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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA,  
SOUTH GAUTENG DIVISION, PRETORIA**

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

**CASE NO: 77011/2010  
4/9/2019**

In the matter between:

**MANDLENKOSI PATRICK NSIBANDE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**SENYATSI AJ,**

- [1] In this claim filed by the Plaintiff, merits have been conceded. The only issue for determination is the quantum of the damages suffered and future loss of earnings capacity.
- [2] The Plaintiff, Mr Mandlenkosi Patrick Nsibande, an adult Plant Attendant, currently aged 44 years and 33 years at the time of the collision, was a passenger in a car. A collision occurred on 14 January 2008 at about 21h30 on the Oorsak Road, Boschfontein, Rustenburg between a motor vehicle with registration number [...] ("the first insured vehicle") driven by T. F Mere and a motor vehicle with registration number [...] ("the second insured vehicle") driven by S. Siyo.

- [3] The Plaintiff was a passenger in the second insured vehicle and was conveyed in the second vehicle in the circumstances referred to in Section 18(1) (b) of the Road Accident Fund Act, No. 56 of 1996 ("the Act").
- [4] The Plaintiff suffered the following injuries in the collision:-
- 4.1 Severe head injury and skull base fracture with permanent neuro-cognitive deficits;
  - 4.2 Fracture of the nose;
  - 4.3 Fracture of various facial bones;
  - 4.4 Whiplash injury to the neck.
- [5] The Plaintiff contends that as a result of the aforesaid injuries:
- 5.1 he was hospitalised and received medical treatment;
  - 5.2 he will in future have to receive medical and hospital treatment and will have to incur costs for such treatment.
  - 5.3 he has suffered a loss of income and will continue to suffer loss of income and/or income potential in future;
  - 5.4 he has suffered a loss of amenities of life and will continue to suffer losses of amenities of life in future;
  - 5.5 has suffered pain, suffering and discomfort and will continue to endure pain, suffering and discomfort in future;
  - 5.6 he has sustained disfigurement and;
  - 5.7 he has sustained both emotional and traumatic shock.
- [6] The plaintiff had initially averred that he had suffered damages amounting to R1 352 000-00. This amount was amended at the hearing of this matter to R5 663 241-00 which is calculated and made up as follows:
- 6.1 Past private hospital expenses R1000-00;
  - 6.2 Past medical expenses R1000-00;
  - 6.3 The estimated costs of future medical treatment which amount is presently claimed as an estimated amount as if is anticipated that the Defendant will furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Act  
R100 000-00;
  - 6.4 The estimated costs of earnings and/or earning capacity, which amount is

	presently claimed as an estimated amount and of which all particulars will be provided at later stage	R1 493 194-00
6.5	The estimated future loss of earnings and/or earning capacity, which is claimed as an estimated amount	R3 068 047-00
6.6	General damages for pain, suffering, discomfort, loss of amenities of life, disfigurement as well as emotional and traumatic shock	R1000 000-00
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	TOTAL	5 663 241-00
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[7] The Plaintiff filed in 13 medico-legal reports from his experts to prove his claim. He provided vouchers in support of his claim. All injuries as identified by medical experts were admitted at the pre-trial conference and accorded in the joint minutes. All records of the clinical notes pertaining to the treatment received by the Plaintiff at the respective hospitals were also admitted by the Defendant.

[8] The Defendant also admitted that the Plaintiff would have to undergo and/or receive medical treatment, specialised services in future as stated in the particulars of claim and various medico-legal reports filed on record. For that reason, the Defendant has agreed to issue the Plaintiff with an undertaking envisaged by Section 17(4)(a) of the Act in respect of the future accommodation of the Plaintiff in the hospital or missing home for treatment of or the delivery of a service or supplying the Plaintiff with goods and costs incurred regarding the administration of undertaking, should same be proven upon the provision of the necessary medical legal reports.

[9] For completeness sake, as already stated, the Plaintiff has served the following 13 expert medico-legal reports by the following experts:

- 9.1 Dr T Enslin, Independent Medical Examiner;
- 9.2 Dr D de Klerk, Neurosurgeon;
- 9.3 Dr H Enslin, Orthopaedic Surgeon;
- 9.4 Dr D Le C Stolp, Ear, Nose and Throat Specialist;
- 9.5 Ms A Roos, Audiologist;
- 9.6 Dr F Colin, Psychiatrist;
- 9.7 Dr L Van der Merwe, Ophthalmologist;

- 9.8 Dr H Kluge, Maxilla Facial- and Oral Surgeon;
- 9.9 Ms S Van der Merwe, Clinical Psychologist;
- 9.10 Dr J P M Pienaar, Plastic and Reconstruction Surgeon;
- 9.11 Dr Bester Putter, Occupational Therapist;
- 9.12 Janene White, Industrial Psychologist;
- 9.13 Gregory Whattaker, Actuary.

- [10] The Defendant has not filed and served any expert medico-legal reports.
- [11] I am called upon to determine the quantum of the Plaintiff's damages in so far as the past loss of earnings, future loss of earnings and/or earning capacity and general damages are concerned. In so doing, I have considered the Plaintiff's medico-legal experts reports which are summarised as set out below.
- [12] Dr Daan de Klerk, a neuro-surgeon, concludes after his evaluation of the Plaintiff on 1 March 2016 that there were multiple facial fractures with a deformed nose on a Glasgow Coma score of 11/15. He classifies the Plaintiff as a moderate diffuse traumatic brain injury without evidence that there were focal components to the injury or the possibility of secondary insult due to hypoxia of poor cerebral perfusion. He concludes that his life expectancy will be normal. In regard to pain, Dr de Klerk states that the Plaintiff experiences headaches and low backache on a daily basis. There is a disfigurement of his nose and asymmetry of his orbits. The Plaintiff is expected to carry on his work as he had done before. The Plaintiff continues to be employed and earned income whilst he was *off* sick.
- [13] The medico-legal report by Dr David Le C Stolp, an orthopaedic surgeon, confined his report to the Ear, Nose and Throat areas. He confirmed the injuries suffered by the Plaintiff. He reports of the Plaintiff's complaints of a blocked nose and nasal deformity since the accident. Dr Stolp also states that the Plaintiff experiences crusting in the left nostril, with intermittent episodes of epistaxis and sinusitis. The Plaintiff also complains of hearing less and reduced sense of smell after the accident. No history of a watery discharge from ears and nose which, if present, would indicate cerebral spinal fluid leak. With regards to examination of the Plaintiff's nose, Dr Stolp observed that the external alignment of the bony and cartilaginous portions of the nose showed some deviation to the right. There was also depression and flattening of the nasal bridge due to the previous nasal fracture. Endoscopic examination of the nose showed mild septal deviation to the

left probably due to previous nasal septal fracture. The rest of the endoscopic examination of the nose and post-nasal space was within normal limits. The ears and hearing were found to be normal. There is 0% whole person impairment in both ears. The residual nasal deformity and nasal airway obstruction can be improved by a functional rhinoplasty and functional repair of the nasal septum. The Plaintiff still has 8% facial disfigurement as a result of fractured nose.

- [14] Dr Francis Colin, a psychiatrist prepared the medico-legal report on his assessment of the Plaintiff. He confirmed the injuries which are common facts. The only diagnosis that could be made after the accident was that of minor neurocognitive disorder with impairment of memory. He found that the Plaintiff did not require psychiatric examination as his medical condition was untreatable and could only improve over time.
- [15] Dr Liezel van der Merwe, an ophthalmologist prepared a medico-legal report on the Plaintiff. She confirmed that the Plaintiff had no ophthalmological history of note. She concluded vision with a normal ophthalmological system. She further opined that the Plaintiff would be able to obtain a legal driver's license due to his normal ophthalmological system and rated his whole person impairment as 0%.
- [16] I also considered the medico-legal report of Dr Hans B. Enslin, an orthopaedic surgeon and certified independent medical examiner. He examined the Plaintiff on 24 January 2017. Like all other medical experts, he confirmed the injuries sustained by the Plaintiff in the accident. The clinical examination of the Plaintiff's spine revealed that the tenderness was noted on certain lumbar vertebrae, with normal posture of the lumbar spine. Dr Enslin concludes that the Plaintiff has not been left with serious long term musculoskeletal impairment and will benefit from conservative surgical treatment.
- [17] Dr Hermann W Kluge, a maxilla facial and oral surgeon also prepared a medico-legal report on the Plaintiff on 6 February 2017. He observed that the Plaintiff's general facial appearance indicated that the right orbit is smaller, there was a nasal deformity and flattening of the nasal bridge due to the previous nasal injury. He concludes that orbital reconstruction of the left orbit would be required in future.
- [18] I have also considered that medico-legal report of the clinical psychologist Ms Sasja Van der Merwe who examined the Plaintiff on 28 October 2016. She concluded that the Plaintiff presented with neuro-cognitive deviations from an

assumed average pre-orbit level of performance which can be associated with the significant brain injury in keeping with the diagnosis of a moderate traumatic brain injury by Dr Daan de Klerk. The deviations, so concludes Ms van der Merwe, can be expected to have a negative impact on the Plaintiff's occupational functioning. Although the Plaintiff was left emotionally vulnerable by the accident, he has the capacity to manage his own affairs. She concludes that the Plaintiff will benefit from 24 sessions of non-curative psycho-therapy in support of his adjustment to the post- accident reality he faces.

- [19] Dr JPM Pienaar, a plastic and reconstruction surgeon, prepared a medico- legal report for consideration by this court. He examined the Plaintiff on 27 February 2017. He found that although the Plaintiff suffered acute pain for seven days due to injuries sustained in the accident, there was no double vision and malocclusion of the teeth. He found that although the Plaintiff suffered acute pain for seven days due to injuries sustained in the accident, there was no double vision and malocclusion of the teeth. He found the Plaintiff's hearing and swelling normal and noted evidence of serious displaced facial fractures. He further concluded that the Plaintiff suffered chronic pain, tenderness and discomfort for six weeks after the accident. He also concludes that the Plaintiff's life expectancy has not been affected by his injuries, that he is not acute or chronically ill, not toxic or shocked. The Plaintiff had no sign of anaemia, jaundice or cyanosis and that his nutritional state was good. He recommended plastic surgery for certain scars on the face. These were clear peri-orbital asymmetry, deviation of his nose to the right and his left medical eye corner which has drifted laterally. He also noted a contour deformity of the frontal area between the Plaintiff's eyebrows. Finally he noted in his left eyebrow that the Plaintiff had a surgical scar of 4Yi cm that is visible, irregular and very unsightly which will all require future treatment. He finally states the accident has left the Plaintiff with serious permanent facial scarring and disfigurement which has had negative effect on his quality of life. The Plaintiff has become shy, withdrawn and self-conscious and has affected his masculinity, leisure, sporting and social activities. The accident has decreased his general enjoyment of life.
- [20] Next to be considered was the medico-legal report by Dr Theo J Enslin an independent medical examiner. He examined various parts of the Plaintiff's body. He concludes that the Plaintiff suffered a severe head injury, loss of vision in both

eyes and photophobia and that he wears sunglasses. He states the Plaintiff has pain and discomfort over his lumbar spine when it is cold and has disturbed sleep. He is unable to play soccer since the accident.

- [21] I have also considered the medico-legal report prepared by Mr SAi Pretorius, an occupational-therapist who assessed the Plaintiff on 8 February 2016. The conclusion was that the Plaintiff will not have any significant physical restrictions with regard to executing work in the open labour market as a conveyor belt attendant. It was further noted that the Plaintiff was capable of sedentary light and medium work. It was noted in the report that in the event of degenerative changes developing in the lumbar spine and progressing to the point of invasive surgical intervention becoming indicated, he will become limited to work of light weight handling demands, with limitations in maintaining and/or assuming static/awkward positions. The report furthermore states that for as long as spinal symptomology remains intensive and/or in the event of undergoing invasive spinal injury, the Plaintiff is considered a vulnerable competitor in the open labour market compared to his non-injured peers.
- [22] Ms Janene White, an industrial psychologist, prepared a medico-legal report and consulted the Plaintiff on 19 October 2016. Based on the Plaintiff's educational level of grade 12 and N5 Electrical Engineering Certificate, Ms White is of the opinion that the Plaintiff would have, but for the accident, completed an electrical apprenticeship during 2008 and 2009 and an electrical trade test by 2010. She furthermore opines that the Plaintiff would have secured employment in the privately surveyed sector, such as Lommin Mine or an alternative employer. The Plaintiff would have probably progressed from actual earnings at the time of the accident as a qualified electrician Paterson C1 median complexity and earnings level during 2010/2011. With the necessary experience and exposure, he probably would have progressed to a Patterson C2 complexity and upper quartile earnings levels, at age approximately 45 years. The experts suggests that a straight time increase be applied, applied from actual earnings at the time of the accident earnings until the correct ceilings as this results in a decreasing pattern of real increases in earnings with normal increases thereafter. She is of the view that should the acquisition of Lonmin by Sibange lead to retrenchment, it is likely that the Plaintiff would be retrenched and it would be hard to secure employment.

- [23] The actuarial calculation of damages was performed by Algorithm Consultant and Actuaries. The purpose of the report was to determine the capitalised value of loss of income, the ammonised post accident earnings with a pre-accident contingency of deductions of 5% pre-accident for the past earning and 15% for future as and post accident contingency deductions of 5% past earnings and 25% for future earnings, the past loss of earnings of pre-accident was said to be R2 938 356 less contingency deduction of 5% of R 146 918 for the net past loss. The future loss was set as uninjured value of R6939 986 less contingency deductions of 15%, R1040 998-00 and the value of income injured of R3774 589 less contingency deduction 25% R943 647 leaving the sum of R2830 942. The net future loss proposed was R3 068 047 leaving a net loss of R4 561 240.
- [24] I now need to consider the approach for determination of loss of earning capacity. In *Southern Insurance Association v Bailey* NO 1984(1) SA 98(A) SA 98(A) in regard to the approach to be followed for determination of damages for loss of earning capacity, Nicolas JA held at 113H as follows:

*"Any enquiry into damages for loss of earning capacities of it's nature speculative ..... All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the judge to make a estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason, adopt a non possumus attitude and make no award.....In a case where the Court has before it material on which an actuarial calculation can fully be made. I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an informed guess, it has the advantage of an attempt to ascertain the value of what cost on a logical basis, whereas the trial Judge's gut feeling (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."*



[25] When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must to the best it can, on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss (See *Anthony & another v Cape Town Municipality* 1967(4) SA 445 (A) at 4518-C).

[26] In *Santam Versekering maatskappy Bpk v Byleveldt* 1973(2) SA 146 (A), Rampff CJ held that the:

*"Verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standard van verwagte inkomste, is n verlies van geskiktheid en nie n verlies van inkomste nie."*

[27] In *Legal Insurance Company Ltd v Bates*, Holmes JA held that:

*"In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tried down by inexorable actuarial calculations."*

[28] In *D'Hooghe v Road Accident Fund* 2010(6J2) QOD, (ECP) Chetty J held as follows:

*"It follows from the foregoing authorities that where, as in casu, a plaintiff suffers a permanent impairment of earning capacity the proper method of determining such loss is -*

- i) to calculate the present value of income which the Plaintiff would have earned but for the injuries and the consequent disability;*
- ii) adjust that figure having regard to all relevant factors and contingencies; and (v) subtract the latter from the former."*

[29] In determining quantum for general damages, the approach to be taken when comparing awards made in similar cases has been restated by Brand JA in *De*

*Jongh v Du Pisame N.O 2005(5) SA 457 (SCA) at para 64 as follows:*

*"Die benadering wat van oudsher deur hierdie hof gevolg word, is egter juis andersom .....Vo/gens hierdie benadering is die beginsel juis dat die vastelling van nie-patrimoniale skade in die diskressie van die hof is. By die uitoefening van die hof se diskressie is vergelyking met toekennings in vorige sake n nuttige n hulpmiddel omdat dit dare, vir die hof die bree parameters of te wel 'n patroon aandui waar binne sy toekenning tuis gebring moet word. Dit is ook'n nodige riglyn omdat konsekwentheid in toekenning n inherente vereiste van billikhede is. Nietemin bly dit steeds n riglyn. Oit vervang nie die hof se diskressie met 'n letterknegtige gebondenheid aan die aangepaste waarde van vorige toekennings nie."*

- [30] The Court is not required, in exercising its discretion on award of general damages to factor in the tendency with mathematical precision.
- [31] Although the Plaintiff suffered acute pain as a consequence of his injuries, the injuries have not left him permanently disabled.
- [32] I have already stated the fact that all experts agree that he can and is still employed in the same service he was as a conveyor belt operator. Although there is, according to the industrial psychologist, a risk that if retrenchment were to be implemented as a result of Sibanye's acquisition to the Plaintiff's employer, the Plaintiff would be a target due to his previous injuries, this cannot on the face of the expert report, be regarded as a foregone conclusion.
- [33] Consequently, the award that will be made will take all these factors into consideration at what this Court regards fair and balanced between the parties.

#### ORDER

- [34] After having heard counsels both parties, the Court orders as follows:

##### 34.1 PLAINTIFF'S CAPITAL

The Defendant is ordered to pay the Plaintiff the amount of R3 397 945 (Three million three hundred and ninety seven rand nine hundred and forty five rand) in delictual damages for loss of earnings in full and final settlement following injuries

Plaintiff sustained in a motor vehicle accident which occurred on 14 January 2008, which amount is payable by Defendant to Plaintiff on or before 14 (fourteen) days from the date of order by depositing same into Plaintiff's attorneys of record's trust account, the details of which are as follows:

Account Holder:	Macrobert Inc
Bank:	Standard Bank
Type of account:	Trust
Account number:	[.....]
Branch:	Pretoria
Branch code:	01-00-45
Reference:	1008074

#### 34.2 INTEREST:

33.2.1 The Defendant will not be liable for interest on the outstanding amount;

33.2.2 Should the Defendant fail to make payment of the capital amount on/before 14 (fourteen) days from date of this order), Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10,25% per annum as from date of order to final payment.

#### 33.3 UNDERTAKING:

The Defendant is ordered to deliver to Plaintiff within reasonable time on undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, wherein the Defendant undertakes to pay to Plaintiff 100% of the cost of future accommodation in a hospital or a nursing home or treatment of, or rendering a service or supplying of goods to Plaintiff pursuant to the injuries Plaintiff sustained in a motor vehicle accident which occurred on 14 January 2008, after the costs have been incurred and on proof thereof.

#### 33.4 COSTS:

The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on High Court scale, which costs will include, but will not be limited to, the following, subject to the discretion of the taxing master:

- 34.4.1 The costs of all expert reports, medical-legal reports, addendum medico-legal reports, and combined joint reports, RAF4 Serious Injury Assessment Report(s) and radiology reports of all experts of whom notice has been given and/or whose reports have been furnished to the Defendant and/or its attorneys and/or whose reports have come to the knowledge of the Defendant and/or its attorneys as well as all reports in their possession and/or contained in the Plaintiff's bundle of documents. This shall include, but not be limited to, the following experts of whom notice has been given namely:
- 34.4.1.1 Dr D De Klerk, Neurosurgeon;
  - 34.4.1.2 Dr D Le C Stolp, Ear, Nose and Throat Specialist;
  - 34.4.1.3 Dr GRIESE! & Janse van Rensburg (A Roos), Audiologist;
  - 34.1.4 Dr F Colin Psychiatrist;
  - 34.1.5 Dr L Van der Merwe, Ophthalmologist;
  - 34.1.6 Dr H B Enslin, Orthopaedic Surgeon;
  - 34.1.7 Dr H W Kluge, Maxilla-Facial and Oral Surgeon;
  - 34.1.8 S Van der Merwe, Neuro-Clinical Psychologist;
  - 34.1.9 Dr JPM Pienaar, Plastic & Reconstructive Surgeon;
  - 34.1.10 Dr T J Enslin, Medical Practitioner;
  - 33.1.11 SA J Pretorius, Occupational Therapist;
  - 33.1.12 J White, Industrial Psychologist;
  - 34.1.13 G Whitaker, Actuary.
- 34.4.2 The full fees of Plaintiff's senior counsel in respect of preparation, consultations, pre-trial conferences) and a day fee for 13 May 2019;

- 34.4.3 The reasonable travelling and transportation costs including e-toll fees incurred by and on behalf of Plaintiff for attending the trial and all the medico-legal examinations arranged by Plaintiff and Defendant;
- 34.4.4 The costs of holding all pre-trial conferences, as well as roundtable meetings between the legal representatives for both the Plaintiff and Defendant;
- 34.4.5 The reasonable costs of and consequent to holding of all expert meetings between the medico-legal experts appointed by the Plaintiff;
- 34.4.6 The reasonable taxable costs of one consultation with the client in order to consider the offer of the Defendant, the costs to accept it, have it made an order of court and to procure performance by the Defendant of its obligations in terms hereof;
- 34.4.7 The cost incurred in obtaining payment and/or execution of the capital amount mentioned in paragraph 1 above;
- 34.4.8 The full fees for preparation and copying charges for making 6 **(six)** sets of the trial bundles.

34.5 TAXATION:

- 34.5.1 The Plaintiff is ordered to serve the Notice of Taxation of Plaintiff's party and party bill of costs on Defendant's attorneys of record;
- 34.5.2 The Defendant is ordered to pay the Plaintiff's taxed and/or party and party costs within 14 -(fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;
- 34.5.3 Should the Defendant fail to make payment of the party and party costs within 14 (fourteen) days after service of the taxed accounts on the Defendant's attorneys of record, Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10,25% per annum as from the date of taxation to date of final payment.

34.6 CONTINGENCY FEE AGREEMENT:

- 34.6.1 The Plaintiff and his attorneys of record did not enter into any contingency fee agreement.

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**ML SENYATSI**  
**ACTING JUDGE OF THE HIGH COURT OF**  
**SOUTH AFRICA, GAUTENG DIVISION,**  
**PRETORIA**

**For the Plaintiff:** Adv R De Alcantara  
**Instructed by:** Macrobert Inc, Pretoria

**For the Defendant:** Adv S Nomadondo  
**Instructed by:** Brian Ramaboa Inc, Pretoria