

SOUTH AFRICA / JUDGMENT

Kolwane v Road Accident Fund (RAF523/2022) [2024] ZANWHC 274 (1 November 2024)

[2024] ZANWHC 274

COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

RAF523/2022

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

CASE

NO: RAF 523/2022

Reportable: NO

Circulate to Judges:

NO

Circulate to

Magistrates: NO

Circulate to Regional

Magistrates: NO

In the matter between: -

VICTOR TSIETSO KOLWANE

PLAINTIFF

AND

THE ROAD ACCIDENT

FUND

DEFENDANT

Judgment is handed

down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 01ST November 2024 at 10h00

ORDER

1.

THAT: The Defendant is to pay to the Plaintiff the amount of R 1 014 961 .50 (one million fourteen thousand, nine hundred and sixty one rand fifty cents, ("the capital") in respect of loss of earning and/earning capacity, within 14 (FOURTEEN) days of this order being made an order of court directly into the trust account of Messrs. Savage, Jooste and Adams Attorneys,

being: Savage, Jooste and Adams Attorneys

Bank: NEDCOR - ARCADIA Branch

code: 16-33-45-07 Account

no: 1[...]

Ref: Mr Makole/KK90

1.1

The Defendant will not be liable for any interest on the said payment on condition that payment be made timeously, failing which the Defendant shall be liable to pay interest at the applicable mora rate from the 15th day of this court order being granted.

2. THAT:

The Defendant is ordered to make payment of the Plaintiff's taxed or agreed party and party costs, on the High Court Scale, in respect of the action, which costs shall include but are not limited

to: 2.1

The fees consequent upon the employment of Counsel at Scale B;

2.2

The reasonable taxable transportation, accommodation and other costs incurred by the Plaintiff, in attending the medico-legal appointments subject to the discretion of the taxing master;

2.3

The costs of the following expert reports, RAF 4 Serious Injury Assessment Reports and addenda (where applicable), as the taxing

master may upon taxation
determine:

2.3.1

Dr JJ Prinsloo — Industrial Psychologist; and

2.3.2

Mr G Whittaker — Actuary.

2.4

The costs of the Plaintiff's instructing attorney and correspondent attorney, which includes reasonable travelling costs, costs for preparing for Pre-Trial Conferences, costs for actual attendances at Pre-Trial Conferences, costs of drafting Practice Notes, Pre-Trial Agenda's and Pre-Trial Minutes, costs for preparation for and attending of Judicial Case Management Conferences, all costs for preparing for trial and complying with Caselines, costs of preparation for and application for the Case Management Meeting as well as attendance; and

2.5

All radiological expenditure, including the obtaining of CT and MR Scans as requested by the above medico-legal experts (where applicable considering the court order of 26 FEBRUARY 2024 in casu).

3. THAT:

Should the Defendant fail to pay the Plaintiffs party and party costs as taxed agreed with 14 (fourteen) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at applicable prescribed rate per annum, from the date of settlement including the date of final payment thereof.

4. THAT:

The Plaintiff shall, in the event that the parties are not in agreement as to the costs referred to in paragraphs 2 and 3 above, serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant fourteen court days to make payment of the taxed costs.

5. THAT:

There is a valid Contingency Fee Agreement applicable in this matter.

6. THAT:

The Application in terms of Rule 38(2) is hereby granted in terms of the Notice of Motion dated 16th of MAY 2024 in terms of prayers 1 and 2 thereof.

JUDGMENT

REDDY J

Introduction

[1] On 01 August 2024 this Court in broad ordered that the defendant pay the plaintiff an amount of R901 260-50 (nine hundred and one thousand two hundred and sixty rand, fifty cents) in respect of loss of earnings. The order included the usual ancillary orders which for the purposes of this exercise need no further exposition. On 27 August 2024, the plaintiff requested full reasons for this order. These are then the reasons for this order.

Background facts

- [2] On 27 August 2020, the plaintiff was involved in a motor vehicle collision. Pursuant to this collision, the plaintiff sustained the following injuries, a C5-C6 bifacet fractured dislocation, a severe left femur fracture, severe bodily scarring, a mild uncomplicated concussion, shock and psychological trauma. On 26 February 2024, Djaje DJP ordered that the defendant was liable for 100% of the plaintiff's agreed or proven damages in consequence of the injuries sustained in this motor vehicle collision. Moreover, the defendant was to pay the plaintiff an amount of R950 000.00 (nine hundred and fifty thousand rands) in respect of general damages.
- [3] Furthermore, the defendant was to furnish the plaintiff with an undertaking in terms of section in terms of section 17 (4) (a) of the Road Traffic Act 56 of 1996. With reference to the crisp question of the quantum in respect of the loss of earnings/ earning capacity of the plaintiff, this was to be determined separately within parameters of Rule 33(4) of the Uniform Rules of Court, ("the Rules").
- [4] Before me, the earning capacity was further limited by both parties contending that the head of damages for future loss of earnings had been agreed upon in the amount of R965 636 25. Resultantly, the outstanding head of damages related to the past loss of earnings.
- [5] It would be apposite to address this compromise in respect of the future loss of earnings. Given the argument that followed in respect of the past loss of earnings, Adv Gianni for the plaintiff posited that the opposition to the past loss of earnings, by Mr Mohale for the defendant was irrational. This contention was founded on the concession so far as it relates to the quantum for future loss of earnings. To my mind, the past and future loss of earnings are inextricably intertwined. This being so, the ineluctable

conclusion

was that the compromise was bad in law given Mr Mohale's opposition.

[6] This Court, is cloaked with the necessary judicial power to make a compromise an order of court. This is indisputable. The issue of compromise in our legal landscape was revisited in *Road Accident Fund v Taylor and other matters* (1136/2021; 1137/2021; 1138/2021; 1139/2021; 1140/2021) [2023] ZASCA 64 (8 May 2023). Van der Merwe JA stated as follows regarding the issue of compromise at paragraphs [36], [38] and [39]:

[36] The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our courts have for more than a century held that, irrespective of whether it is made an order of court, a compromise has the effect of *res iudicata* (a compromise is not itself *res iudicata* (literally ‘a matter judged’) but has that effect).

[38] In *Western Assurance Co v Caldwell’s Trustee* 1918 AD 262 at 270, Innes CJ referred to the common law and proceeded to say:

According to that law a *transactio*, if established and valid, is an absolute defence to the action compromised. It has the effect of *res iudicata*.

The next important case is *Estate Erasmus v Church* 1927 TPD 1. The full bench (at 25-26) extensively referred to common law authorities, had regard to *Cachalia v Harberer* and *Western Assurance* and concluded:

The object therefore of a compromise is to end, or to destroy, or to prevent a legal dispute. The effect of a compromise is *res iudicata*; and, according to Domat, the effect is even stronger than that of a judgment inasmuch as, unlike in the case of judgments, the parties have consented to the terms on which they intend to compromise.

[39] These dicta have repeatedly been approved by this court. See *Van Zyl v Niemann* 1964

(4) SA 661 AD at 669H and, in particular, *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978

(1) SA 915 AD at 921A-D and 922C. See also *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] ZASCA 54; 2017

(5) SA 508 SCA para 14 and *Watson NO v Ngonyama and Another* [2021] ZASCA 74; 2021

(5) SA 559 (SCA) para 60. In *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001

(2) SA 59 (SCA) para 10, it was stated that our courts encourage parties to deal with their disputes by way of compromise. This court proceeded to say, with reference to *Estate Erasmus v Church*, that when concluded, such a compromise disposes of the proceedings. The culmination of all of this, for purposes of this judgment, as stated in *Legal-Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015

- (2) SA 568 SCA para 22, is that once ‘the parties have disposed of all disputed issues by agreement inter se, it must logically follow that nothing remains for a court to adjudicate upon or determine’.
- [7] The parties wished that the compromise receives the imprimatur of the court. In so doing, the court is vested with a judicial oversight role. This envisages that a courts judicial oversight is not rendered nugatory by simply functioning as a conveyer belt on mass authorizing court orders that may fall gravely shy of what constitutes a compromise. A compromise should only be made an order of court, if it complies with the Constitution and the law.
- [8] In Taylor supra, Van der Merwe JA, postulated as follows:
- [40] When requested to do so, a court has the power to make a compromise, or part thereof, an order of court. This power must, of course, be exercised judicially, that is, in terms of a fair procedure and with regard to relevant considerations. The considerations for the determination of whether it would be competent and proper to make a compromise an order of court, are threefold. They are set out in Eke v Parsons [2015] ZACC 30; 2016
- (3) SA 37 (CC) paras 25-26 (Eke v Parsons).
- [41] The first consideration is whether the compromise relates directly or indirectly to the settled litigation. An agreement that is unrelated to litigation, should be made an order of court. The second is whether the terms of the compromise are legally objectionable, that is, whether its terms are illegal or contrary to public policy or inconsistent with the Constitution. Such an agreement should obviously not be made an order of court. The third consideration is whether it would hold some practical or legitimate advantage to give the compromise the status of an order of court. If not, it would make no sense to do so.
- [9] The compromise before me, fell squarely within the exceptions as set out in Taylor supra and was certainly legally objectionable, put differently it was inconsistent with public policy and the Constitution. The Constitution is the supreme law of our country. Section 1 of the Constitution provides that South Africa is a Republic founded on the value of constitutional supremacy. Section 2 of the Constitution provides that the Constitution is supreme law in the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
- [10] In Eke v Parsons (CCT214/14) [2015] ZACC 30 at paragraphs [26][27] and [28] the issue of whether a compromise is legally objectionable was addressed as follows:
- [26]Secondly, “the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order”. That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must “hold some practical and legitimate advantage”.

- [11] The less restrictive approach adopted in the adjudication of this action is in line with the wide power that courts must regulate their process. This power is expressed in section 173 of the Constitution, which provides:

“The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

- [12] The power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests with the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction.
- [13] The compromise by Adv Gianni and Mr Mohale no doubt was intended to delineate to this Court the way the future loss had to be resolved. This compromise became muddled when oral submissions were made in respect of past loss. The result was that the compromise in respect of the future loss did not meet the watermark of a valid compromise in our law. See: *Mafisa v Road Accident Fund and Another* (CCT 156/22) [2024] ZACC 4; 2024 (6) BCLR 805 (CC); 2024
- (4) SA 426 (CC) (25 April 2024). Given the stance of Mr Mohale on the past loss of earnings, this Court was enjoined to consider both the past and future loss of earnings in the absence of the

compromise. I shift focus to address the past and future loss of earnings.

- [14] On 24 May 2024, Adv Gianni moved an application in terms of Rule 38(2) for the evidence of the following experts to be considered on affidavits:

- (i) Dr JJ du Plessis, Neurosurgeon.
- (ii) Dr M Mazabow, Clinical Neuropsychologist.
- (iii) Dr J Prins, Orthopaedic surgeon.
- (iv) Dr N. Mogoru, Independent Medical Examiner.
- (v) Miss A Greef, Occupational Therapist.
- (vi) Mr JJ Prinsloo, Industrial Psychologist.
- (vii) Mr G Whittaker, Consultant and Actuary.

[15] The application found favour with this Court, as there was sufficient reason to order that all the expert evidence to be adduced at the hearing into the loss of earning capacity, be given on affidavit. *Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation* 2018 (3) All SA (NWM) para [64], *Havenga v Parker* 1993

(3) SA 724 (T), *Madibeng v Local Municipality v Public Investment Corporation* 2008 (6) SA 55(SCA) para [26]

[16] To determine the claim for future loss of income or earning capacity, it is necessary to compare what the plaintiff would have earned 'but for' the incident with what he would likely have earned after the incident. The future loss represents the difference between the pre-morbid and post-morbid figures after applying the appropriate contingencies.

[17] The basis for the award is set out in *Deysel v Road Accident Fund* [2011] ZAGPJHC 242 (24 June 2011) at paragraphs 15 and 18 that:

"Loss of income arises primarily from a loss of earning capacity, in other words, if the plaintiff loses a certain degree of earning capacity', this will show in that they will lose actual income in future. This is also true in that when a person loses income due to a damage-causing event such loss is due to a lowered earning capacity arising from the same cause of action."

...

In my view this does not mean that such plaintiff would be claiming for loss of income and not loss of earning capacity per se it is merely this loss of income that provides evidence of a loss of earning capacity, and visa-versa. Earning capacity is part of a person's patrimony, but this capacity can only be proven to have been lowered, and the damages for this quantified by proving an actual loss of income. However, when both of these losses have been shown to exist, then the claim for one is also the claim the other and they appear to be interchangeable."

[18] Our jurisprudence relating to a claim for diminished earning capacity is settled. The mere existence of physical disability does not axiomatically reduce the estate or patrimony of the person injured. Simply put, impaired ability to earn an income should establish that there was in fact a diminution in earning capacity. See: *Union & National Insurance Co Ltd v Coetzee* 1970(1) SA 295 (A) at 300A; *Santam Versekering Maatskappy Bpk v Byleveldt* 1973

(2) SA 146 (A); *Dippenaar v Shield Insurance Co Ltd* 1979

(2) SA 904 (A); *Krugell v Shield Ins. Co Ltd* 1982

(4) SA 95 (T) at 99E; *Rudman v RAF* 2003

(2) SA 234 (SCA); *Prinsloo v RAF* 2009(5) SA 406 (SE).

[19] In *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) the issue of earning capacity was expressed in the following manner:

“In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss if such loss

diminishes the estate. This was the approach in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where the following appears:

“In later Roman law property came to mean the universitas of the plaintiff’s rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland.”

[20] The plaintiff placed much store on several expert reports. In *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another* 2001

(3) SA 1188 (SCA), the Supreme Court enunciated the approach a court should adopt in dealing with expert evidence where the following was advanced:

“[36] . . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1997] UKHL 46[1997] UKHL 46; ; [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.

[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because

evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice.

The Court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached ‘a defensible conclusion’ (at 241G-242B)

[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express prospects of an event’s occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingly v The Chief Constable, Strathclyde Police* 200

SC (HL) 77 and the warning given at 89D-E that

‘(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.”

[21] In *Radebe v Road Accident Fund* 2457/2017) 2020 ZAFSHC (unreported) the court, set out succinctly the role of experts as follows:

“[24] The common theme is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts that caused the expert opinions in this case are vital. It was supplied by the plaintiff.”

[25] It is not for the opposing party to prove the true facts of the plaintiff's case; it is the onus of the plaintiff.

[26] Only if the expert's opinion based on the correct facts is questioned could it be expected that a countering expert should be called. It is the expertise that will then be at issue and not the accuracy of the facts on which it is based. Counsel must identify and separate the two aspects. The argument of the actuary in this case that the failure to call an expert in the defendant's case is tantamount to a default judgment is wrong. It is not the expert's veracity that is in dispute; it is the facts on which he based his calculations. Experts must assist the court not a party to the dispute.”

[22] There is no need to rehash the expert reports, more especially given the defendant's election not to file any expert reports. Notwithstanding this decision of the defendant, the plaintiffs' expert reports must be carefully scrutinized. A conspectus of the facts that can be extrapolated from the various reports will suffice. Prior to the injury the plaintiff had, but for the Covid-19 pandemic and national shutdown that followed, been working as a taxi driver ferrying children to school and mechanic over the weekend.

[23] Dr du Plessis was of the view that the plaintiff had suffered approximately a 10% loss of efficiency due to his neck injury and has suffered a significant loss of earning capacity due to the injury on his left leg. Moreover, Dr du Plessis opined that the plaintiff's ability to perform light physical work is limited which has the result of the plaintiff not being able to continue working as a driver.

[24] Dr Mazabow noted that the plaintiff was compelled to use two crutches for a year after the incident, followed by a single crutch until October 2022. In the opinion of Dr Mazabow, the vocational choices that avail the plaintiff are closed due to his limited ability to perform physically demanding activities or drive. Additionally, the plaintiff's psychological disturbances coupled with the effects of depression, anxiety and pain on his cognitive, interpersonal functions, present additional obstacles in the work environment. Dr Mazabow developed this in the following manner. The variable concentration, which included the plaintiff's slow speed and variability in his concentration combined with his fatigability, his

lower motivational drive, social interest and self-confidence would impact his ability to perform effectively which would include sedentary duties. The result in the view of Dr Mazabow given his findings together with the plaintiff's limited educational attainment would make the plaintiff unemployable.

- [25] Dr Prins reiterated the view that the plaintiff cannot be seen as an equal competitor in any sector of the labour market. Tellingly, the plaintiff must be categorised as unemployable.
- [26] Miss Greef echoed the findings as regards the employability of the plaintiff, concluding that the plaintiff does not retain suitability for performing any work exceeding the light ranges or occasional use of his limb dynamics due to the accident-related sequelae. Ultimately, Miss Greef opined that the plaintiff was markedly compromised and vulnerable for the execution of work duties as related to his work history and for any work requiring use of physical dynamics. Thereafter he worked as an unqualified assistant mechanic with his grandfather. His foray in the unskilled labour market continued as he was employed as a general assistant in the construction sector.
- [27] Further educational training was minimal. As can be seen, the plaintiff pursued the accumulation of a broad skills base through on-the-job training and action learning. This culminated in him obtaining his driver's licence in August 2019.
- [28] In August 2019, the plaintiff began working as a taxi driver engaged in the transport of learners to and from school. This was confirmed by Miss Moroke. During the weekends, the plaintiff worked as an unqualified mechanic. The Covid-19 pandemic signalled the cessation of both forms of employment. A career aspiration that was on the radar of the plaintiff was that of securing employment as a bus driver in Madibogo.

- [29] Critically, in addressing the pre and post morbid career, Adv Gianni contended as follows:

“38. With respect of the pre morbid career scenario Mr Prinsloo opined that the plaintiff was unemployed at the time of the accident and probably would have entered in informal market in a taxi driver position (transporting children) as at January 2021, in which

capacity he would have worked for over a period of time. He would have secured a taxi driver position, in which capacity he would have functioned until the normal retirement age of 65 years.

39. With respect to the Plaintiff's post morbid career scenario Mr Prinsloo perused all the abovementioned reports and opined that the plaintiff will probably functionally unemployed for the remainder of his career lifespan.

40. Mr Prinsloo based this opinion on the impact of the “triad of career forces” namely:

40.1. The plaintiff's educational skillset are fair and limited. He completed Grade 10 on the second attempt and discontinued his studies during Grade 11, to commence working. He functioned in various capacities set out above ending with a taxi driver in the informal sector. Based on the plaintiff's work history of being a construction assistant right through to being a taxi driver, Mr Prinsloo opined that the plaintiff has fair education with a comprehensive skillset

within the unskilled domain of work and then focussed semi-skilled as a taxi driver for school children. At the age of 33, he acquired a skillset that limits job opportunities to that of unskilled labour or semi-skilled driver.

40.2. The plaintiff functioned in a depressed labour market in the North West Province, with an official unemployment rate in 2019 of 26.4% and an expanded unemployment rate of 44%. These percentages increased during the first quarter of 2023 to an official unemployment rate of 38% and the expanded unemployment rate of 54%. Mr Prinsloo opined that these statistics do not bode well for an individual with health conditions in a labour market with an oversupply of prospective younger and healthier work seekers.

40.3. The plaintiff's accident injuries and impairments have had a detrimental impact on his post-morbid occupational functioning and in this regard Mr Prinsloo specifically considered the abovementioned opinions highlighted above."

- [30] The actuarial calculations of Mr Whittaker resulted in the plaintiff's loss of earnings and has applied a 5% contingency deduction on past loss, with respect to the uninjured scenario which amounts to a total of R113 701.00, with respect to future loss a 15% contingency deduction on the uninjured scenario which equates to of R1 094 388.00. The net loss was calculated to be R 1 208 089 00.
- [31] Observing, that the RAF CAP did not apply, Adv Gianni sought that the draft order be made an order of court for R 1 208 089 00 which included the usual consequential orders.
- [32] Mr Mohale for the defendant succinctly summarised his contention on past loss of earnings of the plaintiff to be that the plaintiff was simply unemployed, resultantly there could not be any past loss of earnings. To this end, Mr Mohale's argument ran that confirmation of the plaintiff being unemployed was to be found in the expert reports which formed part of the application in terms of Rule 38(2).
- [33] On a proper consideration of the expert reports on a conspectus of all the evidence, this court was of the view that the opinion of the experts had a logical source. Put simply, the experts had considered comparative risks and benefits and reached a defensible conclusion. The value of the past loss income uninjured was R119, 685, less a 5% contingency deduction of R 5 984, resulting in a net past loss of R113 701. The value of the future loss of income uninjured was R 1 287 515, less a 15% contingency of R193 127, resulting in a net future loss of R 1 094 388, with a total net loss of R1 208 089.
- [34] Considering the facts above and applying the principles for determining the award, as held by the court in *Southern Insurance Association Ltd v Bailey NO*, 1984 (1) SA 98, the court has "a large discretion to award what the court considers right" even where the method of actuarial computation is adopted in assessing damages for loss of earning capacity. One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life".

[35] Although comparative cases are purely a guide, in *Road Accident Fund v De Bruyn* 13 [2014] ZAGPPHC 108. a 60% post-morbid contingency deduction was applied to a plaintiff, who was still functioning in his pre-accident occupation and still employed. He would however not be able to sustain the postulated levels of earnings going forward. In *Kannenbergh v Raf* Case No: 45549/16 the court applied a differential of 40% in respect of a compromised plaintiff who at the time of trial had

suffered no loss was still employed and was even promoted after the accident. The evidence was that her functions would be compromised

over time resulting in a diminished earning capacity.

[36] Inadvertently, an unintended omission occurred in the order. This related to the failure to include the past loss of earnings in the order. A 30% contingency was applied to the future loss of earnings with the past loss of earnings accepted to be R113 701. This should have resulted in an intended order of R 1014 961 50. Any enquiry into damages for loss of earning capacity is to its nature speculative because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of a loss. See: *Southern Insurance Association Ltd v Bailey* NO, 1984(1) SA 98 AD.

Order

[37] Resultantly, the following of 01 August 2024, is corrected in line with the overriding intention of this Court.

1. The Defendant is to pay to the Plaintiff the amount of R1 014 96.50 (one million, fourteen thousand nine hundred and sixty one rand fifty cents. ("the capital") in respect of loss of earning and/earning capacity, within 14 (FOURTEEN) days of this order being made an order of court directly into the trust account of Messrs. Savage, Jooste and Adams Attorneys, being:

Bank:

NEDCOR - ARCADIA

Branch code: 1 6-33-45-07

Account no:

1[...]

Ref:

Mr Makole/KK90

1.2 The Defendant will not be liable for any interest on the said payment on condition that payment be made timeously, failing which the Defendant shall be liable to pay interest at the applicable mora rate from the 15th day of this court order being granted.

A REDDY

HONOURABLE JUDGE OF THE

HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Counsel for the plaintiff: Advocate Gianni Attorneys for the plaintiff: Savage Jooste & Adams Inc
C/O:Nienaber&Wissing attorney 4204 Palmer Crescent, Leopard park golf estate Mahikeng
Attorney for the defendant: Mr Mohale Attorneys for the defendant: The State Attorney,
Mahikeng East Gallery, Mega City Mahikeng Date of Judgment: 01 August 2024 Request for
reasons: 27 August 2024 Date reasons handed down: 01 November 2024.

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Prepared on 11 October 2026 · Esheria