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**REPUBLIC OF SOUTH AFRICA**



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

Case Number: **7993/17**

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

**14/12/2017**

DATE

SIGNATURE

In the matter between:

**ADVOCATE M PATEL N.O.**

**obo MZANO CHRISTOPHER MATHONSI**

**Plaintiff**

**and**

**ROAD ACCIDENT FUND**

**Defendant**

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## JUDGMENT

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**FISHER, J:**

### INTRODUCTION

[1] The order in this case was handed down on 03 November 2017. I now hand down my reasons for such order.

[2] The case involves a motor vehicle accident which occurred on 13 December 2015 near Heidelberg Road, Benoni, Gauteng. Mr Mzamo Christopher Mathonsi, an adult male born on [...] November 1987, was injured when the insured driver's vehicle collided with him as he was pedestrian whilst assisting the driver of another vehicle which had broken down.

[3] As a result of the his injuries, Mr Mathonsi was declared unable to act in his own defence and Mr Patel, an advocate of this court was appointed as his *curator ad litem* with powers to recommend how any monies derived from this litigation is to be dealt with. Mr Mathonsi was referred to throughout the hearing as "*the patient*" and for purposes of consistency I have continued with this nomenclature.

[4] This matter came before me on the basis that many of the issues had already become settled between the parties. Liability was agreed at 100% as was the fact that the defendant was obliged to furnish the patient with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act.

[5] It was agreed further that the patient had suffered pain, disfigurement and loss of amenities of life arising from the injuries he sustained in the collision and the *sequelae* and that he is properly compensated in the sum of R950 000,00 for this sub head of damage.

[6] The only aspect that was in dispute and which I was called on to decide was

the contingency factor to be applied in relation to his loss of earning capacity.

[7] The patient has sustained a serious traumatic brain injury in the form of a subarachnoid haemorrhage, brain contusion and intraventricular haemorrhage; abdominal injuries; and multiple orthopaedic injuries. He has been left with headaches, poor memory, right ankle pain and an increased chance of developing epilepsy (5-8%).

[8] The Clinical Psychologists for the plaintiff and the defendant respectively, Ms Mahudasa and Ms Nkuna both conducted objective neuropsychological testing of the patient. These tests showed cognitive fall-out in most of his brain faculties. They are agreed that the patient's neuropsychological evaluation demonstrate concentration and attention challenges; a poor learning capacity, and a significantly impaired memory and ability to reason. His ability to verbalise was also affected. The evidence of Ms Mahudasa is that the patient has also sustained significant changes in his personality, mood and behaviour which includes post- traumatic stress disorder with increased aggression and which may be a risk factor in terms of his psycho-social functioning and result in the decline in his inter-personal relationships, including those with employers.

[9] The Occupational Therapists, Ms M September, on behalf of the Plaintiff and Ms M Magoele on behalf of the defendant, both conducted extensive functional and occupational testing of the Plaintiff. They concurred in the joint minute that, in relation to the patient's employability he has poor occupational physical competency by virtue of headaches, pain on the right hip, tenderness below his right knee, compromised dynamic postures owing to the right knee pain and reduced agility. Both found that he suffered from extensive pain on both lower limbs and the right dominant hand and that his muscular skeletal functions such as his gait pattern and balance on the right leg were poor.

[10] With regards to his neuropsychological, behaviour and cognition, his occupational barriers were found to include lack of motivation as a result of his major depressive mood, possible absenteeism from the work owing to headaches, pain intolerance, reduced agility and poor work tolerance. He had features of effective dysfunction such as extremely depressed mood and post- traumatic stress disorder

with moderate anxiety and irritability. His psycho-social based work competency was significantly reduced due to aggression, low self-esteem and irritability. These experts furthermore agreed that the patient has poor work habits, poor work presentation, reduced psychological work competency - particularly under highly pressured work context and reduced potential for sustained employment. They accordingly relegated the Plaintiff to sheltered type of working environment, which, according to the accepted evidence of Ms Magoele, translate to a protected workshop type employment.

[11] Dr Barlin, an orthopaedic surgeon who testified for the plaintiff as to the patient's physical injuries noted difficulties with lower limb joint movements and problems with a significantly injured right ankle. He found that, even with intensive physiotherapy combined with analgesics and anti-inflammatories, the patient is unlikely to regain a full range of motion in the affected joints. Dr Barlin found that patient is incapable of performing his work as a security guard. This is substantiated by the common cause evidence of the two Occupational Therapists.

[12] The Defendant on the other hand led the evidence of the plaintiff's former employer Mr Schoeman. He confirmed that the plaintiff was employed at a company managed by Mr Schoeman, Secure Group during the period March 2017 to September 2017, this period being post the accident. He further confirmed that the plaintiff was employed in the same capacity of a Grade C security guard as he was pre-accident with similar duties to those which he performed pre-accident.

[13] His evidence was that the plaintiff conducted his work satisfactorily over the rough terrain of the area he was assigned to without any complaints.

[14] The medical experts for both parties have recommended treatment and therapy which may enhance his capacity over time.

[15] In determining the contingency to be applied, I take into account that plaintiff did not have strong and established employment history prior to the accident. His school performance was also weak. I accept that he lied about his circumstances in

that he told experts that he was not employed when he was employed in a similar position to that held prior to the accident.

[16] Mr Schoeman conceded that had he been apprised of the true extent of the disabilities suffered by the plaintiff, he would not have employed him. It must thus be considered that, if the plaintiff is hiding the effects of his injuries from his employers in order to earn a living, as he has a family to support.

[17] In *Gwaxula v RAF* - Case No 09/41896 SGHC p14 at 25 it was held (per Moshidi J):

*“the contingencies are an important control mechanism to adjust the loss suffered to the circumstances of the individual case to achieve equity and fairness to the parties.”*

[18] Contingencies are the hazards that normally beset the lives and circumstances of ordinary people. In *Shield Insurance Co Ltd v Booyesen* 1979 (3) SA 953 (AD) at 965G it was held (per Trollip JA):

*“The determination of allowance for such contingencies involves, by its very nature, a process of subjective impression or estimation rather than objective calculation...”*

[19] In *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (A) at 113 Nicholas JA held in relation to the process of imposing an apposite:

*“One (possible approach) is for the judge to make a round 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”.*

[20] Obviously the latter approach, even with its limitations are to be preferred. In this matter the parties are in agreement that the patient's earnings as a security guard projected to age 65 are as calculated by an actuary, Mr Whittaker and set out in his report dated 17 October 2017. In terms of this report the patient's future loss of income is agreed at R 1 100 962.

## CONCLUSION

[21] On the basis of the circumstances above, it is my assessment that it is fair and proper to impose a 20% contingency deduction to the agreed future loss.

## ORDER

An order was thus handed down as follows on **03 November 2017**:

1. The Defendant is directed to pay the sum of **R 1 901 009** to the Plaintiff for the sole benefit of Mzamo Christopher Mathonsi , an adult male born on [...] November 1987 , and whose identity number is [...] (hereinafter referred to as “the patient”) arising from the delictual damages sustained by the patient in the motor collision which occurred on 13 December 2015 , at or near Heidelberg Road between Dube and Lancaster Roads, Benoni, Gauteng and which comprises:

a. General Damages	R 950 000.00
b. Past Loss of Income	R 70 239.00
c. Future Loss of Income and income earning capacity	R 880 770 .00

2. The aforesaid sum of **R 1 901 009** shall be payable within 14 days hereof to the Plaintiff’s attorney, Mngomezulu Inc Trust account with the below-mentioned bank details:

M P Mngomezulu Trust account

Standard Bank

Germiston branch

Branch code: 51001

Account no: [...]

- 3 The Defendant shall be liable for interest on the aforesaid amount or any part thereof, *a tempora mora*, from 14 days after judgment to date of final payment.
4. The sum of **R 1 901 009** shall be kept in the trust account of Attorneys Mngomezulu Inc Attorneys, in an interest bearing account in terms of Section 78(2)(A) of the Attorneys Act, No.53 of 1979, for the sole benefit of the patient pending the formation of a trust for the patient's benefit as referred to below.
5. Plaintiff's attorney, Mngomezulu Inc shall:
  - 5.1 cause a Trust to be established in accordance with the provisions of the Trust Property Control Act, No. 57 of 1988 in favour of the patient within three months hereof;
  - 5.2 in the event that the Trust is not established within the prescribed period, approach this Honourable Court by way of application for further direction concerning the establishment of the Trust;
  - 5.3 be entitled to deduct their disbursements for professional services rendered to the patient from the capital amount;
  - 5.4 pending the formation of a Trust as aforesaid, make provision for the patient to receive a monthly stipend of R 3000.00.
6. The Trust instrument, contemplated in paragraph 4.1 above,

shall inter alia make provision for the following:

- 6.1. The patient to be the sole beneficiary of the Trust;
- 6.2. Subject to the approval of the Master of the High Court, the nomination of Nolwazi Matheatsie on behalf of Standard Trust Limited as the First Trustee and whose consent is annexed hereto marked "A";
- 6.3. The Trustee of the Trust should immediately take all the requisite steps to secure an appropriate bond of security, to the satisfaction of the Master of the High Court, for the due fulfilment of her obligations and to ensure that the bond of security be submitted to the Master of the High Court at the appropriate time as well as to all other interested parties.
- 6.4. The powers of the Trustees to be exercised with specific reference to the circumstances of the patient and such to include but not be limited to:
  - 6.4.1 The right to purchase, sell and mortgage immovable property, invest and reinvest the Trust capital and/ or income;
  - 6.4.2 applying the nett income of the Trust Fund and if that is not adequate at any time for the purpose, the capital thereof, for the maintenance including, without derogating from the meaning of the term, the maintenance of the patient and his lawful minor dependants, their reasonable pleasures, entertainment, general upkeep, welfare benefits and rehabilitation and the acquisition or

provision of residential facilities or a residence for the patient.

The income not used as aforesaid shall accumulate to the capital;

- 6.5 The duty of the Trustee to disclose any personal interest in any transaction involving the Trust property to the Master;
  - 6.6 The amendment of the Trust instrument subject to the leave of the High Court;
  - 6.7. The termination of the Trust on the death of the patient or with the leave of the High Court only;
  - 6.8. The right of the Trustee to pay the Plaintiff's attorney his fee for services rendered herein;
  - 6.9 The Trustee shall be entitled to call for a taxation of the Plaintiff's attorney's attorney and client fee, if deemed necessary;
  - 6.10 The provisions referred to above shall, in accordance with the provisions of the Trust Property Control Act, No. 57 of 1988, be subject to the approval of the Master.
7. The Defendant is directed to furnish the patient with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of

the future accommodation of the patient in a hospital or nursing home or the treatment of or rendering of a service to him or the supplying of goods to him arising out of the injuries sustained by the patient in the motor vehicle collision which occurred on 13 December 2015 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

8. The Undertaking referred to above shall be provided within 14 days of judgement.
9. The Undertaking referred to above shall include payment of :
  - 9.1 The costs of the creation and administration of the Trust and the appointment of a Trustee as referred to in paragraphs 5 above;
  - 9.2. The costs of the Trustee in administering the patient's estate and the costs of administering the statutory Undertaking furnished in terms of Section 17(4)(a) of the Road Accident Fund Act, as determined by the Administration of Estates Act, No. 66 of 1965, as amended, limited to the prescribed tariff applicable to a curator bonis, as reflected in Government Notice R1602 of 1st July 1991, specifically paragraphs 3(a) and 3(b) of the Schedule thereto; and
  - 9.3. The costs of obtaining an annual security bond to meet the requirements of the Master of the High Court in terms of Section 77 of the Administration of Estates Act, No. 66 of 1965, as amended.

10. The Defendant is directed to pay the Plaintiff's taxed or agreed party and party costs of the action on the High Court scale, which party and party costs shall include but not be limited:

10.1 costs incurred in securing payment of the capital sum set out in paragraph 1 and/or any part thereof and the issuing of the statutory Undertaking in terms of Sec 17 (4) (a);

10.2 the costs of the appointment of the Curator ad Litem and his preparation, consultation/s, preparation of his report and attendances at court on 26, 27, 30 and 31 October 2017 and 1, 2 and 3 November 2017 respectively;

10.3 the costs of counsel including preparation, consultation/s, drafting of heads of argument and appearances on trial on 26, 27, 30 and 31 October 2017 and 1 and 2 November 2017 respectively and on appearance/s to note judgment;

10.4 the reasonable preparation, reservation and attendance costs to be determined by the Taxing Master of the below-mentioned experts including but not limited to consultations, preparation of report/s and/or addendum report/s, RAF 4 assessments and joint minutes where applicable:

10.4.1 Prof Karan (neurosurgeon);

10.4.2 Dr. Barlin (orthopaedic surgeon);

- 10.4.3. Dr Louis Sulman & Partners (radiologist)
- 10.4. Ms Mahudasa (clinical neuropsychologist);
- 10.4.5 Prof M Vorster (forensic psychiatrist);
- 10.4.6 Ms N September (occupational therapist);
- 10.4.7n Dr AS Strydom (industrial psychologist);
- 10.4.8 Mr Whittaker (actuary);

10.5 the costs of the preparation and attendances at pre- trial conference/s and certification court including the drafting of an agenda and minutes of a pre- trial conference;

- 11. The aforesaid costs are to be paid by the Defendant directly to the Trustee, alternatively to the Plaintiff's attorney to be held in trust as per paragraph 4 supra.
- 12. Payment of costs is subject to the following conditions:
  - 12.1. The Plaintiff shall, in the event that costs are not agreed, cause the notice of taxation to be served on the Defendant's attorney of record; and;
  - 12.2. The Plaintiff shall allow the Defendant 7 (seven) court days after taxation to make payment of the taxed costs.
- 13. The Defendant is liable for interest *a tempora mora* on the agreed or taxed costs from 8 days after agreement or taxation to date of final payment.

- 14 The Contingency Fee agreement concluded between the patient and his attorney of record is declared invalid. The patient's attorney shall be entitled to charge his ordinary attorney and client fee for services rendered, subject to same not exceeding 25 % of the capital awarded to the patient.
- 15 The Order must be served by the Plaintiff's attorneys on the Master of the High Court within 30(thirty) days from the date of this Order.

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**FISHER J**  
**HIGH COURT JUDGE**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING:	<b>31 October 2017 - 03 November 2017</b>
DATE OF ORDER:	<b>03 November 2017</b>
DATE OF JUDGMENT:	<b>14 December 2017</b>
LEGAL REPRESENTATIVES:	
FOR THE PLAINTIFF	<b>Adv F Docrat instructed by  MP Mngomezulu inc</b>

FOR THE DEFENDANT:

**Adv S Mahomed instructed by  
Dev Maharaj.**