


REPUBLIC OF SOUTH AFRICA



IN THE NORTH GAUTENG HIGH COURT  
PRETORIA

CASE NO: 69330/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
03.10.13..... DATE	
 SIGNATURE	

3/10/2013

In the matter between:

**JOHAN HENDRIK ADRIAAN SAUNDERS N.O.**  
**obo TSHEPO MICHAEL NKOPANE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**J U D G M E N T**

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**TEFFO, J:**

[1] The claimant, Mr Tshepo Michael Nkopane born on 20 January 1982, sustained multiple bodily injuries in a motor vehicle collision which occurred on 4 July 2008 at or near Phuthadichaba, Klerksdorp, when a motor vehicle

with registration letters and numbers FNP 508 NW there and then driven by Martiens Lenaka (the insured vehicle) collided with a motor vehicle with registration letters and numbers CGB 339 NW there and then driven by Alfred Leshage and in which latter vehicle the claimant was a passenger.

[2] The injuries sustained by the claimant in the aforesaid collision are summarised as follows: a head injury with a skull fracture and intracranial bleeding, multiple scalp and facial lacerations which were sutured, a deep laceration on both sides of the head (bleeding), right cheek, right upper eyelid, right side in front of nose, abrasions forehead, cerebral contusion, a thin subdural haematoma and subarachnoid haemorrhage. He was rendered unconscious at impact and arrived at hospital with a Glasgow Coma Scale (GCS) of 5/15. Later in the day his GCS was recorded at 8/15 after he extubated himself. He had a prolonged period of confusion that lasted for about two (2) months. He has multiple facial scars. He has a temporal lobe post-traumatic gliosis and a 10% chance of developing post-traumatic epilepsy. There were also facial bone fractures.

[3] The plaintiff in his capacity as *curator ad litem* has instituted a claim for damages against the defendant arising out of the said collision on behalf of Mr Nkopane which damages are formulated as follows:

3.1	Future medical expenses	R4 000 000,00
3.2	Estimated loss of earnings	R2 600 000,00
3.3	General damages for pain and	

suffering, loss of amenities of life,

disablement, etc R1 000 000,00

Total R4 000 000,00

[4] I am informed that the parties reached agreement on the following:

4.1 The defendant admits full liability for the proven or agreed damages suffered by the plaintiff.

4.2 The defendant has tendered a section 17(4)(a) of Act 56 of 1996 undertaking in settlement of the claim for estimated future hospital, medical and ancillary expenses which the plaintiff has accepted.

4.3 The parties are agreed that the plaintiff's past loss of earnings amount to R44 863,00.

4.4 Accordingly the heads of damages that remain for determination are claims for future loss of earnings or loss of earning capacity and general damages.

[5] Medico-legal reports by the following experts have been filed on behalf of the plaintiff and admitted by consent into the record as evidence:

- 5.1 Dr B A Okoli – Neurosurgeon;
- 5.2 Mrs C Motake – Occupational Therapist;
- 5.3 Mrs N Mngomezulu – Clinical Psychologist;
- 5.4 Dr M Malaka – Industrial Psychologist.

[6] The joint minutes by the following experts were admitted into evidence by consent:

- 6.1 Clinical psychologists – Mrs N Mngomezulu and Ms E Tromp.

[7] Actuarial calculations by Robert J Koch instructed by the plaintiff were also admitted into evidence by consent.

[8] The parties agreed to argue the case for the disputed heads of damages as a stated case on the basis of the admitted facts, medico-legal evidence and opinions. Accordingly no *viva voce* evidence was led by both parties.

[9] It is common cause that when the claimant was involved in an accident he was 26 years old. He was at the time sitting with a friend (who died outright as a result of the accident) at the back of a bakkie when the bakkie had a head on collision with the insured vehicle. He sustained serious injuries and was treated at Tshepong Hospital from 4 July 2008 to 16 July 2008 and transferred to a hospital that was near his home for outpatient treatment. Prior to the accident he was not formally employed. He did piece jobs

whenever available. After the accident he was employed as a diesel attendant at Econo Diesel.

[10] According to Dr Okoli the claimant suffered a severe traumatic head injury with a focal temporal lobe contusion. He has neuropsychological *sequelae* characterised by insensitivity or indifference to the feeling of other people, poor judgment in his relationship with people and his general behaviour and forgetfulness. Dr Okoli is of the view that based on the severity of the injuries and the neuropsychological problems, the claimant will require a neurocognitive evaluation by a clinical psychologist. He opined that the claimant's behavioural problems may interfere with his usual lifestyle and relationships with people. He also opined that with his neuropsychological *sequelae* it was unlikely that the claimant would rise beyond his present level of job functioning.

[11] It was reported to Mrs Mngomezulu that the claimant has significant personality changes post-accident. It was reported that he behaves strangely, has a tendency to offend people by saying inappropriate things and makes silly and offensive jokes. That he is emotionally labile. The claimant's sister expressed concern that he is taken advantage of and has poor judgment ability. It was also reported that the claimant becomes anxious when a car travels in high speed and he often tells the driver to slow down.

[12] Based on the tests she conducted Mrs Mngomezulu concluded that the claimant displays neurocognitive deficits which are commensurate with a significant head injury. Further that the claimant appears to have neuropsychiatric *sequelae* resulting from the head injury. She is of the view that the claimant appears to lack insight with regard to the full scale of his cognitive difficulties and behavioural problems. To support her conclusion Mrs Mngomezulu stated that a significant change in the claimant's personality is evidenced by his lack of awareness of social boundaries, inappropriate behaviour and insensitivity to others' feelings. In her opinion this behaviour is likely to have significant ramification as it can give rise to interpersonal relationship difficulties at work and probably lead to dismissal. She also mentioned that the accident has left the claimant in an emotionally vulnerable position in that the results of the Beck Depression Inventory indicates the presence of depressive symptoms and the fact that he is reported to experience anxiety symptoms when travelling in a car.

[13] Mrs Mngomezulu also mentioned that it was reported to her that the claimant takes time off when he is not feeling well. According to her, should the plaintiff change his job he may not get a sympathetic employer. She is of the view that the claimant's employment prospects in the open labour market would be compromised and he would also experience difficulties competing with his peers in the open labour market.

[14] In their joint minutes Mrs Mngomezulu and Ms E Tromp agree that the claimant is at risk of developing severe psychological and neuropsychological difficulties. They also agree that the claimant has suffered significant loss of future employment opportunities. According to Mrs Mngomezulu the claimant's behavioural difficulties may interfere with his usual lifestyle and relationship with people. She concluded that with his neuropsychological *sequelae* it is unlikely that he would rise beyond his present level of job functioning. She deferred to industrial psychological opinion with regard to quantifying the vocational effects of the neuropsychological status.

[15] Mrs C Motake, the Occupational Therapist, mentions in her report that on formal testing, the claimant's index scores reflect marked difficulty with general visual perception, motor reduced visual perception and visual motor integration. She mentioned that the claimant reported to her that his vision is poor and he struggles to read and write down the litres of diesel pumped from the tanks at work. Furthermore that he has been penalised on two occasions at work for writing down the incorrect number of litres pumped and has had to refund the shortfall on a monthly basis. It appeared from her report that the claimant has been in his current job since October 2008 and over the years, he has not been promoted. This tallies with the opinion of Dr Okoli and Mrs Mngomezulu that with his neuropsychological *sequelae*, it will be unlikely that the plaintiff would rise beyond his present level of job functioning. She opined that given the fact that the claimant makes mistakes at work even though he is familiar with his job, he may be at risk of losing his job. Further that when he starts a new job he is likely to battle to learn new routines and may not be

kept on. She is of the view that the claimant would lose jobs should there be problems with his work, colleagues or superiors and even in low level work, he would battle to sustain employment.

[16] According to Dr M Malaka (Industrial Psychologist) pre-accident the claimant would have stayed healthy and remained self-employed as a gardener. At the time of the accident he was self-employed as a gardener. His view is that over time the claimant would have found suitable alternative employment in the event that an opportunity presented. Further that in the event that this employment ceased for any other reason, he could have found alternative employment at a comparative level. According to him the claimant could have then been expected to work until he reached normal retirement. The claimant reached Grade 11 and did not acquire any form of skills. His work record suggests that he had spells of unemployment, he resorted to the informal sector where he functioned as a gardener for private households. Dr Malaka is of the view that the claimant could have continued to function in this role until he found suitable employment. He opined that assuming that the claimant would have remained employed in the role of gardener, he could have been expected to continue earning at the lower quartile in the unskilled level. Thereafter upon finding suitable employment he could have initially earned in the unskilled level and steadily progress to positions at the low semi-skilled level. Progression from the unskilled level to the low semi-skilled level would have been at interval periods of 5 to 7 years. Thereafter his earnings could have increased to those at the semi-skilled level. According to him health and other factors life permitting, the claimant would have been in a



position to work until age of retirement at 60 to 65 years of age, depending on the policy of the organisation.

[17] He further opined that based on medical expert findings post-accident the claimant is no longer suited to physically and cognitively demanding jobs. While the claimant had been able to find alternative employment at the unskilled level, his view is that the claimant is unlikely to progress beyond this job level. Information from the claimant's employer is that the claimant's work performance was satisfactory and that he was still efficient in his duties. He finds this contrary to the plaintiff's reports that he occasionally takes off from work when he does not feel good. He got information from the claimant's supervisor that his promotional prospects are nil. His view is that following the accident, the claimant's physical capacity is significantly curtailed and his impaired neuropsychological status will adversely affect his employment prospects if he were to lose his current employment.

[18] According to Dr Malaka physically the claimant has been found to have limited walking and standing tolerance and manifest personality changes. He opined that in a working situation the claimant, will not work with any degree of efficiency and will struggle with physical demanding jobs. Furthermore in the event that he lost this employment, he is likely to struggle to find suitable employment. His employability is according to him definitely diminished. His view is that the claimant's injuries are such that he can be expected to struggle with work that is more cognitively challenging, as it is the case in his current work role as a diesel pump attendant. He is of the view that should

the claimant lose his current work role, he will struggle to find alternative suitable employment due to his neurocognitive problems. He concluded that the accident has had a negative effect on the claimant's cognitive functioning and possibly his physical capacity. Furthermore his view is that the claimant is unlikely to actualise his potential for work compatible to his high school education. Whilst it is accepted that he retains some capacity for unskilled work, the claimant may not sustain his employment for long due to his personal difficulties and reduced physical endurance. According to him the claimant's employability is at risk and should he lose his current employment because of his cognitive and physical limitations, he will be rendered less competitive for the open labour market.

#### FUTURE LOSS OF EARNINGS OR LOSS OF EARNING CAPACITY

[19] The defendant accepted the actuarial calculation prepared by Robert J Koch for the plaintiff, which calculation left the determination of contingency deductions to the discretion of the court or for the parties to negotiate. This calculation is based on the opinions of the plaintiff's medical experts which the defendant has accepted. No opposing medical reports were filed by the defendant except for the joint minutes of the Clinical Psychologists Mrs Mngomezulu and Ms Tromp. There was no difference of opinion in the two experts' medico-legal reports. In any event Mrs Mngomezulu's opinion tallied with the opinions of other experts of the plaintiff and made more sense and I found it to be realistic given the severity of the injuries sustained by the

plaintiff. It is clear from the reports by experts that the plaintiff has a residual earning capacity.

[20] Based on the above calculation the parties agreed that but for the accident the claimant would have earned a future income of R642 753 and having regard to the accident he should have earned a future income of R512 430. The parties further agreed that from the but for the accident figure a contingency deduction of 15% should be made. The only issue for determination is what contingency deduction is to be applied to the having regard to the accident scenario.

[21] Counsel for the plaintiff submitted that 100% general contingency deductions should be applied while the defendant's counsel argued about a deduction of between 60 to 70%. Counsel for the defendant submitted that a 100% contingency deduction is highly unreasonable given the fact that even if the plaintiff can be faced with challenges of losing his current job because he once worked as a gardener, he can still do that job. I understand the argument that 100% deduction is highly unreasonable but it is my view that based on the experts' opinion even if the plaintiff was to lose his current job and fall back to his initial work as a gardener his physical, neurocognitive and psychological limitations will still affect him negatively in his job. He will definitely have interpersonal relationship problems with his clients and they will also take advantage of him. Obviously he will also not be having the physical strength and capacity to do the work as before. It is clear from the experts' reports that he will not have the physical ability to do that work given

the injuries. He will therefore not last for long as a gardener. Dr Malaka's view is that the claimant will not work with any degree of efficiency in a working situation and he will struggle with physically demanding jobs. His further opinion is that the claimant's injuries are such that he can be expected to struggle with work that is more cognitively challenging. The argument by the defendant's counsel is not supported by any medical evidence. It is therefore bound to fail.

[22] In *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A) the following remark was made:

*"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingency' or 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or general economical conditions. The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot, of course, be assessed on any logical basis : the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case."*

After considering all the experts' opinion and having noted that the defendant accepted all the plaintiff's reports I am of the view that the most appropriate and fair deduction that should be applied in the having regard to the accident scenario is 85%. Applying the 85% deduction to the having regard to the accident scenario income leaves a balance of R76 865,85.

Income having regard to the accident	R512 439,00
Less 80% contingency	<u>R435 573,15</u>
	R 76 865,85

Income but for the accident	R642 753,00
Less 15% contingency	<u>R 96 412,95</u>
	R546 340,05

[23] The award to be made for future loss of income or loss of earning capacity is as follows:

Income but for the accident	R546 340,05
Less income having regard to the accident	<u>R 76 865,85</u>
Total loss of earning capacity	R469 474,20

[24] As I have already highlighted *supra*, the plaintiff's past loss of earnings therefore amounts to R44 863,00.

### GENERAL DAMAGES

[25] Counsel for the plaintiff submitted that an amount of R900 000,00 will fairly compensate the plaintiff for the injuries sustained in the motor vehicle accident. A number of cases were referred to. The defendant disagreed and argued that an amount of R650 000,00 is appropriate compensation to the

plaintiff's injuries. I have considered the cases referred to by the parties and having taken into account the severity of the *sequelae* of the head injury, the other injuries sustained, the fact that there is a 10% chance of the plaintiff developing epilepsy, his age and the pain that the plaintiff suffers which persists since the accident I am of the view that an amount of R750 000,00 is appropriate in the circumstances.

[26] The award to be made to the plaintiff is calculated as follows:

26.1	Future medical and hospital expenses	An undertaking in terms of section 17(4)(a) of Act 56 of 1996
26.2	Past loss of earnings	R 44 863,00
26.3	Future loss of earnings/loss of earning capacity	R 469 474,20
26.4	General damages	<u>R 750 000,00</u>
	Total	R1 264 337,20

[27] Accordingly I grant judgment in favour of the plaintiff against the defendant as follows:

27.1 The defendant is ordered to pay the capital amount of R1 264 337,20 to the plaintiff's attorneys of record (Chueu Attorneys) on or before 15 November 2013, who will hold the said funds in trust for the trust to be created in terms of para 27.4 of this order. The banking details of the said attorneys are as follows:

Account holder	:	Chueu Attorneys
Bank	:	ABSA
Branch	:	Lephalale
Account Number	:	4050325884
Type of account	:	Trust account
Reference No	:	Chueu/MVA/MB/9175

27.2 Should the defendant fail to pay the said amount to the plaintiff as ordered above, the defendant will be liable to pay interest to the plaintiff on the said amount at a rate of 15,5% per annum, calculated from the date of this order to date of payment thereof.

27.3

27.3.1 The defendant is ordered to, on or before 30 November 2013, provide the plaintiff with a written undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for 100% of the costs of the future accommodation of Michael Tshepo Nkopane (*"the claimant"*) in a hospital or nursing home, or treatment of

or rendering of a service to him or supplying of goods to him, arising out of the injuries sustained by him in the motor vehicle collision that occurred on 4 July 2008, in terms of which undertaking the defendant is obliged to compensate the claimant in respect of the said costs, after such costs have been incurred and upon proof thereof;

27.3.2 The aforesaid undertaking will include the costs of furnishing of security to the Master of the High Court, by the trustee of the trust to be created in terms of para 27.4 of this order.

27.4 The plaintiff's attorneys of record (Chueu Attorneys) shall attend to the creation of an *inter vivos* trust in order to protect the awarded funds for the exclusive benefit of the claimant.

27.5 The Trustee of the trust to be created as referred to in para 27.4 above will be Mr Gert Kruger (identity number: 540102 5004 081) of ABSA Trust.

27.6 Any trustee shall furnish security to the satisfaction of the Master of the High Court.



## 27.7

27.7.1 The plaintiff's attorneys (Chueu Attorneys) shall keep the monies received as referred to in para 27.1 of this order in an interest bearing trust account for the benefit of the claimant and shall pay over such monies to the trustee of the trust to be created in terms of para 27.4 of this order, immediately once the Master of the High Court has issued the trustee with the necessary letters of authority.

27.7.2 The plaintiff's abovementioned attorneys are, however, authorised to pay all disbursements reasonably incurred in respect of this action on behalf of the plaintiff from the abovementioned funds held in trust and shall submit to the trustee to be appointed, a complete schedule of such disbursements paid as well as proof of payment thereof.

27.7.3 The plaintiff's abovementioned attorneys are further authorised to pay from the abovementioned funds held in trust, the costs of provision of security to the Master of the High Court by the trustee(s), where applicable, of the trust to be created, which costs in turn must be refunded by the defendant to the plaintiff in terms of para 27.3.1 of this order.

27.7.4 The plaintiff's abovementioned attorneys shall submit an attorney and client bill of costs to the said trustee to be appointed, who shall authorise and make payment thereof. In the event of a dispute in respect of the said bill of costs, same will be submitted for taxation.

27.8 The defendant is ordered to pay the costs in respect of the creation and future administration of the said trust to be created in order to manage and administer the compensation payable to the plaintiff, as referred to in para 27.1 of this order, which costs will *inter alia* include the fees of the trustee, all disbursements of the trustee, the costs of the annual audit of the trust and the investment costs in respect of trust assets and capital from time to time, upon such costs having been incurred, which costs of administration shall be limited to the amount of costs and fees chargeable by curators *bonis* in terms of Act 66 of 1965, as amended.


27.9 The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs to the trustee of the trust to be created, which costs shall, *inter alia*, include:

27.9.1 the costs consequent upon the obtaining of all the medico-legal reports of the plaintiff's experts, namely:

- 27.9.1.1 C Motake (occupational therapist);
  - 27.9.1.2 N Mngomezulu (neuropsychologist);
  - 27.9.1.3 Dr M Malaka (industrial psychologist);
  - 27.9.1.4 Robert Koch (actuaries);
  - 27.9.1.5 Dr M S Fayman (plastic & reconstructive surgeon);
  - 27.9.1.6 Dr B A Okoli (neurosurgeon);
- 27.9.2 the reasonable and necessary preparation, qualifying and reservation fees, which will, *inter alia*, include the fees in respect of meetings between the plaintiff's attorneys and the abovementioned experts (if any) of all the plaintiff's abovementioned experts, excluding the expert mentioned in paragraph 27.9.1.4 above.
- 27.9.3 the costs of appointment of the *curator ad litem*,
- 27.9.4 the reasonable fees of the *curator ad litem*.
- 27.9.5 the trial costs of 26 February 2013.
- 27.9.6 The fees of senior junior counsel.

27.9.7

The costs attendant upon the obtaining of payment of the amounts and undertaking referred to in this order.

  
M.J. TEFFO  
JUDGE OF THE NORTH GAUTENG  
HIGH COURT, PRETORIA

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