

SOUTH AFRICA / JUDGMENT

Mokoena v Road Accident Fund (45151/2022) [2025] ZAGPJHC 124 (13 February 2025)

[2025] ZAGPJHC 124

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

45151/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 45151/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISE: NO

In

the matter between: XOLANI
 MOKOENA
 Plaintiff
 and
 THE
 ROAD ACCIDENT FUND
 Defendant

JUDGMENT

NOKO J

Introduction

- [1] Mr Xolani Mokoena (“the plaintiff”), instituted claim against the Road Accident Fund (“the defendant”) in terms of the Road Accident Fund Act (“RAF”).^[1] The claim is predicated on the injuries sustained pursuant to a motor vehicle collision which occurred on 12 October 2019 in Witbank.
- [2] The RAF has appointed the Office of the State Attorneys (“State Attorney”) to defend the action. The State Attorney delivered the plea and raised three special pleas. The defendant abandoned the special pleas at the beginning of the trial.

Background

- [3] The following background facts are common to both parties. The plaintiff was a passenger in the motor vehicle (“the insured vehicle”) driven by a driver (“insured driver”) whose details are unknown to the plaintiff. The collision occurred at an intersection between Christiaan De Wet Street and Old Middelburg Road, Extension 10, Witbank. The plaintiff avers that the sole cause of the collision was the negligent driving of the insured vehicle by the insured driver. The defendant has conceded that the insured driver was negligent and as such liability is not being disputed.
- [4] The plaintiff suffered the following injuries: head injury, C2 Pedicle Spinal Fracture, distal displaced left forearm (radius) fracture, open right shaft femur fracture, displaced fracture of the right distal radius, bilateral (left and right) feet fractures, extensive muscle damage, abrasions on the face and abdomen. He was admitted to Witbank Provincial Hospital and subsequently transferred to Life Cosmos Hospital and then, to Milpark Hospital.
- [5] The following procedures and treatment were applied to the plaintiff: tracheostomy; open reductions and internal fixations to the left distal radius, left and right foot; he received a hard neck brace and immobilisation of the left arm, both feet and reconstruction of the lateral ligament of the left knee.

- [6] The plaintiff was discharged on 18 November 2019. He subsequently underwent open reduction and internal fixation of the right ilium and a reconstruction of the lateral collateral ligament of the left knee on 27 November 2019.
- [7] The plaintiff avers that as a result of the said injuries and treatment he experienced frequent headache; intermittent neck pain and stiffness; pain and suffering; lost amenities of life. He suffered past and future loss of earning and earning capacity. He incurred past, future hospital and medical expenses. He suffered long term mental or severe long-term behavioural disturbance or disorder.
- [8] The plaintiff was employed at the time of the collision by S32 Khatala Colliery as a business administrator and data capturer. He returned to same job after he convalesced which was a period of five months after the collision. However, he was retrenched as his position became redundant when the S32 Khatala Colliery was taken over by another company. He was earning R9 266.00 per month. He then sought another employment and was employed as a belt operator at R15 152.63 per month.
- [9] Plaintiff lodged a claim in terms of the RAF Act for the total sum of R 9,686,223.87 made up of the following:
- 9.1 R 836 223.87 for past medical and hospital expenses;
- 9.2 R 150 000,00 for past loss of earnings;
- 9.3 R6 500 000.00 for future loss of earnings and earning capacity;
- 9.4 R2 200 000.00 for general damages; and
- 9.5 Undertaking in terms of section 17(4)(a) for the future medical expenses.
- [10] Plaintiff appointed experts who compiled reports which were served on the defendant and filed with the Court. Those experts are, Dr M De Graad (Orthopaedic Surgeon), Dr L A Fine (Psychiatrist), Mrs C Joyce (Clinical Psychologist), Dr TC Bingle (Neurosurgeon), Ms M Snyman (Occupational therapist), Mr D De Vlamingh (Industrial Psychologist) and Mr G Whittaker (Actuary).
- [11] The defendant failed to settle the claim and plaintiff then issued summons which was served on 14 September 2021. The defendant entered appearance to defend and delivered its special and plea on 8 May
2022. As set out in paragraph 2 above, the special pleas were abandoned at the beginning of the hearing of the trial.
- [12] The experts referred to above deposed to affidavits confirming the contents of their medico-legal reports. The plaintiff also brought an application in terms of Rule 38 of the Uniform Rules of Court for the report to be accepted by the Court.

Merits

- [13] The defendant counsel conceded 100% liability for the claim and to this end the trial only proceeded on quantum. The defence counsel stated that the defendant will not be calling any witness to testify but will challenge the evidence tendered by the experts called to testify at the instance of the plaintiff.

Evidence by the Plaintiff's experts.

Industrial psychologists (IP), Mr D De Vlamingh.

- [14] Mr D De Vlamingh, qualified as an industrial psychologist in 1980 and has been preparing medico-legal reports for a period of 12 years. He has lectured industrial psychology course over a period of time for approximately 300 students.
- [15] He testified that the plaintiff conveyed to him that he had the intention, as at the time of the collision, to become an artisan. The requirements for one to be admitted for the apprenticeship was grade
9. Since the plaintiff had grade 10, he would have qualified for the appointment. In view of the shortage of the artisans in South Africa the prospects of being employed were very high. The plaintiff has further informed him that he had already conveyed to his employer that once a vacancy become available, he would apply to be an apprentice.
- [16] The plaintiff was studying electrical engineering and has passed N3. He has completed his National certificate in business administration, level 3. He also completed business administration NQF Level 3 in 2019 before he was involved in the motor vehicle accident.
- [17] Once employed as a belt controller he was earning R15 152.63 per month and his role being graded at a Paterson level B3 with a total salary of R32 800.30 placing him between the median and upper quartile of Paterson B4 level.
- [18] The IP further reported that due to the injuries sustained he would be able to retain his post until the age of 35 when surgery is required and would thereafter have to secure a sedentary employment with the basic salary of R15 833 per month being at a Paterson B1 level and reach Paterson B3 (basic salary) of R20 083 at 45 with attendant annual increases until the age of 45.
- [19] The counsel for the plaintiff submitted that in view of the foregoing the postulations as set out in the report were therefore more realistic. He was employed as at the time of accident and had to continue therewith and could not realise his dream of become an artisan due to cognitive limitations which resulted from the accident.
- [20] With regard to the post morbid scenario, the IP stated that there was no job offer on the horizon but this was based on the interview conducted with his supervisor, Mr Malatsa who added that the plaintiff was a hard worker and could have reached higher post.

- [21] During cross examination, it was restated that the plaintiff was declared redundant from his previous job and was not terminated due the sequelae of the accident. Further, that the redundancy occurred 3 years after the accident and was earning amount of approximately R14 002.34 at that time which was in 2023.
- [22] It further transpired during cross examination that, the plaintiff was not taken through the fitness tests at the time of employment at the mine when he took his employment as a belt controller. That notwithstanding the plaintiff informed the IP that he was coping despite the injuries he sustained. The IP further stated that the normal tests when entering the mining environment is limited to the blood pressure not physical examinations and this was disputed by counsel for the defendant who stated that ordinarily mining operations are highly regulated and the version by the IP that tests are peripheral is incorrect.
- [23] He had, before the accident, applied for a permanent position underground as an artisan millwright but upon his recuperation the said post was no longer available. After the accident he was absorbed by the mine and become a belt operator out of desperation for employment. The nature of the employment may readily worsen his situation and is likely to be considered as a vulnerable employee due to his psychological challenges.

Ms Madri Snyman, Occupational therapist (OT)

- [24] The plaintiff called the OT Ms Madri Snyman, Occupational Therapist. Ms Snyman has a Diploma in Health and Vocational Therapy obtained 2002.
- [25] The OT testified that the plaintiff would have been able to do much of office work including data capturing, typing and filing. He has applied for a permanent position underground as an artisan millwright which was advertised but regrettably on his recuperation the said post was no longer available. This application was made before the accident. After the accident he was absorbed into mining and become a belt operator and this was as a result of desperation. The nature of his current employment would readily worsen his situation. He is therefore likely to be considered as a vulnerable employee due to the sequelae and his psychological challenges.
- [26] The OT further stated that despite the fact that the belt operator's duty being heavy it appears that the plaintiff who is desperate for money successfully managed to hide the pain he was experiencing.
- [27] She testified that indeed the work in the mining industry is physically demanding and plaintiff as an artisan would be required to do some form of physical work which may also demand mobility. Due to his compromised mental strength/head injuries his endurance is lessened. The assessments and results for physical assessment could not be obtained as it was confidential and she could not force to obtain them from the employer as it would have compromised the plaintiff's position.

- [28] During cross-examination she stated that for the assessment of the pre-accident scenario he could not have access to the employer but is aware that the job was sedentary. In addition, the employer did not make available information on his physical strength. Counsel for the defendant stated that ordinarily artisan work fall under heavy loaded and not light medium. In retort, the witness stated that there are light aspects thereof and become heavy when there is a requirement to climb up.
- [29] When confronted by the counsel that the report[2] states that the plaintiff is cognitively intact, she replied that this is the case on appearance and the end result of a screening test which is very basic assessment tool elicited cognitive impairment. He was forgetful and was once warned of forgetting instructions.
- [30] Counsel for the defence stated further that the plaintiff did not qualify to undertake studies relating to artisanship which requires NQF level which he did not possess. Further, that the reasons which were outlined for failing to progress was because of Covid 19 and not linked to the accident as the report stated. The response was that this is what was stated in the initial report and in any event her interviews which was done via telephone was limited to functional ability.

Dr M Graad, an Orthopaedic Surgeon (OS)

- [31] Dr Graad testifies that he has MB.CHB, M. Med. and Certificate in Medicine and Law. He testified that due to the nature of the injuries plaintiff would be unable to carry out heavy weight and lifting jobs. Due to his mental faculties being impaired he may not be able to carry out work which requires memorisation. He re-affirmed that due to the stiffness he would never recover and again that he took employment as a belt operator due to his desperation and having probably hidden his injuries to the employer. Ordinarily, he should not have lasted this long as a belt operator due to the nature of the injuries.

Clinical Psychologist (CP), Ms C Joyce.

- [32] The CP testified via teams as she was in the USA. She testified that she has a Master's Degree in Psychology and has been practising for more 20 years. She testified that in respect of the pre-morbid position, the plaintiff had no injuries, not smoking, not on drugs and finished high school in 2013, NQF level 3. He had an average cognitive ability level and was goal driven.
- [33] Based on the test results and the history, the CP opined that the plaintiff has sustained a moderate brain injury with diffuse axonal damage.
- [34] Further, that the plaintiff conveyed that he went back to work after the recuperating but he started getting tired easily. He had both physical and mental challenges. He became forgetful, moody, reserved, and no longer played soccer. In general, the CP painted a grim picture of how the accident affected the plaintiff and all these appear to be irreversible.

[35] The CP stated under cross examination that she has last examined the plaintiff in 2021 and cannot deny that there could have been improvement. Further, that she did not have collateral educational history but with the information (and the certificate) at her disposal she can state that evidence points to average intellectual abilities. The defence counsel submitted that it may have been proper that an educational psychologist be appointed and the CP is not qualified to readily provide an opinion with regard to whether the plaintiff is a candidate to further his studies or not.

Dr Leon Fine, Psychiatrist.

[36] Dr Fine obtained the following qualifications, MB,CHB, D.P. M, F.F Psych, BA Hon (Psychology and Certificate in Medicine and Law.

[37] His report states that the plaintiff had no health problems prior to the accident. He does not smoke or take drugs and is an occasional drinker of alcohol. His social disposition before the accident was good, he played soccer and enjoyed fishing and swimming with friends.

[38] The expert reported that the plaintiff presents with having sustained a head injury with significant organic brain injury though no GCS could be found in the Hospital records and the prognosis is very poor and there is no prospect of any improvement hence the injury is considered to be permanent. Further, though the plaintiff has denied this, the examination revealed he has suffered a post-traumatic stress disorder.

Neurosurgeon, Dr TC Bingle.

[39] The neurosurgeon on the other hand opined that the plaintiff sustained a mild traumatic brain injury with no signs of

neurophysical deficits but recommended an MRI scan to exclude focal brain injury. Further, that without the scan results he would not make any comments regarding the degree of his brain injury. The neurocognitive and psychological sequelae as presented by the

plaintiff may imply that there could have been a mild to moderate traumatic brain injury and to this end, he deferred to the findings

of the clinical psychologist.

Submissions

by the parties.

[40] The plaintiff counsel submitted that the experts have demonstrated that the plaintiff had commenced his studies and was already on N3 in his engineering studies. These studies could not be completed as the plaintiff was cognitively impaired. He, at all times, wished to be an artisan and permanently interrupted by the accident. The counsel referred summarily to evidence as presented by the experts set out above.

[41] Counsel for the plaintiff submitted further that usually the apprentices start at level 1 (Paterson level A3) and progressed to level 4 (Paterson B2) before qualifying and earnings will be adjusted in accordance with their qualifications. The counsel further

demonstrated that with this path he would have qualified as an artisan after the apprenticeship and ultimately move to median Paterson C1 level and to reach Paterson C2 in ten years' time (R47 167 per month). He would have also received his annual

increases until his retirement at 65.

[42] The counsel for the plaintiff further submitted that with regard to contingencies normal occurrence of 0.5% of the remaining life should apply and the Court should follow the recommendation of the Actuary.

[43] Further, that the court should further award costs for three days including counsel's fees on scale B and that there is a valid contingency fees agreement entered into between the attorneys and the plaintiff. Reservation fees should also be allowed in respect of the expert witnesses who provided testimony to the Court.

[44] The counsel for the plaintiff made reference to previous awards as a guide and recommended that the fair and reasonable award for the general damages should be R2 200 000.00.

[45] With regard to the contingencies relative to the loss of earning and earning capacity, 5% and 19.5% should be applied to past and future loss, respectively, in respect of uninjured loss. Whereas 5% and 39.9% should apply to past and future loss in respect of injured earnings. The total suggested figure is R6 070 037.00 reckoned as follows:

Past loss of income uninjured

R1 204 553.00

Less contingency of 5%

R 60 228.00

TOTAL

R1 144 325.00

Value of the income injured

R1 057 246.00

Less 5% contingency

R 52 862.00

Total

R1 004 384.00

Net Past loss

R 139 941.00

Future loss of income uninjured R11 903 772.00

Less contingency deduction of 19,5% R 2 321 235.00

TOTAL

R 9 582 537.00

Value of injured income

R 6 037 091.00

Less contingency of 39.5%

R 2 384 651.00

TOTAL

R 3 652 440.00

Net Future loss

R5 930 097.00

Total Future Loss

R6 070 037.00

[46] The defence disputed all heads of damages claimed by the plaintiff. In brief, the defence contends that there is no evidence supporting the claim that the plaintiff could have become an artisan. Further, that even if it is found that he could have become one, the nature of the injuries suffered would not have made it impossible for the plaintiff to work as an artisan.

[47] The defendant further disputed that there is sufficient evidence to conclude in favour of the plaintiff that he really had the intention to become an artisan. This can be inferred from the fact that though he was able to further his studies such a plan fell through. The evidence demonstrated that he has in fact continued his employment as a data capturer after the accident and this can only mean that the accident has not negatively affected him.

[48] The excuse by the clinical psychologist that she could not obtain further information from the current employer is baseless, as POPI Act acknowledges that in certain instances personal information about a third party may be obtained directly from whomsoever has that information. In this regard, the counsel made reference to sections 14 and 16 of the POPI Act[3] which relates to keeping the personal information safe and further that a party is required to keep information which is accurate and not misleading.

- [49] In addition, the primary expert Neurosurgeon stated that the plaintiff has a mild traumatic injury and the report states that an MRI scan should have been done to exclude possibility of a serious traumatic brain injury. Without the MRI Scan, the evidence would be found wanting and would not find a correct conclusion. Therefore, she argued further, to the extent that the clinical psychologist referred to neurocognitive and psychological sequelae same is unsustainable as the Neurosurgeon could have made a conclusion of the severity of the traumatic injury only after the MRI scan.
- [50] The evidence of the Occupational Therapist should also be discarded since the report was stale. Further, that she stated that she is in a position to provide evidence which may be required from an educational psychologist. The aspect of her report which referred to the moderate brain injuries should also be ignored since the said diagnosis could be done by the Neurosurgeon.
- [51] In addition, the counsel for the defendant argued, no conclusive evidence was presented to prove that that the plaintiff would have been an artisan and as such it follows that the calculation postulated on that basis would be incorrect.
- [52] The evidence presented by the Orthopaedic Surgeon was that the plaintiff had the intention to work underground as a millwright and wanted to become an artisan. He was offered the position to start work underground but rejected the offer due to head injuries. The report was not supported by any collateral regarding his fitness as he is now working underground in the mine. It is stated that he could do a sedentary light to medium job. It is noted that post morbid he got employed in the mine and there is no collateral on his fitness test, hence there is no conclusion with regard to his ability to retain and remain working underground. Counsel further found it strange that the experts could argue that there was no collateral regarding tests undergone especially in the mining industry which is highly regulated.
- [53] The testimony of the IP Vleming was based on the qualification of the N3 but there was no evidence of offer for a job as an artisan. The plaintiff is currently at 32 over the Partisan B (2) level.
- [54] In assessing the evidence of the clinical psychologist, the defence counsel submitted that there was no collateral with regard to the allegations that he had passed. Further, that the evidence presented is that he could not complete his studies due to Covid 19 and not accident related cause. The report should not be relied on because there has not been any current assessment and it is also based on contradictory evidence as the primary doctor made reference to mild traumatic injury whereas the clinical psychologist referred to moderate brain injury with diffusion. The report was also prepared more than three years ago and has become stale hence cannot be relied upon.
- [55] The OT's testimony confirms that the plaintiff managed to go back to school and only discontinued due to Covid 2019 and not to the accident. There was never any further studies done with the plaintiff. In addition, the OT opines that an artisan and belt assistant fall within a medium type of work which was decreed by the Orthopaedic Surgeon that he will

be fit for light to medium type of work. There was no collateral from the employer to support the Orthopaedic surgeon that the plaintiff was not fit to work underground. Without the communication with the employer the OT would not have the basis to make a determination of the nature and the profile of the underground work and may therefore not make a conclusion that the plaintiff was unsuited to work underground. The reasoning that the OT has deferred contact with the employer to the OT is unsustainable as he needed same to come to a correct

conclusion.

- [56] Counsel for the defendant contended further that the IP's contention that he could not obtain information from the employer or could not call the employer as the information was confidential is baseless as POPI Act makes provision to obtain such information.
- [57] With regard to the report of the psychiatrist, counsel contended that in contrast to the Neurosurgeon he stated that the plaintiff suffered an organic brain damage. He further stated that though the plaintiff did not admit symptoms of neurocognitive impairment he assumed on the basis that there was extended period of amnesia. He noted that there was no admission Glasgow Coma Scale found and in all probabilities an MRI scan would have cleared any of these assumptions
- [58] In retort, the counsel for the plaintiff contended that, in addition, that the defendant should not complain about alleged inconsistencies in relation to different diagnosis of organic cognitive brain damage and mild to moderate injuries. There is a Glasgow of 20% WPI. He is not suited to underground work. There is no evidence presented by the defendant to gainsay the testimony of the plaintiff's expert. Furthermore, there was no need for the MRI scan.
- [59] Notwithstanding that, the counsel for defendant made recommendations of the amount payable for damages suffered by the plaintiff. The counsel made reference to few comparative awarded damages in previous cases and suggested an amount of R1 000 000.00 as fair and reasonable in respect of general damages.
- [60] Counsel further referred to principles applicable as highlighted in previous court cases that opinions by experts are not cast in stone and the Court is bestowed with discretion to disregard them. To this end the recommendation of the report should not be followed blindly. Further, that ordinarily award in relation to future loss of earnings and earning capacity the exercise is generally within the realm of conjecture. In view of the reservations and shortcomings and holes punched in the reports the counsel opines that, the conclusion that the plaintiff would have become an artisan is unfounded and should be rejected outrightly.

[61] Notwithstanding the foregoing, they may have to apply for a higher contingency as there are various viscidities of life such as level of unemployment, age of the plaintiff and further noting that he was also able to retain his job which was sedentary in nature. To this end counsel recommended the following:

Past loss of income uninjured R1 204 553.00

10%

R120 455.30

TOTAL

R1 084 097.70

Value of the income injured R1 057 246.00

Less 10% contingency

R105 724.40

Total

R951 521.40

Past loss

R 132 576.30

Future loss of income uninjured R11 903 772.00

Less contingency deduction of 40% R4 761508.80

TOTAL

R 7 142 263.20

Value of injured income

R6 037 091.00

Less contingency of 20% R1 207 418.20

TOTAL

R4 829 672.80

Net Future loss

R2 312 590.40

Total Future Loss

R2 445 166.70

Costs.

[62] The defendant's counsel argued that costs to be awarded should be for two days being, Thursday and Friday, and on a normal cost scale. In retort, plaintiff's counsel contended that the matter was set down for Wednesday and could not proceed as allocation of the judge was awaited, who was only allocated on Thursday and as such costs should be Wednesday, Thursday, Monday and Tuesday. The plaintiff's counsel persisted on costs on a punitive scale as the defence though not having disputed the rule 38 expert affidavit, nevertheless, insisted on having to cross examine the expert witnesses. The counsel for the defendant intimated that all expert will be cross examined but, subsequently, decided not to test evidence of all of them through cross examination.

Legal principles and analysis.

General damages.

[63] The determination of general damages is dependent on a number of variables and as such amount awarded for damages in one case may not necessarily be the same as the determination in another case. It was held in Sandler[4] that, "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the judge's view of what is fair in all the circumstances of the case."

[64] Both the plaintiff and defendant made reference to previous judgments as motivation for the amount to awarded as damages.

[65] Notwithstanding that and as was highlighted above previous awards serve only as guides and to this end it was stated in Dikeni[5] that, "...although these cases have been of assistance, it is trite law that each case must be adjudicated on its own merits and no one case is factually the same as another... previous awards only offer guidance in the assessment of general damages."

[66] I had regard to the nature of the injuries and the sequelae as set out in detail in the reports. I also has regard to the previous comparative awards made and considered the recommendations put forward by both parties. I conclude that the general damages should be awarded in the sum of R1 200 000.00.

Past hospital expenses.

[67] The past medical expenses have been clearly set out and collaterals also attached to the papers and no evidence or persuasive challenge has been mounted by the counsel acting for the defendant as to the cogency or authenticity of the evidence presented. To this end I order that the amount claimed as supported by the collateral attached in the sum of R836 223.87 should be paid by the defendant.

Loss of earning capacity.

[68] It is trite that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven, the loss may be compensated if it is quantifiable as a dominium in the value of the estate.[6] The Court would generally get a cue from an Actuary whose report would allude to contingencies. That being said the actuarial recommendations are not edged in stone and the Court is at large to exercise its discretion and may deviate from suggested calculations.

[69] The contingencies may be higher where evidence is clear that the chances of re-employment will mainly depend on the sympathetic employment. It was held in Krohn[7] where a higher contingency was applied that

"There is little doubt that having regard to the sequelae of his injuries fully canvassed by the experts, the plaintiff is at risk of losing his current position and the prospects of him obtaining another position are indeed very slim. The plaintiff is on the proverbial "knife's edge". He can be dismissed from his job anytime. There is no other option in my mind other than to apply a 50% post-morbid contingency deduction. By applying the 50% contingency deduction, the plaintiff is regarded as having a 50% chance to sustain his current employment, alternatively to obtain alternative employment. This is conservative approach if one has regard to the plaintiff's condition."

[70] The Orthopaedic Surgeon was at pain to explain the effect on the plaintiff and whether the fact that he is now employed under ground handling heavy duty had been medically examined and conclude that he is not qualified to carry out the work currently been carried out. It is understood that the plaintiff lied his way through as he was desperate for employment. The fact that he is executing the duty which has been construed by the experts as heavy means that the accident may have not negatively affected his position. Absent persuasive evidence regarding the profile of the work currently undertaken by the plaintiff, the Court is being derailed from making a proper assessment regarding the allegation that his endurance has lessened.

[71] However, it is clear that the plaintiff had no pre-existing conditions, that he is currently employed and that his post-accident income exceeds his pre-accident income. The locus classicus regarding loss of earnings is Southern Insurance Association Ltd v Bailey NO,[8] where the Court acknowledged that any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. It was held that the Court can only make an estimate which is often a very rough one of the present value of the loss and in this exercise, one has to decide to make an award which is just and equitable. One need to be guided by, but not tied down by, inexorable actuarial calculations.[9]

[72] It is clear that the plaintiff's career prospects and earning potential had been detrimentally affected by the accident based on the Industrial Psychologist's recommendation who indicated that the plaintiff's career prospects and earning capacity had been negatively affected as a result of the accident and its sequelae. In the premises, one would consider applying a higher-than-normal post-morbid contingency deduction. Having taken into

account the fact that the recommended figures of the actuary, together with the suggested amount by the parties, shortcomings in the reports by the experts and importantly, that the amounts for loss of earnings is generally in the realm of conjecture. I determine that the fair and reasonable for the loss of earning capacity to be R4 548 472.25.

Past loss of income uninjured

R1 204 553.00

Less contingency of 5%

R60 228.00

TOTAL

R1 144 325.00

Value of the income injured

R1 057 246.00

Less 5% contingency

R 52 862.00

Total

R1 004 384.00

Net Past loss

R 139 941.00

Less contingency deduction of 30% R3 571 131.60

TOTAL

R8 332 640.40

Value of injured income

R6 037 091.00

Less contingency of 35%

R2 112 981.85

TOTAL

R3 924 109.15

Net Future loss

R4 408 531.25

Total Future Loss

R4 548 472.25

[73] It is settled jurisprudence that the costs should follow the results. No attempt by either of the parties were made to persuade me to upset this well-trodden path. The trial was set down for Wednesday and the judge was made available later in the day. The parties agreed that the trial should start on Thursday. The trial proceeded until Tuesday and therefore the costs of those days should be allowed. There was nothing out of the ordinary with this case as such the costs in scale B shall be allowed including the costs of the advocate on brief.

Order.

[74] In the premises I make the following order:

1. The defendant shall pay the plaintiff the sum of R1 200 000.00 (One Million, Two Hundred Thousand Rands) in respect of general damages on or before 180 (One Hundred and Eighty Days) from the date of the Court order.
2. The defendant shall pay the plaintiff the sum of R4 548 472.25 (Four Million, Five Hundred and Forty Eight Thousand, Four Hundred and Seventy Two Rands and Twenty Five Cents) in respect of loss of earnings on or before 180 days from the date of the Court order.
3. The defendant shall pay the plaintiff the sum of R836 223.87 (Eight Hundred and Thirty-Six Thousand Two Hundred and Twenty-Three Rands and Thirty-Seven Cents) in respect of past medical and hospital expenses on or be 180 days from the date of the Court order.
4. The defendant shall furnish the plaintiff's with Section 17(4)(a) of the Road Accident Fund Act undertaking.
5. The defendant would not be liable for interest on the capital amount should same be paid on or before the expired of 180 days (date of payment) from date of Court order failing which the defendant will be liable for interest calculated from 14 days from the date of payment.
6. The defendant shall the plaintiff's taxed or agreed party and party costs on the scale High Court scale up to the date hereof which cost will in include:
 - 6.1. That reasonable cost of the medico-legal reports, RAF 4 assessment reports and their reasonable preparation and reservation fees, (if any), addendum reports and any joint reports of the following experts: Dr M De Graad (Orthopaedic Surgeon), Dr L A Fine (Psychiatrist), Mrs C Joyce (Clinical Psychologist), Dr TC Bingle (Neurosurgeon), Ms M Snyman (Occupational therapist), Mr D De Vlamingh (Industrial Psychologist) and Mr G Whittaker (Actuary).

6.2. The cost of senior junior counsel for the trial, which cost will include attendance of pretrial conferences and drafting of minutes (other than the plaintiff's attorney, if any) costs of preparation and attendance at judicial meetings, (if any), interlocutory Court appearance and all steps in compliance with any current or applicable Court Practise Directives include inclusive of cost of drafting of heads on Scale A.

6.3. The reasonable cost of instructing attorney and correspondent attorney at the seat of the Court (if applicable).

6.4. The reasonable costs of a correspondent at any at the seat of court, which will include travel costs, attendance at court, cost for pre-trial conferences and formulation of the pre-trial minutes, and cost of actual attendances to the pre-trial conferences, preparation for and attendance of judicial meetings, an interlocutory applications, time spent formulating the proposal where applicable,

and all other steps in compliance with any current and applicable practise directive and all subsequent Court directive issued by the Judge President and/or Deputy Judge President of the above Honourable Court.

6.5. The cost occasioned by the plaintiff's attorneys, preparation for trial bundles and time spent uploading all other relevant pleadings and or notices on the Court digital case line system.

6.6. The reasonable cost incurred in obtaining payment of the capital and/or taxed costs and/or Section 17 (4)(a) Undertaking.

7. There is a valid contingency fee agreement concluded between the parties.

8. Taxation or settlement of bills of cost will additionally be subject to the following general conditions:

8.1. The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorneys of record and.

8.2. The plaintiff shall allow the defendant 14 calendar days to make payment of the taxed costs from the date of the stamped allocator and or settlement.

8.3. The defendant would not be liable for interest on the party and party costs except if not paid on/or before the set agreed date, in which case the defendant will be liable for interest calculated from the date of stamped allocator and or settlement.

9. The interest rate on the outstanding monies due to the plaintiff will be calculated as prescribed in Section 1 of the Prescribed Rate of Interest Act 1975, as amended by the Judicial Matters Amendment Act 24 of 2015, promulgated on 15 December 2015.

10. Payment of the capital amount and text cost with shall be paid had been made into the following bank account.

A R[...] A[...]

Account Number: 6[...]

FNB, Clearwater Mall

Code 2[...]

M V Noko

Judge of the High Court

Gauteng High Court, Johannesburg

This judgment was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties /their legal

representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 13 February 2025.

Dates:

Hearing: 4th to 10th September 2024

Judgment:

13 February 2025

Appearance:

For the Plaintiff:

D Strydom

Instructed by:

A Rautenbach Attorneys

For the Defendant:

N Moyo

Instructed by:

Office of the State Attorneys, Johannesburg

[1] Act 56 of 1996 as amended.

[2] CL 007-110 para 262.

[3] Act 4 of 2013.

[4] Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199.

- [5] Dikeni v Road Accident Fund 2002 C&B (Vol 5) at B4 171. See also Protea Assurance Co Ltd v Lamb 1971(1) SA 530 AD at 535 H – 536 A, where it is stated that “Comparable cases, when available should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages.”
- [6] Prinsloo v Road Accident Fund 2009 5 SA 406 (SE) at 409C-410A.
- [7] Krohn v Road Accident Fund (1402/2013)
- [2015] ZAGPPHC 697 at [24] and [27].
- [8] 1984 (1) SA 98 (A) at 99A-C.
- [9] Legal Insurance Company v Botes 1963
- (1) SA 608 (A) at 614 F-G.

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Prepared on 10 October 2026 · Esheria