not mean that a municipality will ipso facto be liable for damages which resulted from its failure to comply with this legal duty. A plaintiff would also have to establish

[2] See *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at para [6], where the Court held that an admission that a defendant was under a legal duty to take steps so as to minimise injury to road users was, in effect, an acknowledgment of wrongfulness.
[3] See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para [12].
[4] 1997 (4) SA 356 (C) at paras [47] to [48].

fault. The recognition of the latter principle, in my view, provides the answer to the greater part of Mr Binns-Ward's argument based on the municipalities' lack of financial resources. A municipality is not required to do more than that which is reasonable. In determining what can reasonably be expected of a municipality, regard must, inter alia, be had to the financial resources available to that particular municipality.

[48] Whether in any particular case the steps actually taken by a municipality will be regarded as reasonable will depend on all the facts and circumstances of that case. Ultimately, the enquiry involves a value judgment. It can be stated with a fair amount of confidence, however, that a Court will bear in mind that no reasonable municipality can keep all its streets and pavements in a perfect condition all the time. If a municipality therefore explains that it was unaware of the fact that a particular street or pavement was in an unsafe condition because, due to financial constraints, it is unable to inspect all its streets and pavements at intervals that are optimal; or that though it was aware of the fact that a particular street or pavement was in an unsafe condition, other even more unsafe conditions in other streets or pavements within its area - for some reason or other - enjoyed a higher priority, its failure to repair may very well not be regarded as unreasonable. There is nothing new about this proposition. There are a number of examples in our case law where the Court had regard to the financial constraints of a defendant municipality in determining the reasonableness of its conduct."

[25] Brand J considered the facts of the specific case and concluded as follows:

"[50] It is not disputed that respondent's damages were caused by the holes in the pavement of Nelson Road, Sea Point. It follows from the aforesaid legal principles that appellant's failure to repair the holes constitutes an unlawful act of omission. The only

question is therefore whether appellant was negligent. The uncontested evidence of respondent was that the holes in question had been there for at least six months prior to the accident. The fact that the holes were repaired within two days after the accident justifies the inference that such repairs did not impose an undue burden on appellant. In the absence of any explanation why the repairs to the pavement were not effected much earlier, I cannot criticise the learned magistrate's finding that the appellant was negligent. In fact, this was fairly conceded by Mr Binns-Ward in argument."

[26] On appeal, in *Cape Town Municipality v Bakkerud,*[5] the Supreme Court of Appeal (SCA) differed with the Full Court on the blanket imposition of a general duty to repair roads and pavements or to warn the public of the presence of potholes.[6] It however confirmed the Full Court's finding on the existence of a legal duty as well as negligence on the part of the Cape Town Municipality. The SCA held that the municipality had been legally bound to mend the holes or warn of their existence, and that it had negligently failed to take either step. In coming to this conclusion, it considered that the area in question was densely populated; the pavement in question abutted on residences and was in constant use; the hole was not shallow; the pavement was relatively narrow and had the effect of shepherding a passer-by in the

[5] 2000 (3) SA 1049 (SCA).

[6] See *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at para [31] *"Per contra, it would, I think, be going too far to impose a legal duty on all municipalities to maintain a billiard table-like surface upon all pavements, free of any subsidences or other irregularities which might cause an unwary pedestrian to stumble and possibly fall. It will be for a plaintiff to place before the court in any given case sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed. It would also be for a plaintiff to prove that the failure to repair or to warn was blameworthy (attributable to culpa). It is said that some (but not all) of the factors relevant to the first enquiry will also be relevant to the second enquiry (if it be reached), but that does not mean that they must be excluded from the first enquiry. Having to discharge the onus of proving both the existence of the legal duty and blameworthiness in failing to fulfil it will, I think, go a long way to prevent the opening of the floodgates to claims of this type of which municipalities are so fearful."*

direction of the hole; and the hole had been there for several months. It concluded as follows:

"[32] In the present case there is very little in the way of evidence to go on when it comes to deciding whether or not it should be held that the municipality was under a legal duty either to repair these holes or to warn the public of their existence and that its failure to do either was negligent. However, there is just enough to warrant a finding that it was. Sea Point is a densely populated suburb. The pavement abutted on residences and would have been in constant use. There were two holes in close proximity to one another and they were not shallow. There was also a pole near the holes from which a wire cable ran which was attached to the pavement in the vicinity of the holes. It had the effect of shepherding a passer-by in the direction of the holes. The pavement was relatively narrow. The holes had been there for many months. No evidence was given on the municipality's behalf. In this Court Mr Binns-Ward adopted the position that, unless the immunity conferred by the municipality cases was re-affirmed, the municipality accepted that it would be liable. In the circumstances, it is unnecessary to subject to any further scrutiny the factual foundation for the existence of a legal duty and a finding that there was culpa in failing to fulfil it."

[27] In the case of *Minister of Safety and Security v Van Duivenboden*,[7] the SCA determined that the inquiry into what is reasonable in the circumstances of a specific case is based on the negligence test outlined in *Kruger v Coetzee*,[8] and that the test "*offers considerable scope for ensuring that undue demands are not placed upon public authorities and functionaries for the extent of their resources and the manner in*

[7] 2002 (6) SA 431 (SCA) at para [23]. See also *Cape Metropolitan Council v Graham* [2001] 1 ALL SA 215 (A) at para [7].
[8] 1966 (2) SA 428 (A).

which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably".

[28] It is thus well established that a plaintiff must present sufficient evidence to convince the court that a legal obligation to repair or warn existed at the time of the injury and loss. The plaintiff would also be required to demonstrate that the failure to fulfil this obligation was culpable. Certain facts may be relevant to determining both the duty and the breach, and they could be considered during both phases of the investigation. The risk of a flood of claims against municipalities would be mitigated by the burden of demonstrating the relevant duty and negligence.[9]

[29] In the present matter the following facts are important in determining whether the defendant was negligent. The potholes in Ilex Way have been present for an extended period prior to the accident. Numerous substantial potholes were observed near the site of the accident, as evidenced by the accompanying photographs. There were three potholes at the intersection of Amarillo Road and Ilex Way, with the smallest having a diameter of 40cm. It was situated at a T-junction, approximately 3 to 4 meters from the stop street on the road that vehicles travel and approximately 150 meters from the plaintiff's residence. Ilex Way is situated within the City of Ekurhuleni Metropolitan Municipality, one of the major municipalities in the Gauteng province. Ms Rittonoti testified that the potholes were repaired approximately two weeks following the accident.

[9] *Bakkerud supra* at para [32]; “Municipalities, mend your ways”. 2000 JBL 40 Alastair Smith.

[30] The defendant called no witnesses. No evidence was thus presented on behalf of the defendant to show that a lack of financial resources hindered the defendant in the execution of his maintenance duties or to detail the steps taken to warn the public of the existence of the potholes. In addition, the defendant's plea did not include any facts or reasons why it was not negligent, despite the plaintiff outlining the grounds for negligence in his particulars of claim. No questions were asked in cross-examination that shed light on why the defendant pleaded that it was not negligent, and no argument was presented in the heads of argument to persuade the court that the defendant was not negligent. Based on the available facts, I am satisfied that the defendant was negligent in failing to repair the potholes.

[31] Regarding contributory negligence on the part of the plaintiff, I consider that the potholes were located 150 meters from the plaintiff's house and had been present some time before the accident. Ms Rittonoti testified that she was aware of these potholes. Given this, it is clear that the plaintiff exhibited contributory negligence. Being so close to his house, he should have been aware of the potholes and taken steps to avoid them, especially driving at night in the rain. Therefore, I attribute 20% of the negligence to the plaintiff.

Past hospital and medical expenses

[32] During the trial the defendant admitted the hospital records discovered by the plaintiff. According to these documents an amount of R188 794.64 (one hundred thousand and eighty-eight thousand, seven hundred and ninety-four rand and sixty-four cents) was expended. I am satisfied that judgment can therefore be granted in the amount of R151 035.71.

Loss of income

[33] The plaintiff claimed past and future loss of earnings in the amount of R680 000. Mr. van Rensburg testified that he received a certificate, completed by the plaintiff's employer, which purportedly proved the plaintiff's loss of income.

[34] During the pre-trial conference the defendant indicated that this certificate was not admitted, and the plaintiff was called upon to prove its past and future loss of income. Despite attempts made by the plaintiff's attorney before and during the trial, the certificate remained in dispute.

[35] The certificate was completed by a Ms Scully during 2011, some 13 years ago. She is no longer employed by the company and is untraceable. Moreover, the initial certificate returned by Ms Scully did not have any information regarding paragraph "m" which deals with whether the employee received any compensation whilst off duty. Mr. van der Westhuizen testified that he completed paragraph 'm" after obtaining the information from Ms Scully during 2011 over the telephone. That is why the certificate annexed to the letter differs from the certificate which forms part of the document bundle. After considering the objection from the defendant, the court disallowed the submission of the certificate as evidence.

[36] In argument the plaintiff submits that the court should correct "the error" as the court is entitled to allow the contents of the certificate in terms of the Law of Evidence Act, on the same basis the court allowed the evidence of the plaintiff's two witnesses on the issue of merits. The plaintiff argues that the court should "revoke its decision in terms of the rule, make use specifically of Rule 41 of the High Court Rules and make the necessary correction".

[37] The contents of the certificate constituted hearsay evidence. It is thus inadmissible. The plaintiff's counsel made no application for the certificate to be admitted in terms of section 3 of the Law of Evidence Amendment Act.

[38] The evidence presented by the plaintiff to prove his past and future loss of income was wholly insufficient. No additional documents or evidence were presented to support the claim for loss of earnings. Consequently, the plaintiff failed to prove his damages.

General Damages

[39] The plaintiff's injuries were not disputed. It can thus be accepted that he fractured his ribs, ankle, shoulder, lung, and that he had various lacerations and abrasions. There is no doubt in my mind that the plaintiff suffered severe pain as a result of his injuries sustained. Ms Rittonoti's testimony is pertinent in this context. Although she is not a medical expert, this does not undermine the plaintiff's case. He testimony is significant because she observed the plaintiff's pain and suffering for an extended period before his death.

[40] The plaintiff's pain and suffering lasted from the date of the accident until his untimely death on 11 February 2012, which amounts to a period of 19 months. In *Abrahams v Road Accident Fund,*[10] the plaintiff suffered multiple injuries including rib fractures. He was awarded an amount of R500 000 for general damages (value today R808 000). In *Vukubi v Road Accident Fund,*[11] the plaintiff suffered an open fracture

[10] 2014 (7J2) QOD 1 (ECP)
[11] 2007 (5J2) QOD 188 (E)

of the knee joint, a fracture of the humerus and a fracture of the radius and ulna. An amount of R400 000 was awarded (value today R999 134).

[41] In *Road Accident Fund v Marunga,*[12] Navsa JA emphasised that the court has a wide discretion to award what it considered to be fair and adequate compensation to the injured party and that although the court might derive some assistance from the general pattern of previous awards, that there were no hard and fast rule of general application.

[42] Considering the evidence provided by Ms Rittonoti, including the plaintiff's suffering, the nursing care she provided, his frequent hospitalizations, and the surgeries he underwent, I am satisfied that an amount of R750 000.00 is fair and reasonable to compensate for the plaintiff's pain and suffering.

Costs

[43] After the plaintiff closed its case and after the amendment was granted, the defendant sought a postponement to re-assess its position. Costs were reserved. The matter was postponed to 25 March 2024. On 25 March 2024, the defendant closed its case without calling any witnesses.

[44] The amendment led to the postponement of the matter. The defendant was entitled to request a postponement to review its position. Since the plaintiff's counsel had passed away, the matter could not be concluded on 25 March 2024. In my discretion, no costs order is made for 25 March 2024.

[45] Section 1(1) of The Prescribed Rate of Interest Act no 55 of 1975 provides that: *"If a debt bears interest and the rate at which the interest is to be calculated is not*

[12] 2003 (5) SA 164 (SCA).

governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2) (a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise." (My emphasis)

[46] Section 2A (1) and (2)(a) provides for interest on unliquidated debts:

"(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.

(2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier."

[47] Summons was issued 13 years ago, and there have been numerous delays in this matter. With the limited information available to me, it is not possible to determine who is responsible for these delays. In addition, a multitude of interlocutory applications between the parties contributed to the delays. The case was eventually case managed by Yacoob J to get the matter trial ready. Given these circumstances, it would be unfair to allow interest to accrue from date of demand as requested by the plaintiff. The court has the discretion to select the appropriate date from which interest should run.[13]

[48] In the result, the following order is made:

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[13] *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA).

1. The defendant is ordered to compensate the plaintiff 80% of his proven damages.

2. The defendant is ordered to make the following payment:

   2.1 An amount of R600 000 in respect of general damages.

   2.2 An amount of R151 035.71 in respect of past medical and hospital expenses.

3. Interest *tempore morae* on the amount in paragraph 2.1 from date of the first case management meeting (27 October 2021) to date of payment. Interest *tempore morae* on the amount in paragraph 2.2 from date of summons to date of payment.

4. The defendant shall pay the plaintiff's costs of suit on the party and party High Court scale on Scale B as taxed or agreed, which costs shall include the dates of 23 January 2024 and 24 January 2024, excluding 25 March 2024.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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 22 August 2024.

APPEARANCES

Counsel for the plaintiff:	Advocate D.A. Louw
Instructed by:	Leon JJ van Rensburg Attorneys
Counsel for the defendant:	Advocate K. Nkabinde
Instructed by:	Tshiqi Zebediela Inc.
Date of hearing:	23 January 2024, 24 January 2024 & 25 March 2024. Heads of argument were filed by the plaintiff on 15 April 2024 and by the defendant on 9 May 2024.
Date of judgment:	22 August 2024