

SOUTH AFRICA / JUDGMENT

Mothobi v Road Accident Fund (2675/12) [2021] ZAGPPHC 560 (2 September 2021) [2021] ZAGPPHC 560

COURT

North Gauteng High Court, Pretoria

BEFORE

Bhoola

CASE / FILE NUMBER

2675/12

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS

JUDGES: YES/NO

(3)

REVISED

02

September 2021

CASE NO: 2675/12

In the matter

between: MOTHOBI TEBOGO
DONALD
Plaintiff
and
THE ROAD ACCIDENT
FUND
Defendant

JUDGMENT

BHOOLA AJ

INTRODUCTION

- [1] The plaintiff, Mr Tebogo Donald Mothibi, in his personal capacity as a driver, sued the defendant in terms of the Road Accident Fund Act 56 of 1996 (RAF), for damages sustained by him arising from a motor vehicle collision which occurred on the 9th June 2008 near Vaalrivier Street, Extension 1, Jourberton in the North West Province.
- [2] On the 31st May 2021, the matter came before me, and there was no appearance on behalf of the defendant. The defendant, was initially represented, however the defendant terminated its mandate with their panel of attorneys due to a policy decision for the defendant to deal with the claims and litigation arising therefrom internally without the assistance of the panel of attorneys. The defendants attorneys did not file a formal notice of withdrawal despite a notice of set down in this matter being served upon them. They simply made made no appearance in court.
- [3] In terms of an order granted on 18th March 2015, the defendant conceded 80% liability in favour of the plaintiff's proven or agreed quantum, which was subsequently accepted. The issue of general damages were settled in an amount of R170 000.00 which was subject to an apportionment of 80% in favour of the plaintiff. The defendant also offered an undertaking assuming for future medical and hospital expenses as encapsulated in section 17(4)(a) of the Act, limited to 80%. On that day, the issue relating to the quantification of plaintiff's damages was separated in terms of Rule 33(4) of the Uniform Rules of Court and the matter was postponed sine die.
- [4] The plaintiff requested to testify by way of affidavit in support of his claim under Rule 39(1) and 38(2) of the Uniform Rules. The acceptance of evidence in this manner is congruent with an approach to balance the disposal of cases against minimizing the danger of spreading Coronavirus (Covid-19). I accordingly granted an order for the matter to proceed by way of affidavits. There was no representation or evidence presented by the defendant[1] and I ordered that the matter proceeded by way of default in terms of Uniform Rule 39(1).
- [5] There are joint minutes by the Orthopaedic Surgeons, Occupational Therapist as well as Industrial psychologists. Only the plaintiff obtained actuarial calculations in this matter.

- [6] A further pre-trial conference was held on the 29th October 2019 where the defendant admitted the plaintiff was injured as a result of the accident and the content of the medical records of Dr. Sekhukhune and Munro Forensics were admitted as being correct.
- [7] The issues before me can be crisply catergorised into two heads of damages: past and future loss of earnings or earning capacity and the other relating to past medical and hospital expenses. Plaintiff's council submitted that he was not pursuing with the claim relating to past medical expenses.

PLAINTIFF'S EVIDENCE

- [8] The plaintiff was born on [.....]. He is accordingly 43 years of age and was 31 years of age at the time of the motor collision. The plaintiff in his affidavit, does not address the issue of his employment history but relies on the affidavits of the expert witnesses in that regard. The plaintiff completed grade 11, possesses a qualified code 14 driver's licence and public permit. Pre- accident, he worked as a mechanic, owned an undertaker's business. After the motor collision, he was employed as a heavy truck driver and encountered difficulties maintaining his employment.
- [9] The plaintiff served its RAF – 1 form on the defendant on 22nd April 2010. According to paragraph 5(g) of the said claim form, the plaintiff's business and or occupation was recorded as a "Taxi Owner Driver". Save to indicate that plaintiff was self-employed, the form did not reflect the date when plaintiff had to return to work and neither did it reflect plaintiff's income for the 12 months immediately preceding the accident from employment and from any other source. The said claim form was completed and signed by Dr. Sekhukhune on 10th June 2008 and served on the defendant on 22nd April 2010. The injuries reflected by the good doctor on the RAF-1 were form were minor head and neck injuries.
- [10] The plaintiff subsequently issued summons on 17th January 2012 and pleaded that as a result of the accident he sustained neck whiplash and head injuries.
- [11] The defendant served its notice of intention to defend on 30th January 2012 and it's plea on the 12th March 2012. The plaintiff denied negligence and pleaded in terms of the Apportionment of Damages Act 34 of 1956, which resulted in quantum being settled 80% in favour of plaintiff's proven or agreed quantum.
- [12] There was no replication filed by the plaintiff. Although the matter was set down for hearing on 31st May 2021, it was only heard on 2nd June 2021 for possible settlement with the defendant, which was unsuccessful.
- [13] The plaintiff, without seeking the courts indulgence, tendered evidence by affidavit, which was commissioned and filed on 2nd June 2021. Although this is frowned upon, in the interest of fairness and in order not to escalate costs, unnecessarily I condoned the late filing of the affidavit and continued to hear the matter as it was not prejudicial to any of the parties. I say this for two reasons: Firstly, as the matter was previously before the court for the merits and other heads of damages which have become settled and secondly, the

evidence was formalistic in nature and the case was to be predominately determined on the expert witness reports, which were properly before the court.

- [14] In his affidavit, the plaintiff confirmed his third party claim as well as the bodily injuries that he sustained. Additionally, he attested that he was examined by the experts that were appointed and he accepted the opinions expressed by the expert witnesses as his narrative. He therefore requested that the expert reports be incorporated into his affidavit.
- [15] The plaintiff also accepted the admitted expert opinion evidence of Dr. Sekhukhune as it referred to him. The plaintiff's evidence was that he still endures pain and discomfort and struggles physically and emotionally as a result of the injuries he sustained in the accident. Consequently, the plaintiff was unable to fulfil his functions in the same manner as he did prior to this collision.

MEDICO-LEGAL EVIDENCE

- [16] As a result of the motor collision, the plaintiff sustained minor head and neck injuries as provided in a medical note by plaintiff's medical doctor, Dr. Sekhukhune on 10th June 2008 and received conservative treatment in the form of analgesics. The plaintiff still suffers physically and

emotionally as a result of the injuries sustained in the motor collision.

Dr Read and Dr Engelbrecht – Orthopaedic Surgeons

- [17] According to the joint minutes of the orthopaedic surgeon, Drs Read and Engelbrecht dated 22nd October 2018, the plaintiff sustained soft tissue injuries to axial skeleton, neck and back injuries and post-traumatic headaches.

Ms van der Heyde and Ms Molemi – Occupational Therapist

- [18] The plaintiff was assessed by Ms Heyde on 24th November 2016, and then re-assessed on 15th January 2019 and was assessed by Ms Molemi on 25th April 2018. joint minutes of the occupational therapist summarised the injuries as follows.

[18.1] Both the occupational therapist agreed that the plaintiff sustained axial skeleton soft tissue injuries.

[18.2] Ms van der Heyde, noted the plaintiff displayed difficulty maintaining eye contact and was unable to sustain a neutral cervical spine. When he lifted his head he experienced pain in the posterior aspect of the cervical spine. This would result in him tilting the seat of the truck to avoid the pain. He fixated at the neck and shoulder girdle area throughout the assessment, clenched his fists, grimaced and reported moderate to severe pain in his spine. He was unable to maintain a neutral neck position or sustain neck extension due to the pain in lower back. The left shoulder was slightly elevated and he avoided neck rotation and turned in a block formation. He was unable to maintain light elevated work, to sustain neck extension and frequently dropped his elbows, he was unable to maintain positions typically placing strain on the lower back example

kneeling stooping and displayed difficulty with the waist to floor lift. His personal hygiene was lacking and low energy levels and poor

psychological endurance was noted.

[18.3]. Dr. Mazabow's report dated 12th March 2019, reveals that the plaintiff fatigued rapidly and became irritable towards the end of the interview. He attributes the plaintiff's current moderate cognitive and behavioural problems to the effect of chronic depression and chronic pain.

[18.4] Dr. Engelbrecht noted tenderness and muscle spasms in his cervical and lumbar spine

[18.5] Both orthopaedic surgeons agree the plaintiff sustained soft tissue injuries to the axial skeleton, neck and back injuries and both noted post traumatic injuries.

[18.6] Dr Gerda Cilliers noted possible nerve root impingement of c5/c6 and c6/c7, with widespread connective tissue tightness of the posterior cervicale spine.

[18.7] The orthopaedic surgeons also agreed on future treatments as enlisted in their reports. They both agreed that he suffered loss of amenities of life as a result of the accident. They both also indicated loss of work capacity and agreed that he is best suited for light to medium demand work. He does experience great thresholds of pain.

[18.8] Ms van der Heyde, the occupational therapist reported his highest level of education to be grade 11 and she is of the opinion that his low education will limit him to manual labour or work within his field of experience as a truck driver or mechanic in future. He is physically and psychologically compromised and not considered an equal competitor should he have to seek alternative employment or start up his own business for gainful income and expenditure. Both physical and psychological limitations will compromise his income generating potential as a self employed individual as it affects his speed and performance. She agrees with Dr Gerda Cilliers, the physiotherapist that long hours of continuous sitting and heavy lifting will worsen his spine pathology and that it is not advised that he resumes his previous employment as a long distance truck driver or relaunching of his motor mechanic business .

[18.9] Ms Molemi, noted that from information provided by the plaintiff, his current work requires short distance driving with occasional rest breaks when loading and offloading. She is of the view that this is an ideal work structure. She opines that plaintiff will benefit from time off work to attend recommended treatment. She accepted that his physical capacity has been reduced as a result of the accident.

Loss of Earnings

[19] The joint minute of the industrial psychologists, Dr. Willie Pretorius and Dr. H Kanengoni of 10th June 2019 reveals:

[19.1] that the plaintiff was 31 years old when he met with the motor collision.

[19.2] that the plaintiff holds a grade 11 level of education and his work history reveals that he had been predominantly employed as a Truck Driver and a self-employed mechanic for the most part of his working life.

[19.3] Additionally, they noted the following post-accident earnings: his 2016 taxed based earnings was R98 631 per annum. For January to March 2019 his salary slips indicated gross income of R8000.00 per month.

[19.4] They also agreed that at the time of the time of the accident the plaintiff was a self-employed mechanic and they noted his reported earnings of R6000.00 to R 8000.00 and that according to plaintiff's industrial psychologist it was R8 000.00 to R12 000.00 per annum.

[19.5] They agreed that his earnings would probable fluctuate due to the nature of his job and noted his post-accident earnings as a truck driver.

[19.4] They agreed that "but for the accident, he probably would have continued working as a truck self-employed mechanic or obtained his code 14 licence (as post-morbid) and worked as a truck driver. His earnings potential was likely comparable to a point somewhere between the median and Upper Quartile for semi – skilled workers.

[19.5] They took note of Kock's suggestions for semi-skilled workers:

- i. Considering Scenario 1 "but for the accident", they agree for calculations
- ii. at the time of the accident the plaintiff would have been somewhere between the Koch derived values of R67 500.00 (sixty seven thousand five hundred rands) and R98 500.00 (ninety eight thousand five hundred rand only) per annum (2008 Kock derived values).
- iii. "but for the accident" he would probably as self-employed mechanic or truck driver have grown his earnings mainly by inflation to earn in 2019 at a comparable Koch 2019 derived values of R130 000.00 (one hundred and thirty thousand rand) to R178 000.00 (one hundred and seventy eight thousand rand) per annum and accept inflationary increases to retirement age of 65.

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[19.6] Post-accident, they agree

- i. the plaintiff was absent from his self-employment work as a mechanic for one week. During this time he received no income, he returned to his work in his injured state in order to earn an income.
- ii. they noted, he only engaged in smaller mechanical jobs and could no longer attend to overhauling engines and as a result, his monthly income declined to R2000.00 to R3000.00 per month.
- iii. They noted the reported difference in information. According to defendant's industrial psychologist, he stopped with his self – employment endeavours in 2009 and according to the plaintiff's industrial psychologist, he stopped in 2013 as his income was too little.

- iv. They agreed in 2014 the plaintiff obtained a code 14 driver's licence and secured employment as a long distance truck driver in 2015 and earned a basic salary of R7 500.00 per month.
- v. They noted he resigned from his employment in January 2016 as the long distance driving was too strenuous on his back. In February 2016 he secured a 4/5 month contract earning R8 500.00 per month and R98 000.00 per annum. In December 2016 he secured permanent employment as a truck driver earning R2 500 per week and R 130 000.00 per annum. He left in August 2017 due to pain and discomfort in long distance driving.
- vi In February 2018, he secured another employment earning R8000.00 per month.
- vii They have noted the joint expert opinions in their respective reports from a work and earning perspective.
- viii Collateral evidence of the plaintiff's current supervisor Mr Godfrey Motsemme reveals they are aware of the plaintiff's neck and back pain and that he can only drive short distances and take regular breaks. They alluded to the fact that he was not suitable to drive long distance trucks and he will be suitable to perform light duty administration which will be a fraction of what he is currently earning.

[19.7]. They concluded that:

- i. from a physical perspective, the plaintiff is not well suited for either one of the occupations which he found himself in. Work as a long distance truck driver also puts extra strain on his back and neck, exacerbating the symptoms, and thus he is not well suited for this employment either. As per the experts, he would be best suited to a semi – sedentary type occupation which places minimal strain on his axial skeleton.
- ii. with recommended treatment, his symptoms will only slightly increase, thus leaving him with a loss of work capacity and choice of work. As a result he will no longer be an equal competitor in the open labour market and he will rely on a sympathetic employer allowing for frequent rest breaks and accommodation.
- iii. They noted the post- accident events that transpired including plaintiff's capacity to work and limited competitiveness.
- iv. They agree on the following post – accident scenario 2 :
 - (a) that the plaintiff would not be able to continue working in his capacity as a self-employed mechanic as he would have 'but for the accident'. His earnings have been negatively impacted and deferred to validated earning information.
 - (b) In terms of future earnings growth, they agreed in accordance with expert opinions, that his ability to compete for employment and grow his earnings in the open labour market has been limited, even in his capacity as a highly accommodated truck driver. He was unable to maintain previous similar work to his current occupation as a long – haul driver; his employer was not sympathetic and understanding. He resigned despite financial stress and

need to generate income as he did not cope with the physical demands of his job. He will rely on a sympathetic employer allowing for frequent rest breaks and accommodation and would at best, only be able to remain in this type of employment as a truck driver for short distances only.

[19.8] They agreed that in his current employment he would at best probably only grow his earnings with mainly inflationary earnings growth.

[19.9] He faces the following future risks to earn less than expected:

- i. Should the dynamics of his position change and he would be required to do some heavy physical work or drive long distances or his physical limitations drastically further decrease, he would not be able to continue in his employment and will have to search for an alternative employment, which leaves him at increased risk for his

unemployment or earning for less than he is currently earning would be to forced to seek a more sedentary type work, which he is not qualified for and if he is at all able to secure such work, his earnings will likely to be limited to somewhere around the national

minimum wage of R3500.00 per month when employed.

- ii. He is already an unequal competitor and a vulnerable employee, his ability to compete will likely further decrease with time and from around the age of 60 his risk to be totally uncompetitive will be high.

- iii. He will likely need some treatment with resultant time away from work. His risk for loss of earnings while away from work increased.

- iv. They recommended the application of appropriate higher post- accident contingencies for the risk of the plaintiff facing long periods of unemployment due to uncompetitiveness, the high risk of earning less than expected and early retirement thereby becoming uncompetitive.

[20] On the 5th February 2020, the plaintiff consulted with an Income Reconstruction Specialist expert, Mr Eric de Kroon from Summit Forensics. The crux of his evidence was to provide a history of plaintiff's employment and to also provide a reconstruction of the plaintiff's earnings since plaintiff did not keep proper records of his past earnings. He considered the various jobs that plaintiff occupied in the past and calculated plaintiff's past loss of income to be R1 543 342 and provided me with in a detailed annexure explaining how he arrived at this amount.

[21] According to plaintiff's industrial psychologist addendum report dated 4th May 2021. Plaintiff was subsequently demoted in March 2021 to an accommodated general worker and is still employed in this capacity and earns an amount of R 5000.00 per month from April 2021. The industrial psychologists, however, postulates that it seems very likely that the plaintiff may only be able to continue with his current occupation as an accommodated general worker for a limited time frame after which he would be forced to seek an alternative more sedentary type of work, which he is not qualified for . He also postulated

that as he ages, the plaintiff's ability to compete will likely further decrease

and from around age 60 he will probably be totally uncompetitive. She was of the view that it is evident from the excerpts from the various expert reports that the plaintiff suffers a direct loss of earnings in addition to a significantly reduced earning capacity over his career span.

[22] He submitted that the plaintiff's claim for loss of earnings / earning capacity consists of the following separate components: he was off from work for 1 week after the accident; he only managed to secure intermittent and lower paying jobs since the accident resulting in an actual loss of earnings; he is not expected to reach the suggested pre-accident career potential; he is expected to retire 5 years early; and He might suffer losses that are not directly quantifiable and should be addressed by means of contingencies.

[23] Munro Actuaries in their report dated 21 May 2021, based on the information provided by the industrial psychologist, calculated the loss. The actuaries were instructed to apply the following contingencies Uninjured: 5% and 15% on past and future earnings respectively; Injured: 45% on future earnings which allows for a 30% contingency differential in respect of future earnings. They submitted that the 30% differential is conservative under the circumstances. They suggested that the plaintiff's Capital Value of Loss of Earnings are R1,850,252.00. inclusive of contingencies and apportionment would constitute compensation for the plaintiff which is fair towards both parties.

ISSUE

[24] Did the plaintiff discharge the onus on a preponderance of probabilities in so far as the determination of quantum of past and future loss of income.

LAW

[25] Future loss of earnings may comprise one of two categories: firstly, where the plaintiff is away from work to receive treatment, and secondly, whereas a result of the injury sustained in the accident the plaintiff would suffer a loss in earning capacity as he is now not able to do certain types of work.

[26] It is accepted 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 diminution in the value of the estate.[2] It must be noted, a physical disability that impacts the capacity to an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the plaintiff to prove that the reduction of the income-earning capacity will result in actual loss of income.[3]

[27] In quantifying such a claim an actuary is often used to make actuarial calculations based on proven facts and realistic assumptions regarding the future. The role of the actuary is to guide the court in the calculations to be made. Relying on its wide judicial discretion the court will have the final say regarding the correctness of the assumptions on which these calculations are based. The court should give detailed reasons if any assumptions or parts of

the calculations made by the actuary are rejected. It must be borne in mind that the actuary depends on the report of the industrial psychologists, who in turn are dependent on the information provided by the claimant.

[28] In *Dippenaar v Shield Insurance Co Ltd*[4] where the following was said at 917A-D:

'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.'

[29] The percentage of the contingency deduction depends upon many factors and ranges between 5% and 50%, depending upon the facts of the case[5].

[30] The importance of applying actuarial calculations and their advantages were discussed in the case of *Southern Insurance Association v Bailey NO*[6] where the court referred with approval to the case of *Hersman v Shapiro and Company*[7] at 379 per Stratford J where the following was said:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

"Any inquiry 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. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss." It has open to it two possible approaches.

One is for the Judge to make a 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. But the Court cannot for this reason adopt a non possumus attitude and make no award."

[31] Ultimately, the award for future loss of income must be based on good medical evidence and corroborating facts. There must be some reasonable basis for arriving at a particular figure. In the event of a mathematical approach, one has to first work out what the third party's earnings would have been but for the accident (that is if the accident had not occurred), and secondly, one has to calculate what the plaintiff's earnings are now that the collision has

occurred (having regard to the accident) and the difference between these two amounts will then represent the loss.[8]

- [32] In *S v Mthethwa*[9] the court, in dealing with the limitations of the opinions of experts, and with reference to *Goldie v City Council of Johannesburg*[10] stated as follows:

“The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value”.

- [22] In the same vein, in the oft-cited English decision of *R v Turner* [11] Lawton LJ found:

“...that the report put forward by the defendant as to his psychological condition and specifically his susceptibility to provocation contained hearsay character evidence which was inadmissible”. He stated further that “[B]efore a court can assess the value of an

opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has considered irrelevant

facts or has omitted to consider relevant ones, the opinion is likely to be valueless”

- [33] The principle regarding the calculation of loss of earnings is to place the claimant in the position he would have been in had the accident not occurred, because he must mitigate his damages. This is regulated by section 17(4)(c). Past loss of earnings will be the losses incurred up to the date of the trial in a litigated matter or up to the date of settlement if settled at the claim stage.

Contingencies

- [34] Contingencies are arbitrary and also highly subjective. The factors to be considered, are actually derived from its meaning. Every matter is unique and must take into account the vicissitudes of life.

- [35] Over time, our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies have to be accounted for. Put differently, the longer period over which unforeseen contingencies can have an influence over the accuracy of the amount adjudged to be the probable income of the plaintiff, the higher the contingencies that have to be applied. [12]

- [36] Contingencies can be described no better than the often quoted passage in *Goodall v President Insurance Co Ltd*[13] where the court stated :

“In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office”

“...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...” [my emphasis]”

- [37] After considering the decision in Goodall,[14] Koch[15] argues that as a general guideline, a sliding scale of 0.5% per year over which the applicable income has to be calculated, can be applied. The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case.[16]
- [38] Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. [17]
- [39] It does, however, fall within the wide discretion of the court to make a general contingency adjustment after the basic calculations have been accepted. In assessing delictual damages it is the duty of the court to ensure that both objective and subjective factors are considered in such a manner that the assessment may be regarded as an application of "fair" mathematics. [18]
- [40] Counsel referred me to comparable case law regarding significantly high post-accident contingencies deductions. The concept of "significantly higher" contingencies has been interpreted to allow for a 40% contingency differential[19] It was proposed that the concept of a "substantially higher" contingency is a synonym to a "significantly higher" contingency. The Courts have interpreted the term "substantially higher" by applying differentials of 40%[20] and 35%[21]

APPLICATION OF LAW TO FACTS

Plaintiffs

Submissions

- [41] Plaintiff's counsel submitted that Munro Actuaries in their report dated 21 May 2021, based on the information provided to them, calculated the loss. The actuaries were instructed to apply the following contingencies Uninjured: 5% and 15% on past and future earnings respectively; With regard to the Injured earnings, : 45% on future earnings which allows for a 30% contingency differential in respect of future earnings. He submitted that the 30% differential was conservative under the circumstances. The Capital Value of Loss of Earnings is as follows is R1,850,252.00. He submitted that the aforesaid total loss of R1,850,252.00 which already applied the contingencies and apportionment would constitute compensation

for the plaintiff which is fair towards both parties and accordingly seeks such an order in respect of the loss of earning.

EVALUATION

[42] Counsel for the plaintiff in his heads of argument argues that under this head of damages, the award of R1 850 252.00 (one million eight hundred and fifty thousand and two hundred and fifty two thousand rand should be granted.

[43] When one compares the plaintiff's situation, pre and post morbidity, the plaintiff is a transformed individual. What appeared to have been a prosperous entrepreneur, as a result of the motor collision turned out into a physically and emotionally impaired individual. The industrial psychologists agree that the plaintiff is more vulnerable and he would not be an equal competitor in the open market.

[44] From the joint minute of the occupational therapists he is unsuited to return to work in any of the previous occupations that he has had in the past and for which he has experience or training. The industrial psychologist reports he is at very high risk to become uncompetitive and unemployable long before the expected retirement age. As he ages and his physical

problems degenerate and pain increase, with resultant decreasing work choices and work performance, his risk for unemployment will

increase.

[45] This will affect his employability as he is a poor competitor for suitable employment. In the open labour market he will compete against healthy, better qualified and experienced competitors for the limited suitable jobs available. He will rely on a sympathetic employer allowing for frequent rest breaks and accommodation. He has no experience or training in light or sedentary occupations and his current employer does not consider him suitable for administrative type of work..

Pre- Morbid Contingencies

[46] When considering the general guidelines utilised in Goodall[22] decision, which was ostensibly supported by the SCA in the case of Guedes, I have also applied my mind to the following factors:

[46.1] That the RAF-1 form completed by the plaintiff indicated plaintiff's profession at the time of the accident, as a "Taxi Owner Driver" yet all the experts reports are based on the fact that plaintiff's employment at the time of the accident was that of a mechanic and or of a mechanic and funeral parlour owner. I have considered the joint minutes of the industrial psychologist and their agreement that but for the accident the plaintiff would have been self-employed as a mechanic or taxi driver.

[46.2] I was inclined to dismiss this head of damage, in the light of the contradiction in all the expert reports that the plaintiff was mechanic at the time of the collision. However, fortunately for the plaintiff, upon perusal of Mr Kroon's report, in paragraph 3.1 , it reveals " He states that as a mechanic he earned at least [as] much as he did driving a taxi. On occasion it could be more, such as when required to overhaul an engine." This is uncontested evidence. In the light of this, I make a finding that even though this internal inconsistency exists in the plaintiff's case, whether the plaintiff was a taxi owner driver or a mechanic he would have earned the same income during the period of the accident according to Mr Kroon.

[46.3] Relevant information regarding plaintiff's income was not completed in the RAF -1 form.

[46.4] The medical practitioner in the RAF-1 form did not authorise that the plaintiff stay away from work after the collision, yet plaintiff informed the expert witnesses that he stayed away from work for an entire week.

[46.5] When I considered the expert reports I considered the fact that the plaintiff was involved in a second motor collision after the first collision and no medical information was provided with regard to the nature and extent of the second accident even though plaintiff was taken to hospital by an ambulance. Surely, this would have had an impact on his health. The expert reports seemed to have considered the "knee injury" in the second collision as insignificant and a minor injury.

[46.6] I have also considered the frequency that the plaintiff changed his employment and the fact that there were no records, nor were any bank statements, financial statements or tax returns provided to any of the experts. Nonetheless, I must consider what is before me and if that is the best evidence then I must make a decision in that regard. Mr. Kroon's report is consistent with the joint minute of the industrial '

[46.7] I have also observed the inconsistencies in the expert reports where the plaintiff informed Mr Pretorius that overhauling of engines was the plaintiff's main source of income yet he informed Dr Cilliers that the plaintiff's job entailed changing gearboxes, servicing cars, changing oil and clutch plates and occasionally overhaul engines.

[46.8] When I considered plaintiff's qualifications, Dr Mazabow stated that the plaintiff informed him he completed his grade 12 examinations and even provided with the symbols he obtained yet all the other experts reported that the plaintiff only completed grade 11. I have taken note of the industrial psychologists joint minute dated 19th June 2019, where it was noted that the plaintiff completed grade 11. No proof thereof was provided.

[46.9] I have noted the inconsistency in the joint industrial psychologists report the fact that the plaintiff informed the defendant's industrial psychologist that he stopped his self endeavours in 2009 and yet he informed the plaintiff's industrial psychologist that stopped his employment endeavours in 2013. I also took note of the disparity of salaries that the different industrial psychologist were informed about.

[46.10] I have taken note of the chronic illness of the plaintiff and the fact that he is on medication for such illness. This is an important consideration when considering contingency deductions.

[46.11] Having considered the aforesaid I am of the view that a 20% contingency deduction should be applied in the pre morbid scenario.

Post morbid Contingencies

[47] I have considered the following factors when considering the post morbid Contingencies:

[47.1] the impact of the injuries sustained by the motor collision and the effect it has on plaintiff's employment.

[47.2] that the plaintiff was consequently forced to change his employment from a high earning occupation of mechanic alternatively truck driver where he is currently employed as a general worker, to an occupation he was forced to continue with.

[47.3] He is already an unequal competitor and a vulnerable employee, his ability to compete will likely further decrease with time and from around the age of 60 his risk to be totally uncompetitive will be high.

[47.4] He will likely need some treatment with resultant time away from work. His risk for loss of earnings while away from work increased.

[47.5] The numerous business ventures engaged in by the plaintiff lends itself to the inference that the plaintiff has entrepreneurial skills and acumen.

[47.6] The past reconstructed income calculations remain uncontested. On a perusal of the calculations provided, I have no reason to doubt the reconstruction calculations and under the circumstances it is the best available evidence. I accordingly accept that the calculations for past loss of earnings, in the amount of R705 355 (seven hundred and five thousand and three hundred and 55 rands) is the best available evidence that is before the court.

[48] I accordingly find that a 30% contingency differential reflects a substantially higher as opposed to a high contingency and I am of the view that 50% should apply in respect of the plaintiff's income projection, having regard to the accident.

RULING

[49] Regarding the past earnings, I am of the view that applying normal contingencies of 5% is appropriate. Based on calculation performed by the plaintiff's actuary, the past loss of income in the uninjured earnings is R1387 855.00 (one million three hundred and eighty seven thousand eight hundred and fifty five rand)

[50]] After an application of a 5% contingency in respect of past loss and a 20% contingency on the future loss in the pre-morbid scenario, the loss relating to uninjured amounts to: R 1 826 960 .00 (one million eight hundred and twenty six thousand nine hundred and sixty rand). After an application of a 5% past loss and 50% future loss contingency in the post-morbid injured loss amounts to : R303 350.00 (three hundred and three thousand three hundred and fifty rand).

Uninjured Earnings	Injured Earnings	Loss of Earnings	Past	1 460 900 682 500	Less Contingencies
5%	1 387 855 682 500 705 355	Future	2 283 700 606 700	Less Contingencies	20% 50%
1 826 960 303 350	1 523 610	Total Loss of Earnings	2 228 965		

[51] Applying the 20% merits apportionment that will be R 2 228 965.00 – R445 793.00 = R 1 783 172.00. This is the total amount, which I intend awarding to the plaintiff under this head of damages.

[52] With regard to costs, the general rule in matters of costs is that the successful party should be given his costs, and this should not be departed from except where there are good grounds to do so.[23] I cannot find any reason why I should deviate from this general rule and I accordingly award costs in favour of the plaintiff against the defendant.

ORDER

[53] In a result,

[1] Judgment by default is granted in favour of the plaintiff against the defendant as follows:

[1.1] The defendant is ordered to pay a capital amount of R1 783 172.00 (one million seven hundred eighty three thousand, one hundred and seventy two rands) in respect of the plaintiff's claim for loss of earnings.

[1. 2] The defendant is ordered to make payment within 180 (one hundred and eighty) calendar days calculated from the date of this order.

[1. 3] Payment of interest on the said capital amount of R1 783 172.00 (one million seven hundred eighty three thousand, one hundred and seventy two rands) in respect of the plaintiff's claim for loss of earnings at the prescribed legal rate from fourteen (14) days from the date of this judgment.

[1.4] Payment of the plaintiff's costs of suit, including the reasonable costs of all medico-legal reports obtained by the plaintiff, and the preparation, qualifying fees and court attendance fees of plaintiff's expert witnesses.

[1.5] All payments of the plaintiff's capital and legal costs are to be made by paying the amount(s) and taxed or agreed costs to the credit of the Trust account of Salomé Le Roux Attorneys, the detail of which is as follows:

SALOMÉ LE ROUX ATTORNEYS

BANK:

THE STANDARD BANK OF SOUTH AFRICA

BRANCH:

PRETORIA, CHURCH SQUARE

BRANCH CODE: 01-00-45-00

ACCOUNT NUMBER: [...]

ACCOUNT HOLDER: SALOMÉ LE ROUX TRUST ACCOUNT

TYPE OF ACCOUNT: TRUST CHEQUE ACCOUNT

REF: M0750

[1. 6] It is noted and recorded that the plaintiff's claim is not subject to a contingency fee agreement.

C. B. Bhoola

Acting Judge of the

High Court of South Africa

Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judges whose names is reflected 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 CaseLines. The date for hand-down is deemed to be 2 September 2021.

APPEARANCES

Counsel for the Applicant : Advocate L.J Visser

Instructed by

: S Le Roux, Attorneys for Plaintiff

Counsel for the Respondent : None

Defendant :

ROAD ACCIDENT FUND

Date of Hearing :

02 June 2021

Date of Judgment : 02 September 2021

[1] Madibeng Local Municipality v Public Investment Corporation Ltd 2018

- (6) SA 55 (SCA) PER Plasket AJA (Ponnan JA, Wallis JA, Willis JA, and Makgoka AJA concurring), para 26 (page 60 G-H:
- [1] Madibeng Local Municipality v Public Investment Corporation Ltd 2018
- (6) SA 55 (SCA) PER Plasket AJA (Ponnan JA, Wallis JA, Willis JA, and Makgoka AJA concurring), para 26 (page 60 G-H:
- [2] Prinsloo v Road Accident Fund 2009 5 SA 406 (SECLD) at 409C-41A
- [3] Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) at para 11, Union and National Insurance Co Limited v Coetzee 1970 (1) SA 295 (A) AT 300A.
- [3] Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) at para 11, Union and National Insurance Co Limited v Coetzee 1970 (1) SA 295 (A) AT 300A.
- [4] 1979 2 SA 904 (A)
- [5] . (See AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812, De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D, Goodall (supra), and Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114- 115A-D)
- [5] . (See AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812, De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D, Goodall (supra), and Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114- 115A-D)
- [6] 1984 1 SA 98.
- [7] 1926 TPD 367.
- [8] Potchefstroom Electronic Law Journal (PELJ) On-line version ISSN 1727-3781, PER vol.18 n.7 Potchefstroom 2015
- [9] [2017] ZAWCHC 28 at [98
- [10] 1948
- (2) SA 913 (W) at 920
- [11] [1975] 1 All ER 70.
- [12] Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W)392H – 393G.
- [13] Ibid see footnote 12.
- [14] Ibid see footnote 2.

- [15] Robert J Koch, *The Quantum Yearbook*
- [16] (AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812; De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D; Goodall v President 1978(1) SA 389 (W) 393; Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114-115A- D).
- [16] (AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812; De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D; Goodall v President 1978(1) SA 389 (W) 393; Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114-115A- D).
- [17] (see Southern Insurance Association Ltd supra 116G-H).
- [18] L Steynberg, “Fair” Mathematics in assessing delictual damages, Professor, Department of Private Law, Unisa
- [19] Ligthelm v Road Accident Fund 2014 JDR 0721 (GNP)
- [20] Hall v Road accident Fund 2013, JDR 1299 (GSJ)
- [21] Krohn v Ruad Accident Fund, 2015, JDR 2147 GP (GSJ)
- [22] Ibid See Footnote 13
- [23] Myers v Abramson 1951(3) SA 438 (C) at 455

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Prepared on 24 October 2026 · Esheria