

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

Case No: 75931/2017  
03/07/2020

In the matter between:

**Setaki Abram Mokwena**

**Plaintiff**

And

**Road Accident Fund**

**Defendant**

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**JUDGMENT**

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Maumela J.

1. The Plaintiff, Setaki Abram Mokwena instituted action against the defendant; the Road Accident Fund. The action stems out of bodily injuries which the plaintiff sustained in a motor vehicle accident which took place on the. Plaintiff seeks compensation from the Defendant in terms of Act 56 of 1996. In these proceedings, both liability and quantum are in dispute. Both the Plaintiff's *locus standi* and substantial compliance with the Road Accident Fund Act are admitted. The issue to be determined regarding liability in this matter has to do with negligence as the cause of the accident, specifically contributory negligence as the cause of the

accident.

2. The Defendant did not plead contributory negligence. In the case of *Jwilli v Road Accident Fund*<sup>1</sup> the court held that it is contradictory to deny all knowledge of the accident alleged and then positively allege that the plaintiff was negligent in a number of respects. In *Adv Ronelle Ferguson obo De Ridder*<sup>2</sup>, Khumalo (J) held that in an action, pleadings are there to define issues between the parties. However, parties may by agreement re define the issues from the Pleadings. Also see *Knox Darcy & Another v Land & Agricultural Development Bank of SA*<sup>3</sup>.
3. Defendant made further admissions as per the pre-trial minute dated the 24<sup>th</sup> of October 2018. In that regard, defendant made the following admissions:
  - 3.1. The date, time and place of the accident. In that regard, it admits that the accident occurred on the 26th February of 2017 at 15h30, on the N1, just before the N4 off-ramp (paragraph 10);
  - 3.2. It admits the identity of the parties and vehicle involved in the accident; to wit that the Plaintiff, (a pedestrian), was standing next to the highway when he was knocked down by a vehicle bearing registration letters and numbers [...], there and then driven by Ms. Thandi Nkosi ;
  - 3.3. The defendant also concedes that the insured driver was negligent, but submits that the Plaintiff was also negligent;
  - 3.4. It concedes that the Plaintiff was a pedestrian, standing off the road, next to the highway, at the time of the accident.
4. At the pre-trial conference of the 29<sup>th</sup> of August 2019, the Defendant admitted:
  - 4.1. That the insured driver was negligent.
  - 4.2. That the version by the independent eye witness, Mr. Ben Mokwena is their version of how the accident occurred.

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<sup>1</sup> 2010 (5) SA 32 (GNP) par [11] at 36).

<sup>2</sup> Case No A592/2013.

<sup>3</sup> 9625/12 (2013) ZASCA 93 (5 June 2013).

- 4.3. The Defendant admits the date, time and place of the accident to wit that the accident occurred on the 26<sup>th</sup> of February 2017 at 15h30 on the N1, just before the N4 off- ramp;
- 4.4. That when the accident occurred, visibility was good.
- 4.5. Photographs depicting the inspection *in loco* are admitted into evidence.
5. The facts that were admitted on the record, do not require proof. The Plaintiff's version is that he was a pedestrian, standing next to the road when the accident took place. The facts sufficiently establish the liability of the defendant concerning the accident. See *section 15 of Act No 25 of 1965; Gordon v Tarnow*<sup>4</sup> *Barclays Bank of Zimbabwe Ltd v Air Zimbabwe Corporation*<sup>5</sup>. Defendant knew about the version of the plaintiff from the time the claim was submitted on the 30<sup>th</sup> of June 2017.<sup>6</sup> The facts cannot be contradicted. See *Dinath v Breed*<sup>7</sup>. The affidavit submitted corresponds with the allegations in the Particulars of Claim.
6. The Defendant advanced the following version: *"The Defendant refers to the independent eye witness statement made by Mr. Ben Malose Mokwena (dated 3/4/2017), and commissioned by a SAPS officer and submits same as the Defendant's version"*<sup>8</sup>. The version of the defendant also establishes its liability. Plaintiff contends that on both of the versions of the parties mentioned above, it is undeniable that the accident resulted from the causal negligence of the insured driver.
7. taking into consideration the versions as indicated by both parties, it is clear that plaintiff has proven the liability of the defendant. In the case of *Nieuwoudt v Joubert*<sup>9</sup>, the court stated the following: *"Litigation is not a game where a party may seek tactical advantages by concealing facts from his opponents and thereby occasioning unnecessary costs"* also see

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<sup>4</sup> 1947(3) SA 525 (A) at page 531.

<sup>5</sup> 1994(1) SA 639 (Z) op 647).

<sup>6</sup> See Defendant's date stamp on the RAF1 claim form (Index to Documents: Pages 1-12).

<sup>7</sup> 1966 (3) SA 712 (T) at 716-7).

<sup>8</sup> (paragraph 10 of the pre-trial minute dated 29 August 2019).

<sup>9</sup> 1988 (3) SA 84 (SOK), on page 91.

*Quartermark Investments (Pty) Ltd v Mkhwanazi and another*<sup>10</sup> and *MB v OB*<sup>11</sup>. In the case of *Ntsala v Mutual & Federal Ins Co Ltd*<sup>12</sup>, the court stated the following: "I am satisfied that the onus rests throughout on the plaintiff to prove negligence on the part of the defendant. Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary: he must tell the remainder of the story, or take a risk that judgment be given against him."

8. In this case the plaintiff contends that the situation is the same, considering the facts admitted. Also see *Lourens v Road Accident Fund*<sup>13</sup>. The court considered the judgments of *Ntsala v Mutual & Federal Ins Co Ltd*<sup>14</sup> *Alberts v Engelbrecht*<sup>15</sup>, and *Motor Insurers Association of South Africa v Boshoff*<sup>16</sup> in reaching the conclusion that the onus rest on the Defendant to begin. Defendant argues that the insured driver was contributorily negligent along with the Plaintiff.
9. Plaintiff points out that the defendant did not advance evidence to justify a finding of contributory negligence. As a result, the he submits that he should be held to be entitled to 100% on merits and the Defendant should be ordered to be liable for 100% of the Plaintiff's proven or agreed damages.<sup>17</sup> Plaintiff argues that the onus is upon the Defendant, See *Alberts v Engelbrecht*<sup>18</sup>; *Motor Insurers' Association of SA v Boshoff*<sup>19</sup>; *Adendorff v Shield Ins Co Ltd*<sup>20</sup> and *Longueira v Securitas of SA (Pty) Ltd*<sup>21</sup>. He also argued that the duty to begin also lies on the Defendant. This is also common cause between the parties.<sup>22</sup> The Defendant has no

<sup>10</sup> 2014 (3) SA 96 (HHA) paragraph (20) at page 102-3.

<sup>11</sup> 2013 (6) SA 86 (KZD) paragraph [39] at page 99).

<sup>12</sup> 1996 (2) SA 184 (T) at page 190.

<sup>13</sup> (31816/2017) (2018) ZAGPPHC 621 (23 August 2018) at paragraph 17-20

<sup>14</sup> 1996 (2) SA 184 (T) at page 190.

<sup>15</sup> 1961 (2) **SA 644** (T)

<sup>16</sup> 1970 (1) SA 489 (A) at page 502.

<sup>17</sup> Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ) par 27 at page 176.

<sup>18</sup> 1961(2) SA 644 (T) at page 646.

<sup>19</sup> 1970(1) SA 489 (A) at page 502.

<sup>20</sup> 1979 (4) SA 390 (C), at page 393.

<sup>21</sup> 1998 (4) SA 258 (W) paragraph 5.1 at 264).

<sup>22</sup> See pre-trial minute paragraph 66, dated 29 August 2019.

witness and has never had one<sup>23</sup>.

10. Plaintiff is adamant that he cannot be found to have been contributorily negligent because the defendant did not advance any version. He makes the point that he was a pedestrian, standing alongside the road when the accident took place. This is also common cause between the parties<sup>24</sup>. Plaintiff contends that the Defendant has not discharged its duty to furnish an exculpatory explanation or its *onus* of proof, much as it is not proven contributory negligence on the part of the plaintiff. He contends that the Defendant should never have taken this matter to trial on the merits. According to him, a punitive cost order should be granted against the Defendant.
11. Rule 37(9)(a)(ii) provides: *"At the hearing of a matter the court shall consider whether or not it is appropriate to make a special order as to costs against a party or his attorneys because he or his attorney .. (ii) failed to a material degree to promote the effective disposal of the litigation"* [Jwili v Road Accident Fund<sup>25</sup>; See Tshabangu v RAF<sup>26</sup>. Rule 37(9)(a)(ii) is especially applicable where unnecessary costs and problems of preparation were occasioned by the Plaintiff, See Van Rensburg v RAF.<sup>27</sup>
12. The plaintiff points out that in this case, the Defendant proceeded to trial without a version and without exculpatory witnesses. He contends on that basis that the matter should never have gone to trial on the merits and should simply have been disposed before trial. He argues that the Defendant did not properly fulfil its functions by way of investigating the merits as soon as the claim was lodged. He views that merits should have been settled without coming to trial. The Plaintiff charges that in failing to do so, the Defendant failed to comply with its statutory requirements. Plaintiff argues that the court should make a finding and declare that the Defendant is liable for 100% of the Plaintiff's proven or agreed damages

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<sup>23</sup> See pre-trial minute dated 29 August 2019 par 11

<sup>24</sup> See Pre-trial minutes of 24/10/2019; at Paragraph 11.

<sup>25</sup> 2010 (5) SA 32 (GNP) paragraph 10 at page 36.

<sup>26</sup> (2009/49589) [2011] ZAGPJHC 145 (19 October 2011).

<sup>27</sup> (66640/16) [2018] ZAGPPHC 375 (9 March 2018) para 9].

and that the court should order the Defendant to pay the costs on an attorney and client scale.

#### QUANTUM:

13. The Plaintiff is currently 40 years of age. On the 5th of November 2019, the Defendant's defence was struck in respect of both the merits and quantum. The matter accordingly proceeded on the Plaintiff's experts only. Plaintiff argues that the reports of the defendant's experts should not be taken into consideration. For that contention plaintiff advances the following grounds:
  - 13.1. That the reports were served out of time and were objected to by the Plaintiff;
  - 13.2. That on the 27<sup>th</sup> of September 2019, the matter was before AJ Strydom for a Judicial Management Meeting. At the judicial oversight meeting, the Defendant provided the court with an undertaking that their reports would be filed by the 18<sup>th</sup> of October 2019, failing which the matter was to proceed on the Plaintiff's expert reports, which reports are automatically admitted, including the factual basis and opinions and conclusions of such experts.

#### EDUCATION AND WORK HISTORY.

14. Plaintiff holds a Grade 7 level of education.<sup>28</sup> At the time of the accident, he was working as a garage door installer and driver at Right Quip.<sup>29</sup> He earned R1500 per week. He was off work for 5 months and only received 50% of his salary.<sup>30</sup> He resigned from this work on the 20th of April 2018 after an incident in which he loaded the wrong equipment and was reprimanded by his employer. He became apprehensive of the fact that this incident laid a basis on which he might end up served with a final warning which may lead to a disciplinary process which may culminate in his dismissal from work. After resigning, he secured work at Roos Garage

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<sup>28</sup> Dr Pretorius-Industrial Psychologist (Index to Plaintiffs Experts): Page 208.

<sup>29</sup> Dr Pretorius-Industrial Psychologist (Index to Plaintiff s Experts): Page 209.

<sup>30</sup> Dr Pretorius-Industrial Psychologist (Index to Plaintiff s Experts): Page 209.

Doors as a driver and garage door installer, earning R1600 per week. He is still in this employment.

#### INJURIES AND TREATMENT.

15. Plaintiff was admitted at Steve Biko Hospital on the day of the accident, namely the 26<sup>th</sup> of February 2017. He was hospitalized there until the 7<sup>th</sup> of March 2017. He suffered the following injuries:
  - 15.1. A right compound humerus fracture above the elbow. An open reduction and internal fixation surgical operation was performed on the 28<sup>th</sup> of February 2017.
  - 15.2. A left closed fibula fracture. An open reduction and internal fixation surgical operation was performed on the 28<sup>th</sup> of February 2017.
  - 15.3. A head injury. His GCS was 13/15 and this deteriorated to 8/15. He was intubated in casualties because of the low-level GCS. A CT scan was taken and an angiogram done and
  - 15.4. Soft tissue neck injury: The Plaintiff was placed in a Philadelphia neck collar.

#### MEDICO LEGAL REPORTS.

Medico legal report by Dr Meja (Neuro Surgeon).

16. This expert examined the Plaintiff on the 26<sup>th</sup> February 2017. The Plaintiff lost consciousness at the accident scene. He was transported to the Steve Biko hospital. He was diagnosed with the following injuries:
  - Head injury with abrasions on his scalp and forehead. On the scene, his GCS was 14/15. His GCS was 13/15 on admission to the hospital but deteriorated to 8/15 in the hospital casualty.
  - Right upper arm fracture (humerus);
  - Lower leg fracture (Fibula) and
  - Abrasions on the chest and abdomen.
17. Plaintiff complains of memory loss, neck pain, right upper arm pain and left ankle pain. He also presented with scarring. His gait is beset with a

limp. He suffered a diffuse traumatic brain injury of moderate severity. He was resuscitated, intubated and ventilated. His risk of developing epilepsy is 5-8% above that of the population in general.

MEDICO LEGAL REPORT BY DR MENNEN (ORTHOPAEDIC SURGEON).

18. This expert examined the Plaintiff on the 2<sup>nd</sup> of August 2019. Plaintiff complained of pain to his right arm and right elbow stating that it becomes worse during inclement weather. He experiences pain when picking up heavy objects and he can only put out a diminished range of motion. His right arm is weak. He presents with swelling of the left ankle and pain in the lower left leg. The range of motion in his left ankle is weak and his gait is laden a limp. He has a diminished range of motion in the left ankle and he limps. He is unable to run and cannot walk far. His neck is stiff; especially in the mornings.
19. X-rays revealed the that concerning plaintiff's Right humerus, a metal plate and screws are in good position at the mid to distal third of the right humeral shaft. There is a slight deformity on his mid to distal right humeral shaft with cortical thickening due to incomplete bony remodelling after the previous fracture. On the left lower leg, a metal plate and screws are in good position at the distal left fibula and the fracture line is no longer visible. A diastasis screw is also in position. A bony bridge is present across the distal tibia and fibula due to heterotopic bone formation at the intraosseous membrane.
20. The expert noted scarring at 5x2 cm on the right shoulder, 17 cm longitudinal scar over the right upper arm and a 13cm longitudinal scar over the left ankle. There is scarring which is multiple and abrasive on the forehead. An examination of the neck revealed a diminished range of motion of the neck and reduced rotation to the right. An examination of the right elbow revealed a diminished range of motion and 2cm muscle wasting. Examination of the right ankle revealed a 2cm muscle wasting and a diminished range of motion of the left ankle. A clinical swelling was



noted at the examination. There is scarring and prominence over the lateral malleolus where the plate was inserted.

21. This expert determined that plaintiff will require the surgical removal of the plates in future. He stated that plaintiff has suffered a loss of work capacity as a result of the accident. His loss of work capacity is related to the pain and weakness that he is suffering from in his right arm. He has a diminished range of motion of his right elbow. This affects him in his daily activities, but it also affects his ability to install garage doors. Plaintiff's occupation is physical and strenuous. As a result, the injury to his right arm resulted in a significant loss of his work capacity. He cannot walk without a limb and has pain and stiffness in the left ankle. He cannot run. Prolonged standing and working in a crouched position causes him significant pain in the left ankle. The expert stated further that plaintiff has a 15% WPI. He qualifies for general damages under the narrative test. As a result, he may not be able to work until the retirement age of 65 years.

#### MEDICO LEGAL REPORTS BY DR BERKOWITZ (PLASTIC SURGEON).

22. This expert examined the Plaintiff on the 30th of August 2019. He noted the following scarring:
- There is a sinuous scar measuring 45 x 4 mm in the centre of the frontal scalp;
  - There is a curved non-hair-bearing scar of 25 x 5 mm in the left temple region of the scalp;
  - There is a superficial scar measuring 50 x 3 mm lying horizontally in the right parietal region of the scalp;
  - There is a hyper pigmented post abrasion scar of 55 x 20 mm lying transversally on the point of the right shoulder;
  - There is an unsightly post-surgical scar of 165mm x 10mm running longitudinally down the midline of the posterior aspects of the right arm;
  - There is a post-surgical scar of 50mm x 15 mm on the medial aspect of the distal third of the right arm;
  - Post-surgical scar of 130 x 2 mm running longitudinally down the

midline of the lateral aspect of the distal third of the left leg.

23. This expert stated that scars numbers 1, 2, 5 and 6 can be surgically improved. Despite this, plaintiff will remain with a disfiguring scarring and will have a permanent serious disfigurement. He has a 20% WPI and qualifies for general damages under the narrative test.

MEDICO LEGAL REPORT BY MR FERREIRA TEXEIRA (CLINICAL PSYCHOLOGIST).

24. This expert examined the Plaintiff on the 29th of August 2019. Before him, the plaintiff complained of nose bleeds which occur once a month, neck pain; especially with fast movement, pain in the right elbow and left ankle, especially during cold weather. He cannot walk, run or jump for long periods or distances. He has difficulty lifting heavy objects off the floor and over his head. He is forgetful and has diminished processing speed. He forgets recent activities and names of people. His partner must remind him of important tasks at work. He is easily distracted and loses his thread of thought. He struggles to perform more than one task at a time.
25. This expert stated that after the accident, plaintiff has become depressed and sad. He said that plaintiff diminished processing speed and forgetfulness. His forgetfulness and cognitive complaints negatively impact on his relationships with his colleagues which causes him emotional distress. He also has chronic pain. He has accident related fear. He is easily fatigued and he must take regular rest breaks. He emerged after the accident with a tendency to consume more alcohol. Plaintiff was employed as a driver and installer at Right Quip. Consequent to disputes at work, he resigned from the company. His chronic pain influenced his work performance as he took longer to complete his tasks at work. Because of his deficiency and processing speed, his work is slower and he is dependent on help from colleagues. Pain interferes with his ability to work effectively because of his physical slowness. He struggles to lift heavy objects from the floor and overhead.

26. Testing revealed the following neuro-cognitive deficits: Defective psychomotor speed and visual scanning, sustained attention complex attention and concentration, double mental tracking capacity, narrative memory, verbal memory and verbal retrieval abilities, rote verbal memory, working memory, defective capacities for verbal and abstract reasoning and defective executive functioning with regard to forward planning in structured situations.
27. This expert noted that considering the severity of the brain injury, some long term changes in neurocognitive and neuro behavioural changes are anticipated. His overall psychological functioning and the presence of pain may also contribute to his overall cognitive profile. Plaintiff presented with symptoms of Post-Traumatic Stress Disorder, Anxiety and Depression. In addition, his scarring affects his self-consciousness and this negatively impacts on his self-esteem. The experts stated that scars can have a long-lasting physical and Psychological effect and may bring about symptoms of depression, anxiety and problems with social interaction. The Plaintiff has been rendered psychologically much more vulnerable as a result of the accident. His symptoms of depression and anxiety will likely have a mutually an exacerbating effect on each other, resulting in increased psychological distress overall.
28. Occupationally, the neuropsychological profile impacts his work as follows:
- The decreased attention and concentration may render him more prone to errors or negligent mistakes which would decrease his effectiveness;
  - Chronic pain makes him less productive than had been the case prior to the accident;
  - His self-esteem could hinder his attempts to market himself for career advancement or to promote his skills optimally for alternative positions of employment;
  - His anxiety will render him less attentive upon initial arrival at work. This will impact his efficiency and productivity.

THERAPIST).

29. This expert examined the Plaintiff on the 10<sup>th</sup> of October 2019. Before him, the plaintiff stated that he experiences the following challenges when at work: Pain in his left ankle when he stands and walks for prolonged periods and when climbing ladders, pain in the right elbow when lifting and carrying heavy garage door sections. On the day of the assessment, he was laden with a decreased elbow flexion and he complained of pain in his right elbow with all movements. Muscle strength was slightly diminished in the muscle surrounding the right shoulder and elbow and mild muscle wasting of the right upper arm, forearm and bicep muscles were noted. Dorsi flexion of the left ankle was diminished and he complained of a left ankle pain, with all movements. Hi muscle strength was slightly diminished around his left ankle, with mild muscle wasting of his left thigh and a mild swelling in the left ankle.
30. The expert stated that the plaintiff is ideally suited for work of a medium nature. His pre-accident work was heavy in nature. There is thus a mismatch relating to dynamic strength requirements. Thus, it is expected that he will struggle to sustainably comply with the inherent job requirements of the job of an installer of garage doors. These limitations relate mostly to lifting and carrying of the heavy garage door panels. He could only continue with his work for some two years after the accident because he relies heavily on a co-worker.
31. The expert stated that considering that plaintiff's employer has understanding, he may be able to continue with the work demands. However, he will be vulnerable and an employee is always at risk of losing his work due to a highly competitive nature of the unskilled and low semi-skilled domains. As a manual labourer, plaintiff depends on his physical strength to secure and maintain employment. Due to his compromised musco-skeletal system, it is anticipated that he will remain compromised and will not compete fairly with pain free individuals of the same age and educational level.
32. The expert stated that plaintiff has suffered occupational dysfunction and

will remain an unfair competitor in the open labour market. His career choices have become limited and considerably narrowed and he will no longer be able to cope with heavy work, unless he is employer tempers the wind to the shorn lamb he has become by offering him work-related accommodations. If for some reason, plaintiff loses his current work, he will struggle to obtain other employment due to the ongoing symptomology in his right elbow and left ankle unless there is understanding on the part of his employer. As a result, he will find himself frequently unemployed.

33. This expert stated that cognitively, plaintiff will not cope with jobs that require higher cognitive skills, abstract reasoning and a high-level decision making. Considering that he sustained a head injury during the accident, it is likely that the cognitive deficits are accident-related. He presents with various difficulties including recall deficits and moderate to severe deficits in visual and auditory forward and backward memory and with sequencing simple mathematics skills, he is bound to experience concrete problem where it regards solving and abstract thinking.
34. Ms. Steyn stated further that plaintiff remains a compromised individual who will not be able to compete fairly with individuals of the same age and educational level, mainly due to the neurocognitive and physical deficits. He will always need an understanding employer who is willing to offer reasonable accommodation. In a highly competitive open labour market, it is anticipated that the plaintiff will struggle to retain employment due to poor productivity and efficacy. Should he develop epilepsy, he will remain unemployed for the remainder of his life. He will be excluded from work near open water, flames, heights or machinery, neither will he be competent as a driver. He is currently a driver and he works with machines.

#### MEDICO LEGAL REPORT BY DR PRETORIUS (INDUSTRIAL PSYCHOLOGIST).

35. This expert examined the plaintiff on the 29th of August 2019. He secured collateral feedback from the employers. The right Quip indicated that

plaintiff's pre-accident performance was without difficulties. After the accident, he was off work for 5 months and received only 50% of his salary. He became prone to making mistakes after the accident. The mistakes were related to tasks of loading wrong equipment. Due to altercations with his employer, he resigned on the 20<sup>th</sup> of April 2018.

36. Plaintiff told this expert that he went to work for Roos Garage Doors from the 19<sup>th</sup> of October 2018, which was a few months later. Although he can perform the work, he sometimes struggles and at times, he walks with a limp. There are two workers in his team and his partner as to do most of the heavy lifting. He complains often and this may cause problems in the future because his team is performing below par. The company is to contend with numerous return-jobs deriving from his team due to incomplete work or work that fails to meet the satisfaction of the customers. His team is also slower than other teams. He remains employed merely because he is being accommodated. His slow pace at work and the return jobs that occur are a problem at his employment. He stated that work gets repeated at a great expense to the company due to its shoddy quality. According to him, this impacts the business's reputation and brand value.
37. Plaintiff points out that the company has therefore implemented a policy in order to ensure quality of work. He fears that he may fade to ascertain the standard and quality of work required. He is concerned that he may receive a verbal, written and final warning in due course and he may be dismissed consequent to a disciplinary hearing if his work is found not to be on par with what is expected of him. On that basis, he views that he is at risk of losing his employment. According to him, this risk is significantly high. He points out that to be able to perform the work, one must be able to measure and calculate and must demonstrate basic cognitive intact skills. The return-jobs suggest that the Plaintiff is experiencing workplace problems. He is earning R1696/week. He does 5.5 hours of overtime a month. He views that given he is poor performance, he will not receive a 100% bonus because the bonuses are performance based and

discretionary. He is instead likely to get a 60% bonus. A well performing employee will be paid between R2000 and R3000 per week to retain the employee. The Plaintiff will not qualify for a higher paying job. Should his performance not drastically improve, he is at risk of losing his employment.

#### PLAINTIFFS WORK CAPABILITY BEFORE THE INJURY.

38. At the time of the accident, the was employed at Right Quip, earning R1500 per week or R78 000 per annum. With overtime and his bonus, this income would amount to R82 000 per annum. Of this amount, R 7292.80 is his annual bonus. His income would have increased to R1696.00 or R88 192 per annum in today's terms. With bonuses and overtime this would amount to R 97 583.60. From 2020, his income would have increased with an additional R250 per week or R13 000 per annum. This income would have increased with inflation to age 65 (60-65).

#### POST INJURY.

39. Plaintiff acquired a low level of education and will always rely on his physical ability to earn an income. He is not suited for his current work and he is vulnerable from a physical, psychological and neuropsychological work capacity perspective. In order for his employment to survive, his employer ought to be highly accommodative. The expert noted that the biggest problem is the negative cognitive and psychological impact of the accident. As an installer, he must plan, execute and solve practical problems, do quality control and manage his team whilst interacting with clients. Due to a combination of his physical, psychological and neuropsychological limitations, his work performance is poor. He is slow and he makes numerous mistakes. His interpersonal skills are poor. He presents with a poor drive and motivation which result in poor work performance.
40. Because of all this, plaintiff views that he stands to lose his job in the next year. He contends that his chances of securing another employment are

poor. Because of that, he is of the view that he faces prospects of extended periods of unemployment in future. He points out that should he develop epilepsy, he will not be able to perform duties like working at heights, driving a car or working with electricity. He states that he is a very vulnerable employee, much as he is visited with vulnerability in securing and retaining employment that could allow him to grow his career. He is at risk of not being able to retain employment. He faces prospects of long periods of unemployment and is at risk of not ending a salary at expected levels. He contends that he is poised to reach a stage where he will not be a competitive employee and that this will render him to be highly prone to become unemployed. On that basis, the expert proposes that very high post-accident contingencies be applied.

41. This expert projects that plaintiff will no longer receive the additional R250 per week or R13 000 per annum from 2020 and his bonus is limited to 60% of R7292.80. His 2019 salary is thus R94 666.48. He stands to lose his current employment at the end of 2020. From 2021, he will secure work again. His income will amount to R 82 000 per annum, decreasing in a direct line to age 55, at which stage he will earn R 20 700 per annum (LQ of unskilled workers). He will remain unemployable after the age of 55.
42. An actuary; Mr Johan Sauer, generated a summary of the calculations relating to the plaintiff's potential income. He postulated an array of possible scenarios relating to prospects relating to plaintiff's pre-and post-injury and incapacity. Having computed and contrasted various scenarios, this expert is of the view that the plaintiff's earning capacity stands at R 1 050 294 - 00.

#### CONTINGENCIES.

43. As a general rule, the court may apply a sliding scale in respect of contingencies, and apply a ½ %, per annum from the date of the accident to retirement age.<sup>31</sup> Dr. Robert Koch, proposes that the normal

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<sup>31</sup> Goodall v President Insurance 1978 (1) SA 389 (W).



contingencies are 5%, (past loss) and 15% (future loss).<sup>32</sup> He states that allowing for contingencies is one of the elements in exercising the discretion to award damages, See *Cf Southern Insurance Association Ltd v Bailey* NO<sup>33</sup>.

44. It is trite that contingencies may consist of a wide variety of factors. They include matters such as the possibility of error in the estimation of a person's life expectancy, the likelihood of illness, accident or employment which in any event would have occurred and therefore affects a person's earning capacity. See *Minister of Defence and Another v Jackson*, at page 34 FH; and Boberg: "*Deductions from Gross Damages in Actions for Wrongful Death*"<sup>34</sup>.
45. Contingencies may be positive or negative. Not all contingencies are negative involving a reduction of the award. In *Bresatz v Przibilla*<sup>35</sup> (cited with approval in *Minister of Defence and Another v Jackson* supra at page 34 H-J and *Southern Insurance Association Ltd v Bailey* NO<sup>36</sup> where the following was stated: "*It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on considering what the future might have held for the particular concerned. He might have fallen sick from time to time, been away from work and unpaid. He might have become unemployed and unable to get work. He might have been injured in circumstances in which he would receive no compensation from any source. He might have met an untimely death. Allowance must be made for these 'contingencies' or 'vicissitudes of life' as they are glibly called. But this ought not to be done by ignoring the individual case and making some arbitrary subtraction ... Moreover, the generalisation, that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse, all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the*

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<sup>32</sup> Koch R (2015) *Quantum Yearbook* 120.

<sup>33</sup> 1984 (1) SA 98 (A) 116 H).

<sup>34</sup> (1964) 81 SALJ 194 at 198).

<sup>35</sup> [1962] HCA 54; (1962) 36 ALJR 212 (HCA) at 213.

<sup>36</sup> 1984 (1) SA 98 (A) at 117 B-O).

*rewards of fortune. Each case depends on its own facts."*

46. Although contingencies are generally taken into account when awards of damages are quantified, See *Nochomowitz v Santam Insurance Co Ltd*<sup>37</sup> ; *Gillbanks v Sigournay*<sup>38</sup> , this is not always done. In the case of *Wessels v AA Onderlinge Assuransie Assosiasie(TPO)* referred to in Corbett & Honey *The Quantum of Damages Vol 4 A3-19 at A3-33*, the Court refused to take contingencies in respect of future medical costs into account where although the amount of damages, excluding loss of income, had been agreed upon, contingencies were neither mentioned nor in issue. A 5% contingency was applied on the past loss for both injured and uninjured. As for future loss, the contingency applied was 15% on injured and 30 % on uninjured.

#### GENERAL DAMAGES.

47. The injuries and sequelae have been listed above. It is a well- known fact that making an award for general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life is particularly difficult. However, certain governing principles have evolved over the years. It is now trite that when considering general damages, the court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. See *RAF v Marunga*<sup>39</sup>.
48. Although courts generally recognise the necessity of making a comparison to past awards, it must always be borne in mind that there is no such thing as a case which is on all fours and that past awards serve no more than to give some indication of what sort of awards are appropriate on the facts of the particular case. Due to the difficulty in calculating an amount to be awarded for non-patrimonial damage, considerations of fairness and reasonableness always play determining roles in the assessment of such damages.
49. It is trite that whilst fairness and reasonableness mean that the claimant

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<sup>37</sup> 1972 (1) SA 718 (T) 723.

<sup>38</sup> 1959 (2) SA 11 (N) 17-8).

<sup>39</sup> 2003 (5) SA 164 (SCA) at 169E-F.

must be sufficiently and properly compensated for the injury she has suffered; it also means that inordinately high awards should not unnecessarily burden the defendant. In *Bay Passenger Transport Ltd v Franzen*<sup>40</sup>, at page 274 Trolip, JA said that in striving to determine a fair amount for general damages, the court must decide "*by the broadest general considerations*" on an amount which it considers to be "*fair in all the circumstances of the case*".

50. Having said so, it must however be acknowledged that generally awards presently are higher than those made in the past. Thus, in *Wright v Multilateral Motor Vehicle Accident Fund*<sup>41</sup> Broome DJP said: "*I consider that when having regard to previous awards one must recognise that there is a tendency for awards to now be higher than they were in the past. I believe this is to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living, and recognition that awards in the past have been significantly lower than those of most other countries.*"

## **COMPARABLE AWARDS.**

Moderate to severe brain injury.

51. In the case of *Ramatsebe obo Ramatsebe v RAF As* discussed in Diphoko Obo DN v Road Accident Fund<sup>42</sup> (per Victor J), delivered on the 2<sup>nd</sup> of September 2011, a 3 year, 9 month old boy with mild to moderate brain injury plus tibial fracture and post-traumatic stress was awarded R800 000,00 in general damages. This case is the most on point with the patient's injuries and it also reflect orthopaedic injuries. In 2019 terms, this translates to R1 222 535. In the case of *Smith and Ngoben v the Road Accident Fund*<sup>43</sup> (per C J Claassen J), delivered on the 29<sup>th</sup> of April 2009, a 27-year-old woman with a moderate to severe brain injury coupled with right and left hemisphere deficits and a wide range of executive deficits affecting working memory, problem solving, abstract reasoning and having

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<sup>40</sup> 1975 (1) SA 269 (A).

<sup>41</sup> Corbett & Honey Vol 4 XE3-36.

<sup>42</sup> (48040/09) [2013] ZAGPJHC 258 (22 October 2013).

depression, was awarded R1 000 000,00 in general damages. In 2019 terms, this translates to R 1 674 154.

#### MILD TO MODERATE BRAIN INJURY.

52. In the case of *Makupula v Road Accident Fund*<sup>44</sup>, a minor five- year-old boy who was injured presented the following synopsis of injuries and after effects. He had a mild to moderate diffused axonal concussive brain injury. Neurocognitive deficits with attention deficit hyperactivity disorder, memory dysfunction, uncooperative and aggressive behavior, poor concentration, poor executive functioning and poor scholastic performance. The court awarded an amount of R300 000. In 2019 terms this translates to R 485 450.00.
53. In the case of *M obo M v Road Accident*<sup>45</sup> a minor child of 8 years old was awarded an amount of R400 000.00 for a minor brain injury. The neurosurgeon experts agree that the plaintiff suffered a mild concussive brain injury with an associated laceration and a haematoma of the forehead. They agree that she suffers with post traumatic headaches which must be compensated for. They agree also that she has a visible ugly scar on her forehead on the left side which qualifies for non-pecuniary loss due to it being visible and ugly. She experiences cognitive functional problems and personality changes. This has had a major neuropsychological impact on her mental status.
54. They found further that she suffers from post-traumatic stress disorder and has depressive disorder symptoms. The symptoms of a depressive disorder and persistent Post Traumatic Stress Disorder symptoms were present. The aforementioned appear to be resultant from the brain injury and the trauma and physical pain she experienced. The plaintiff's psychiatrist Dr Larry Grinder noted that following even a mild head injury such as sustained by the plaintiff, individuals are at risk of developing a range of organically based psychiatric syndromes and comorbid

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<sup>43</sup> (47697/09) ZAGPHCJ (29 April 2009).

<sup>44</sup> 2011 (684) QOD48 (ECM).

<sup>45</sup> Fund (4484/2016) [2018] ZAGPJHC 451 (18 June 2018).

psychiatric disorders which include mood disorders and impulse control. In 2019 terms, this translates to R414 000.00.

#### BRAIN INJURY AND HUMERUS FRACTURE.

55. In the case of *Gaxo v RAF*<sup>46</sup>, (per Saldulker J), delivered on 16 March 2012, where a 26 year old male with severe brain injury, chest and upper limb injuries as well as fractures of the right humerus, pneumothorax and corneal laceration, was awarded R900 000,00 general damages. In 2019 terms, this amounts to R1 302 766.

#### HUMERUS FRACTURE.

56. In the case of *Mulliner v Bendix*<sup>47</sup>, a 68 year old female, sustained an injury to the shoulder and ribs, an impacted fracture of the left humerus, fracture of the left third rib, and lacerations to the forehead. The *sequelae* were 5 percent limitation of the left shoulder joint, and a permanent nervous condition. The court awarded the plaintiff R3000-00. In 2019 terms, this translates to R321 338.00. In the case of *Saayman v Commercial Union Insurance Co. of SA*<sup>48</sup>, a 52 year old railway crane driver, sustained a compound comminuted fracture of the right humerus, fractures of both radius & ulna, and an injury to the lumbar spine. The *sequelae* were permanent back ache; a painful shoulder and a future operation to the wrist. He was still able to do some light employment on the Railways. He was awarded R8000-00. In 2019 terms, this translates to R522 336.00.

#### HUMERUS AND TIBIA FRACTURE.

57. In the case of *Khumalo v Road Accident Fund*<sup>49</sup>, the plaintiff, a domestic worker of about 41 years of age sustained a fracture of the mid-shaft of the left humerus, a comminuted left upper tibia fracture and fracture to the neck of the left tibia. The *sequelae* in the matter of included a gross

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<sup>46</sup> (Unreported) 2009/18711( 2012).

<sup>47</sup> 1954 C&B 529.

<sup>48</sup> 1972 (2) ECO.

deformity of the limb that resulted in a claw-like unsightly hand that she would probably not use again. This disability was equated to that of a person whose left arm had been amputated. There was decreased muscle strength in the left leg and it was 1 cm shorter. The award for general damages was R400 000.00. In 2019 terms, this translates to R827 293.

#### SCARRING.

58. In the case of *Solomon and Another NNO vs De Waal*<sup>49</sup> the plaintiff, whose injuries consisted of, amongst the other things, a horrible scar on her thigh which necessitated a skin graft and which caused a severe and unsightly cosmetic deformity, was awarded an amount which in the current 2013 rand terms would amount to R380 000,00. In 2019 terms, this translates to R520 000.00. In the case of *Nxumalo v SA Eagle Insurance*<sup>51</sup> the plaintiff suffered an extensive degloving injury of his right lower limb with severe scars on his thigh and lower leg. This plaintiff also suffered a permanent deformity disability with disfigurement of his knee and upper leg and suffered loss of mobility with impairment of muscle power. In 2019 terms, this translates to R353 208.00.
59. Plaintiff contends that compensation at an amount of R 850 000.00 will be fair and reasonable. He argues that merits should be granted in his favour at 100%. Past loss of income it is quantified at an amount of R 53 563. Future loss of income is calculated at an amount of R 996 731 and General Damages at an amount of R 850 000.00. The plaintiff claims compensation at the total amount of R1 900 294.00.

60. For purposes of arriving at a decision in this case, the court is to consider the version of the plaintiff. This version proves on a balance of probabilities the liability of the defendant. This is because the defendant did not advance a version that can be employed in order to gainsay that of the plaintiff. In the result, the court finds that plaintiff proved his case against the defendant. The Defendant's defence having been struck, and

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<sup>49</sup> (2006) JOL 17136 (W).

<sup>50</sup> [1972] 2 All SA 112 (A).

<sup>51</sup> 1995 4 C7B G 5-1.

having heard counsel, the following order is made:

ORDER.

1. The Defendant is ordered to pay 100% of the Plaintiff's proven or agreed damages.
2. The Defendant shall pay the sum of R 1 900 594.00 [One Million, Nine Hundred Thousand, Five Hundred and Ninety- Four rand] in settlement of the Plaintiff's claim, to the Plaintiff's attorneys, Roets & Van Rensburg Attorneys, payable within 14 days hereof by direct transfer into their trust account with the following details:

Account Holder	: Roets & Van Rensburg
Bank	: ABSA BANK
Branch Code	: 33 42 47
Account Number	: [....]
Reference Number	: TL Zandberg/KC 52.

3. The aforementioned amount referred to in paragraph 2 above will not bear interest unless the Defendant fails to effect payment thereof within 14 (Fourteen) calendar days of the date of this Order, in which event the capital amount will bear interest at the prescribed rate of 10% per annum calculated from the date of this order up to the date of payment thereof.
4. The Defendant shall forthwith provide to the Plaintiff an Undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for the payment of 100% of the costs of SETAKI ABRAM MOKWENA (Born on 02 April 1979) future accommodation in a hospital or nursing home or treatment of or rendering of a service to him/her or supplying goods to him/her, unlimited to the expenses incurred thereunder, arising out of the injuries sustained by him/her in the motor vehicle collision which occurred on 26 February 2017 after such costs have been incurred and upon proof thereof.
5. The Defendant is ordered to pay the Plaintiff's taxed or agreed

attorney and own client costs on a High Court Scale, which costs shall include but not be limited to the following:

5.1. The costs of the experts mentioned herein below including, but not limited to, preparation for trial, qualifying as well as the costs of the RAF 4 serious injury assessment reports, the medico-legal reports, the addendum reports, actuarial/revised actuarial calculations, cost to prepare and submit affidavits from experts and joint minutes of all of the Plaintiff's experts, which include, but will not be limited to, the following experts:

5.1.1 Mr Johan Sauer (Actuary);

5.1.2 Dr Mennen (Orthopaedic Surgeon);

5.1.3 Ms Jacobs & Ms Steyn (Occupational Therapist);

5.1.4 Dr Pretorius (Industrial Psychologist).

5.1.5 Mr Ferreira Texeira (Clinical Psychologist);

5.1.6 Dr Moja (Neuro Surgeon)

5.1.7 Dr Berkowitz (Plastic Surgeon)

5.1.8 All other experts' reports served on the Defendant;

5.2. Costs of the Plaintiff's two counsel, inclusive of the drafting of the Heads of Argument and Advice on Evidence, Plaintiff's Counsel's day fee and the reservation for trial/collapse fee, preparation for trial, consultation with client, attorney, employer and experts as well as travelling costs and attendance of inspection in loco/work visits.

5.3. The costs for plaintiff's attorney, for attending to the pre- trial preparation, traveling, and attendance of the respective pre-trial conferences, judicial management meetings, court attendances and trial preparation;

5.4. The costs in respect of the preparation, drafting and copying of all the bundles of documents.

5.5. The reasonable costs for the preparation, attending, traveling expenses and time spent for conducting work site visits and



inspection *in locos*.

- 5.6. The costs attendant upon the obtaining of payment of the amounts referred to in this Order, including the costs to obtain and administer the Undertaking in terms of Section 17(4)(a);
  - 5.7. The reasonable traveling costs (inclusive of toll gate and e-toll charges), subsistence, accommodation and transportation costs, if any and upon proof thereof, incurred by the Plaintiff in attending medico-legal examination(s) with the parties' experts and in attending Court on the day(s) of trial;
  - 5.8. The costs of a consultation between the Plaintiff and his/her attorney to discuss the settlement offer received from the Defendant and the terms of this Order;
  - 5.9. The costs of ATC and/or Boitumelo assessors, including their time spend.
  - 5.10. The above costs will be paid into the aforementioned attorneys trust account.
6. Payment of the above costs by the Defendant is subject to the following conditions:
- 6.1. The Plaintiff is ordered to serve the Notice of Taxation of the Plaintiffs party and party bill of costs on the Defendant's attorneys of record;
  - 6.2. The Defendant is ordered to pay the Plaintiffs' taxed and/or agreed 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
  - 6.3. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the prescribed rate of 10.25% on the taxed or agreed costs from the date of the allocator to date of final payment.

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T.A. Maumela.

Judge of the High Court of South Africa.